
THE ANTI-BRIBERY AND ANTI-CORRUPTION REVIEW

THIRD EDITION

EDITOR
MARK F MENDELSON

LAW BUSINESS RESEARCH

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This article was first published in The Anti-Bribery and Anti-Corruption Review -
Edition 3
(published in November 2014 – editor Mark F Mendelsohn).

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ANTI-CORRUPTION
REVIEW

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Editor

MARK F MENDELSON

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Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK
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ISBN 978-1-909830-31-8

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

ADVOKATFIRMAET BA-HR DA

ADVOKATFIRMAN HAMMARSKIÖLD & CO

ANAGNOSTOPOULOS

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EDITOR'S PREFACE

This third edition of *The Anti-Bribery and Anti-Corruption Review* presents the views and observations of leading anti-corruption practitioners in jurisdictions spanning every region of the globe. The worldwide scope of this volume reflects the reality that anti-corruption enforcement has become an increasingly global endeavour, resulting in a challenging environment for anti-corruption practitioners and the clients they advise.

Over the past year, a growing number of countries enacted or amended significant anti-corruption and anti-bribery legislation and, perhaps more importantly, increased their enforcement of those laws. This volume touches upon a wide range of such legislative developments. A few highlights include: Latvia's May 2014 accession to the Organisation for Economic Co-operation and Development Anti-Bribery Convention, the German Federal Cabinet's May 2014 resolution to adopt the Act on the Ratification of the UN Convention against Corruption, and the European Parliament's April 2014 adoption of the Directive on Disclosure of Non-Financial and Diversity Information by Certain Large Companies and Groups, which will require covered companies to disclose information on their policies, risks and results regarding anti-corruption and bribery issues.

In the United States, enforcement authorities continue to vigorously enforce the Foreign Corrupt Practices Act (FCPA), with the past year's cases showing both an increase in the number of charges against individuals and a continued focus on corporate conduct. The investigation and enforcement focus cuts across a range of industries including: pharmaceutical and medical device companies, the financial, mining and aviation industries, and the energy sector. In January 2014, the Department of Justice (DOJ) and the Securities and Exchange Commission announced settlements with Alcoa Inc and its subsidiary Alcoa World Alumina LLC. These settlements, involving \$384 million in criminal fines, administrative forfeitures and disgorgement, constitute the fifth largest FCPA settlement in US history. In September 2014, Marshall L Miller, Principal Deputy Assistant Attorney General for the DOJ Criminal Division, announced his office's intention to 'vigorously employ proactive investigative tools that may not have been used frequently enough in white-collar cases in past years: tools like wiretaps, body wires, physical surveillance and border searches'. These investigative tools appear to have

been employed during the recent investigations of French citizen Frederic Cilins and a group of executives at BizJet International, a US-based subsidiary of the Lufthansa Corporation. Companies and their counsel continue to struggle with the issue of whether or not to self-report potential violations of the FCPA in light of the enforcement climate and concerns regarding the risk/reward calculus. And, as in previous years, we have continued to see the uncovering of bribery in mergers and acquisition diligence as well as an increase in various forms of private litigation related to FCPA investigations.

The foreign bribery landscape grows increasingly complicated for multinational companies, as China, the United Kingdom, Norway and Canada, among other countries, have each launched significant investigations and brought a substantial number of corruption actions in the past year related to international business transactions. The growing number of enforcement actions around the world are supported by a significant trend toward greater international cooperation in anti-corruption enforcement efforts. In a 17 June 2013 keynote address, then DOJ Acting Assistant Attorney General Mythili Raman commented: 'Through our increased work on prosecutions with our foreign counterparts and our participation in various multilateral fora like the OECD and United Nations, it is safe to say that we are cooperating with foreign law enforcement on foreign bribery cases more closely today than at any time in history.'

I wish to thank all of the contributors for their support in producing this volume. I appreciate that they have taken time from their practices to prepare chapters that will assist practitioners in navigating the complexities of foreign and transnational business.

Mark F Mendelsohn

Paul, Weiss, Rifkind, Wharton & Garrison LLP
Washington, DC
November 2014

Chapter 18

SOUTH AFRICA

*Darryl Bernstein and Nikita Shaw*¹

I INTRODUCTION

While public opinion would appear to suggest that ‘political corruption is entrenched in South Africa’,² the Public Protector, Thuli Madonsela, has been quoted as saying that South Africa is at a ‘tipping point’ in its battle against ‘endemic’ corruption.³ South Africa has experienced a number of high-profile corruption scandals within public sector agencies and provinces, and serious allegations that have been linked to the highest levels of government. Media reports in South Africa appear to indicate that in the past decade more than 2,600 government officials have been found guilty of corruption.

Endemic corruption has the effect of distorting economies, making the poor poorer and the rich richer. In our young South African democracy, corruption, hugely problematic in both the public and private sectors, could ultimately derail democratic progress. Former President Nelson Mandela warned that ‘our hope for the future depends ... on our resolution as a nation in dealing with the scourge of corruption’.⁴

The law and legal framework in South Africa dealing with both domestic and foreign bribery and corruption is relatively nascent in its development. While it would appear as though malfeasance in relation to institutionalised corruption has increased since the advent of democracy in South Africa in 1994, commentators have noted that this perception ought to be properly contextualised against an elevated

1 Darryl Bernstein is a partner and Nikita Shaw is an associate at Baker & McKenzie.

2 Tom Lodge (1998), ‘Political Corruption in South Africa’, *African Affairs* Vol 97 (387), Oxford, pp. 157–187.

3 SAPA (2012), ‘SA at corruption “tipping point”’, available online at www.iol.co.za/dailynews/news/sa-at-corruption-tipping-point-1.1269779#.UGtORk1J5rk.

4 Ibid.

awareness of the problem and consequent attempts to tackle good governance through independent institutions.⁵

These institutions include the independent press, as well as a number of anti-corruption bodies, including the Public Protector, the National Director of Public Prosecutions (including the Special Investigating Unit and the Asset Forfeiture Unit), the Heath Investigative Commission, the Independent Police Investigative Directorate (formerly the Independent Complaints Directorate) and departmental anti-corruption units including the special National Anti-Corruption Unit of the South African Police Service and other special multidisciplinary investigative units such as the Office for Serious Economic Offences and the Investigative Directorate for Organised Crime, including the recently established Directorate for Priority Crime Investigation (the Hawks), successor to the notably successful Scorpions unit.

II DOMESTIC BRIBERY: LEGAL FRAMEWORK

i Domestic bribery law and its elements

The Prevention and Combating of Corrupt Activities Act 12 of 2004 (PCCA) is the central anti-corruption law in South Africa, applying to both public and private sector officials and employees, as well as public and private entities, including government, parliament and the judiciary.

The purpose of the PCCA is to bring South African law in line with the international standards imposed by the United Nations Convention Against Corruption and the African Union Convention on Preventing and Combating Corruption.⁶

The PCCA envisages a general crime of corruption, as well as a substantial list of specific crimes of corruption pertaining to specific classes of persons or situations.

Section 3 of the PCCA creates a general offence of corruption, which provides that any person who directly or indirectly accepts or offers to accept any gratification from any other person (whether for the benefit of him or herself or for the benefit of another person) to act, personally or by influencing another person so to act, in a manner that amounts to either the illegal, dishonest, unauthorised, incomplete or biased exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation, that amounts to the abuse of a position of authority, a breach of trust, the violation of a legal duty or a set of rules, designed to achieve an unjustified result or that amounts to any other unauthorised or improper inducement to do or not to do anything, is guilty of the offence of the crime of corruption.

5 Anthony Minnaar (1999), 'A Symbiotic Relationship? Organised Crime and Corruption in South Africa'.

6 The National Anti-Corruption Forum guide to the Prevention and Combating of Corrupt Activities Act, Act No. 12 of 2004, available online at: www.nacf.org.za/guide-prevention-combating-corrupt-activities/pdf/NACF_understanding_corrupt_activities_act_full_guide.pdf.

In simple terms, any person who accepts gratification from another (or gives to another) to act in a way that amounts to the abuse of their position is guilty of corruption. It is important to note that under the PCCA, should an offer of a bribe be accepted, both parties involved in the corrupt activity will be guilty of corruption.

The definition of 'gratification', considered in more detail below, is exceptionally broad.

The PCCA also provides for various specific offences of corruption applicable in defined circumstances. Among these specific offences are offences in respect of corrupt activities relating to:

- a* public officers (Section 4);
- b* foreign public officials (Section 5);
- c* agents (Section 6);
- d* receiving or offering of unauthorised gratification by or to a party to an employment relationship (Section 10);
- e* offences in respect of corrupt activities relating to contracts (Section 12); and
- f* offences in respect of corrupt activities relating to procuring and withdrawal of tenders (Section 13).

However, the PCCA goes further than creating criminal offences for actively participating in corrupt activities and, in addition, provides for a duty to report knowledge or suspicion of corrupt activity to the South African Police Service (Section 34). Failure to do so constitutes a criminal offence.

ii Definition of public official

The PCCA defines a public official or public officer as:

*any person who is a member, an officer, an employee or a servant of a public body, and includes any person in the public service contemplated in the Public Service Act; any person receiving any remuneration from public funds; or, where the public body is a corporation, the person who is incorporated as such.*⁷

The definition of a public official does not, however, include any member of the legislature, judicial officers or members of the prosecuting authority.

iii Public official participation in commercial activities

Pursuant to the enactment of the Public Service Act 103 of 1994, Public Service Regulations were promulgated that provide for *inter alia* a Code of Conduct (the Code) with which all public officials are expected to comply.⁸ In general terms, the primary purposes of the Code are to promote exemplary conduct, give practical effect to the relevant constitutional provisions relating to the public service, and to provide a guideline to public officials as to what is expected of them from an ethical point of

7 Section 1 of the PCCA.

8 Government Notice No. 21951: Public Service Regulations (GN 1 of 5 January 2001).

view. Compliance with the Code is expected to enhance professionalism and help ensure confidence in the public service.⁹ While a full discussion of the Code is beyond the scope of this article, the following key principles are noted.

Firstly, insofar as the relationship with the legislature and executive are concerned, public officials are required to be faithful to the Republic and honour the Constitution, to abide by the Constitution in the execution of their daily tasks, and put the public interest first in the execution of their duties.¹⁰

Secondly, with regard to the relationship with the public, public officials are required to serve the public in an unbiased and impartial manner to create confidence in the public service, they are to refrain from favouring relatives and friends in work-related activities and are prohibited from abusing their positions or authority.¹¹

Thirdly, in respect of their personal conduct and private interests, public officials are not to use their official positions to obtain private gifts or benefits for themselves during the performance of their official duties, nor are they to accept any gifts or benefits when offered. They are furthermore prohibited from using or disclosing any official information for personal gain or for the gain of others, and may not undertake remunerative work outside their official duties or use office equipment for such work, without approval.¹²

Lastly, in the performance of their duties, public officials may not engage in any transaction or action that is in conflict with or infringes on the execution of their official duties, and must recuse themselves from any official action or decision-making process that may result in improper personal gain (and this should be properly declared by the employee).¹³

In addition to the Public Service Regulations and the Code, new regulations have recently been published under the Local Government: Municipal Act 32 of 2000, which *inter alia* seeks to curb corruption in municipalities by banning senior managers found guilty of financial misconduct from government jobs for up to 10 years.¹⁴

iv Gifts, travel, meals and entertainment restrictions

In general terms, South African law does not prescribe any limitation on hospitality expenses such as gifts, travel, meals and entertainment. But whether or not a hospitality expense is appropriate will depend on a number of factors such as the reasons for the gift or entertainment, the level of employment of the government official to whom it is offered (if any) and, importantly, whether the expense was given to induce the other party to do or not do something that is not authorised.

9 Chapter 2, Regulations A.1, A.2 and B.3 of the Code.

10 Chapter 2, Regulations C.1.1 and C.1.2 of the Code.

11 Chapter 2, Regulations C.2.2, C.2.7 and C.3.3 of the Code.

12 Chapter 2, Regulations C.5.3, C.5.4 and C.5.5 of the Code.

13 Chapter 2, Regulations C4.5 and C.4.6 of the Code.

14 Government Notice No. 37245: Local Government: Regulations on Appointment and Conditions of Employment of Senior Managers (GN 21 of 17 January 2014), Regulation 17(1)(c) read with Regulation 18 and Schedule 2.

That said, the PCCA provides that ‘dealing’ includes any promise, gift, donation or deposit.¹⁵ Any person who, knowing that property forms part of any gratification that is the subject of a bribe, enters into any dealing in relation to such property, or holds, receives or conceals such property, is guilty of an offence.¹⁶

Accordingly, while hospitality expenses in the private sector are not unlawful *per se*, it is imperative that hospitality expenses are not given as a form of gratification for an unauthorised or improper inducement to do, or not do, anything. In practice, most companies have their own internal hospitality expenses policy that regulates the acceptance and offering of gifts.

However, in the public sector, senior government employees are only permitted to accept gifts that are offered as part of a formal exchange of gifts, or if the gifts are unsolicited or constitute a moderate act of hospitality, and they are satisfied that they will not in any way be compromised by such acceptance. While there are no limitations prescribed, senior government employees are required to disclose gifts and hospitality from a source other than a family member that exceeds 350 rand.¹⁷

v Political contributions by foreign citizens and foreign companies

The Electoral Act 73 of 1998 and the Public Funding of Represented Political Parties Act 103 of 1997 closely monitor and regulate public funding by the state to political parties represented in Parliament; however, the statutes are silent on the subject of private funding (both local and foreign).

Political contributions by foreign citizens and foreign companies, save to the extent that they may be regulated by international agreement or convention, are not regulated by South African domestic legislation, and disclosure of the amount contributed and the source of such a contribution is largely discretionary.

This has given rise to a national dilemma in relation to public funding, insofar as such funding may very well come with strings attached, while never being publicly disclosed, and without regulation. The corrupting tendency of undisclosed funding is a fundamental concern and the institutionalised regulation of private funding in South Africa is imperative. This is explored more fully in Section III, *infra*.

vi Private commercial bribery

Private commercial bribery is dealt with in Sections 10 and 12 of the PCCA.

Section 10 provides that any person who is party to an employment relationship accepts from any other person an unauthorised gratification, or any person who gives or agrees or offers to give to any person who is party to an employment relationship any unauthorised gratification in respect of that party doing any act in relation to the exercise, carrying out or performance of that party’s powers, duties or functions within the scope of that party’s employment relationship, is guilty of an offence.

15 Section 1 of the PCCA.

16 Section 3 of the PCCA.

17 Chapter 3, Regulations E. (f) of the Code.

In other words, an employee who offers to use his or her position to help someone else secure what they want in return for money or a favour is guilty of the crime of corruption. If someone offers an employee money or a favour to help him or her to secure something that they want, then that person is similarly guilty of corruption.

Furthermore, Section 12 of the PCCA provides that it is a crime for anyone to offer or accept money or favours to influence who gets a contract or to dishonestly fix the price (or other money dealt with) in the contract.

vii Penalties

Penalties are dealt with in Section 26 of the PCCA, and may, depending on the monetary value involved and the specific offence, be severe.

Any person convicted of a Part 1, 2, 3 or 4, or Section 18 offence of corruption (including the attempt, conspiracy and inducing of another to commit the offence) may be sentenced in a high court to a fine or to imprisonment of up to 25 years. In the case of a sentence to be imposed by a regional court, that person may be sentenced to a fine or to imprisonment not exceeding 18 years, and by a magistrate's court, to a fine or to imprisonment not exceeding five years. These offences include the general offence of corruption, as well as a number of the specific offences of corruption.

Any person convicted of a Section 17(1), 19, 20, 23(7)(a) or (b) or 34(2) lesser offence is liable, in the case of a sentence to be imposed by a high court or a regional court, to a fine or to imprisonment not exceeding 10 years; or in the case of a sentence to be imposed by a magistrate's court, to a fine or to imprisonment not exceeding three years. These offences include a number of miscellaneous offences such as being an accessory to the crime of corruption and the failure to report corrupt transactions.

Interestingly, and in addition to any fine a court may impose, the court may impose a fine equal to five times the value of the gratification involved in the offence.

Furthermore, the PCCA provides for a register of entities and individuals convicted of acts of corruption relating to contracts and the procurement and withdrawal of tenders, with the consequence being that the National Treasury may terminate any agreement and prevent such persons from doing business with the government for 10 years. The National Treasury may also recover from the person or enterprise any damages incurred or sustained by the state as a result of the tender process or the conclusion of the agreement, or that the state may suffer by having to make less favourable arrangements afterwards.

Lastly, the proceeds of and assets instrumental in the commission of the offence of corruption may be confiscated or forfeited in terms of the Prevention of Organised Crime Act 121 of 1998 (POCA). Generally, the value of assets may be used to compensate victims of the crime involved, or forfeited to the state.

III ENFORCEMENT: DOMESTIC BRIBERY

While case law is limited in relation to the enforcement of the legislation set out above, the controversy over private funding of political parties makes for an interesting South African case study.

Private funding of political parties is a contentious issue in South African politics; while private funding is permitted, no conditions or regulations regulate the practice.

This practice was the subject of a court challenge in the Cape High Court (as it then was) in 2004 by the Institute for Democracy in South Africa (IDASA), which launched proceedings to force South Africa's most prominent political parties, the ANC, DA/DP, the Inkatha Freedom Party and the African Christian Democratic Party to open their financial books to public scrutiny.¹⁸ The court proceedings were vociferously opposed by the parties,¹⁹ who argued, *inter alia*, that in the case before the Cape High Court the records sought could not be readily or easily obtained in the format sought, that the parties were not public bodies in the sense contended for by the applicants but were voluntary, private organisations, and that such disclosure would undermine the parties' ability to raise private funding, essentially on the basis that the publication of funders would discourage the advance of funding.

While the relief sought by IDASA was dismissed, the Court's judgment highlighted 'the complexity of the issues involved and the myriad ways in which they can be dealt with by legislation'.²⁰ The court went on to find that 'it [was] precisely because of these complexities that the Court [was ...] ill equipped – compared with the legislature – to perform the task that the applicants are seeking to impose upon it'.²¹

Unfortunately, to date no legislation regulating private funding of political parties had been presented or passed.

IV FOREIGN BRIBERY: LEGAL FRAMEWORK

i Foreign bribery law

The PCCA has extraterritorial jurisdiction in a number of instances, such as when the person to be charged is a citizen of South Africa, is ordinarily resident in the Republic, was arrested in the territory, or is a company incorporated or registered or any other body of persons, corporate or unincorporated, in the Republic. Furthermore, any act committed outside the Republic will be deemed to have been committed in the country if that act affects or is intended to affect a public body, a business or any other person in the Republic.

Furthermore, Section 5 of the PCCA creates a crime limited to corruption of 'foreign public officials'. This term is defined more specifically in Section 1.

Section 34 of the PCCA (which imposes a duty to report suspected and known corrupt activities) also has the potential to become a useful tool in uncovering instances of foreign bribery.

ii Definition of foreign public official according to the PCCA

A 'foreign public official' is defined by the PCCA as:

18 *Institute for Democracy in South Africa and Others v. African National Congress and Others* 2005 (5) SA 39 (C).

19 The Court noted the 'uncharacteristic display of solidarity across party-political divisions'.

20 Judgment, Paragraph 90.

21 *Ibid.*

*any person holding a legislative, administrative or judicial office of a foreign state; any person performing public functions for a foreign state, including any person employed by a board, commission, corporation or other body or authority that performs a function on behalf of the foreign state; or an official or agent of a public international organisation.*²²

iii The legal restrictions on providing foreign public officials with gifts, travel, meals and entertainment

As noted above, while there are no prescribed limits on hospitality expenses, whether or not such an expense is appropriate will depend on a number of factors, most notably whether the expense was given to induce the other party to do or not do something that is not authorised. If the giving of such gifts, etc. constitutes gratification in terms of the PCCA, then the parties to the activity will have committed the offence of corruption.

iv Payments through third parties or intermediaries

The PCCA provides that any person who directly or indirectly gives or agrees or offers to give any gratification to a foreign public official, whether for the benefit of that foreign public official or for the benefit of another person, to act, personally or by influencing another person to act, to abuse their position of authority is guilty of the offence of corrupt activities relating to foreign public officials.²³

In other words, South African law does not distinguish between direct payments, and indirect payments (such as payments through third parties or intermediaries) for the purposes of defining what constitutes corruption.

v Individual and corporate liability

All the offences created in the PCCA refer to ‘any person’, which would also include juristic persons (such as companies).

Furthermore, in terms of the Criminal Procedure Act 51 of 1977 (CPA), a corporate body can be held criminally liable for an act performed by, on the instruction of, or with the express or implied permission of a director or servant of that corporate body; or for an omission of any act that ought to have been but was not performed, by or on instructions given by a director or servant of that corporate body.²⁴

Intent is not required and the corporate body will be liable if the director or servant was acting in the exercise of his or her powers or in the performance of his or her duties as a director or servant while furthering or endeavouring to further the interest of that corporate body.²⁵

vi Civil and criminal enforcement

The PCCA itself only provides for criminal enforcement; however, it is always open to a person to pursue relief under the civil justice system.

22 Section 1 of the PCCA.

23 Section 5 of the PCCA.

24 Section 332 of the CPA.

25 Ibid.

vii Enforcement agencies

The South African Police Service is the primary agency responsible for the investigation of crime, including the bribery of foreign public officials.

In recent history, South Africa's law enforcement was restructured following the disbandment of the Directorate for Special Operations (DSO), colloquially known as the Scorpions, and the establishment of the Directorate for Priority Crime Investigation (DPCI), colloquially known as the Hawks, within the South African Police Service. This is discussed in more detail below.

Section 17B of the South African Police Service Act 68 of 1995, as amended, provides that the purpose of establishing the DPCI, is to 'prevent, combat and investigate national priority offences, in particular serious organised crime, serious commercial crime and serious corruption'.

Accordingly, the investigative capacity once held by the DSO within the National Prosecuting Authority (NPA) now lies with the DPCI within the South African Police Service, and no prosecutors are placed within the DPCI.

The Public Protector will also investigate alleged contraventions of the PCCA.

viii Leniency

There is no leniency given to companies for self-reporting or cooperation with authorities. In fact, Section 34 of the PCCA creates a duty to report knowledge or suspicion of corrupt activity to the South African Police Service, and it is a criminal offence not to do so. Accordingly, South African law does not specifically recognise compliance programmes and as such does not officially stipulate how such programmes may mitigate liability.

ix Plea-bargaining

Plea and sentence agreements are provided for by Section 105A of the Criminal Procedure Second Amendment Act 62 of 2001 (the Amendment Act), in which the procedures that are required to be followed to effect what is commonly referred to as a 'plea bargain' are set out.

A prosecutor, authorised thereto in writing by the National Director of Public Prosecutions, and an accused, who is legally represented may, before pleading to the charge brought against him or her, negotiate and enter into an agreement in respect of a plea of guilty by the accused to the offence charged.

The complainant, or his or her representative, where it is reasonable to do so and taking into account the nature of and circumstances relating to the offence and the interests of the complainant, must be afforded the opportunity to make representations to the prosecutor regarding the contents of the agreement.

x Prosecution of foreign companies

The PCCA does not provide for specific procedures to be followed where a foreign company is prosecuted for allegedly having been a party to a bribe.

V ASSOCIATED OFFENCES: FINANCIAL RECORD KEEPING AND MONEY LAUNDERING

i Financial record-keeping laws and regulations

The Financial Intelligence Centre Act 38 of 2001 (FICA) is part of the South African government's fight against money laundering.

FICA provides for the establishment of an anti-money laundering regulatory body and introduces mechanisms aimed at preventing money laundering.²⁶ The aim of FICA is to identify the source of proceeds that are suspicious and possibly derived from illegal activities such as bribery.

FICA places onerous identification, record-keeping and reporting burdens upon 'accountable institutions'. These accountable institutions include banks, authorised users of exchanges, investment managers, attorneys, accountants and estate agents.

ii Disclosure of violations or irregularities

Section 29(1) of FICA imposes a reporting obligation on any person who carries on a business, or is in charge of or manages a business, or who is employed by a business and who knows or suspects that the business has either received or is about to receive the proceeds of unlawful activities, or facilitated or is likely to facilitate the transfer of the proceeds of unlawful activities, to report the grounds for the knowledge or suspicion and the prescribed particulars concerning the transaction or series of transactions.

Section 32 provides that a report in terms of Section 29 must be made to the Financial Intelligence Centre in the prescribed manner. The Regulations to FICA prescribe that a report under Section 29 must be made by means of the internet-based reporting portal provided by the Centre for this purpose.

A report under Section 29 of FICA must be sent to the Centre as soon as possible but not later than 15 days (excluding Saturdays, Sundays and public holidays) after becoming aware of a fact concerning a transaction on the basis of which a report must be made.

A failure to report a suspicious and unusual transaction is an offence in terms of Section 52(1). In addition, Section 52(2) creates an offence in respect of a negligent failure to report in terms of Section 29.

A failure to report a suspicious and unusual transaction carries a fine not exceeding 10 million rand or 15 years' imprisonment.

Again, the PCCA makes it an offence not to report attempted or actual corrupt transactions under Section 34.

iii Tax deductibility of domestic or foreign bribes

In 2005, Section 23(m) of the Income Tax Act 58 of 1962 was amended to provide for the prohibition on the deduction of bribes, fines and penalties from income subject to tax.

A payment is, therefore, not deductible for tax purposes if the payment constitutes a corrupt activity in terms of the PCCA.

26 Financial Intelligence Centre official website: www.fic.gov.za.

iv **Money laundering laws and regulations**²⁷

Apart from the PCCA and FICA, various other acts are used to combat money laundering in South Africa. Some of these pieces of legislation are dealt with briefly below.

Banks Act 94 of 1990

The Banks Act provides for the regulation and supervision of the business of public companies taking deposits from the public. It places the obligation on banks or controlling companies to disclose their interest in subsidiaries, trusts and other undertakings and allows for the repayment of money unlawfully obtained by any person who conducts the business of banking without registering as such.

International Co-operation in Criminal Matters Act 75 of 1996

This Act deals with the execution of sentences in criminal cases, confiscation and the transfer of the proceeds of crime between South Africa and foreign states. The Act enables the courts to request assistance from a foreign state in the enforcement of a confiscation order, or in recovering a fine or compensation.

POCA

This Act introduces legislative mechanisms to combat organised crime, money laundering and racketeering activities. The maximum penalty created for an offence of racketeering is a fine of up to 1 billion rand and life imprisonment. The Act also creates an obligation to report certain suspicious transactions, and anyone assisting another to benefit from the proceeds of unlawful activities commits an offence.

VI ENFORCEMENT: FOREIGN BRIBERY AND ASSOCIATED OFFENCES

South Africa would not appear to have a significant existing track record in this regard and enforcement of cases involving foreign officials is infrequent. As at 2012, the Organisation for Economic Co-operation and Development (OECD) concluded in a 2012 report that ‘South Africa has neither prosecuted nor adjudicated any case of bribery of a foreign public official.’²⁸

27 Institute for Security Studies, ‘South Africa: Money Laundering Legislation’, available online at www.issafrica.org/cdct/mainpages/pdf/Money%20Laundering/Legislation/South%20Africa/SOUTH%20AFRICA%20Notes%20on%20Anti-ML%20Laws.pdf.

28 OECD, ‘South Africa: Phase 2 Follow-up Report on the Implementation of the Phase 2 Recommendations: Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions’, available online at: www.oecd.org/daf/briberyininternationalbusiness/South%20Africa%20-%20Phase%202%20Web.pdf.

VII INTERNATIONAL ORGANISATIONS AND AGREEMENTS

South Africa has signed and ratified both the United Nations Convention Against Corruption (2003) and the African Union Convention on Preventing and Combating Corruption (2003). South Africa is also party to the SADC Protocol Against Corruption (2001). The PCCA was promulgated to give effect to these international instruments.

VIII LEGISLATIVE DEVELOPMENTS

The South African Police Service Amendment Act 10 of 2012, which came into force on 14 September 2012, is the result of a Constitutional Court judgment, handed down on 17 March 2011.²⁹

In this matter, the Constitutional Court found that the DPCI (colloquially known as the Hawks) was not adequately independent, as required by the Constitution of South Africa and the international conventions to which South Africa is party.³⁰ The aim of this Act is to align the provisions of the South African Police Service Act 68 of 1995 relating to the DPCI with the judgment and to ensure that the Directorate has the necessary structural independence to fulfil its mandate without undue influence.

Civil society organisations made submissions to parliament, calling for new legislation to relocate the DPCI out of the South African Police Service. This, it is argued, is the best way for the unit to be truly independent, innovative and importantly, to secure public confidence.³¹

However, this Act does not go this far. The Hawks will remain a Directorate of the South African Police Service. Nevertheless, this Act has strengthened the Directorate and should reduce its vulnerability to political interference:

- a* the head of the DPCI has been given the authority to overrule the National Commissioner of Police in decisions regarding which crimes will be investigated by the unit;
- b* the head of the DPCI determines the organisations' budget, which is 'ring-fenced' for use only by the DPCI. The head reports directly to parliament on the expenditure of the Directorate;
- c* the head of the DPCI has the final authority in the recruitment and dismissal of all DPCI staff; and
- d* it is a criminal offence, punishable by up to two years in prison, for anybody to attempt to hinder, obstruct or interfere with the work of the DPCI.

29 *Glenister v. President of the Republic of South Africa and Others* CCT 48/10 [2011] ZACC 6.

30 Dr Chandre Gould and Gareth Newham, 'Strengthening Legislation for a South African Anti-Corruption Agency', Crime and Justice Programme, ISS Pretoria, available online at: www.polity.org.za/article/strengthening-legislation-for-a-south-african-anti-corruption-agency-2012-06-12.

31 *Ibid.*

This is important in the light of allegations that the Minister of Police interfered with a DPCI investigation into controversial head of the South African Police Service Crime Intelligence Division Richard Mdluli.³²

Other improvements in the Act include that it sets out clear criteria about the type of person that should be appointed as the head of the DPCI.³³

This person should be 'fit and proper', and 'due regard' must be given 'to his or her experience, conscientiousness and integrity'. This will be particularly reassuring in the light of several instances in which individuals with questionable integrity and ability have been appointed to key positions in the criminal justice system.³⁴

The Act also addresses concerns raised about the potential for ministerial influence over the work of the unit. While the controversial Ministerial Committee that previously had an 'oversight' role remains in existence, the Act has stripped it of all powers to interfere and allocated it the task of only coordinating the activities of the DPCI and other government departments. This Committee, made up of the Ministers of Police, Finance, Home Affairs, State Security and Justice, also has to report to parliament about its activities.

One significant weakness remains: the processes and requirements for the dismissal of the head of the unit are, it is argued, ambiguous. Such a weakness allows the Minister of Police the discretion to determine whether the head of the Hawks, during any period of suspension, will receive a salary. It is argued that this creates the opportunity for political influence.³⁵

The success or failure of the Hawks, it is argued, will largely be determined by who is appointed as its head. If a political appointment is made, the Hawks will be unlikely to pursue anyone that the President or Minister of Police may wish to protect.³⁶

IX OTHER LAWS AFFECTING THE RESPONSE TO CORRUPTION

There are various other pieces of legislation worth mentioning in the context of the fight against corruption in South Africa, such as the Promotion of Administrative Justice Act 3 of 2000, the Promotion of Access to Information Act 2 of 2000, and the Public Finance Management Act 1 of 1999.

Also of importance in this context is the Protected Disclosures Act 26 of 2000 (the Whistle-Blowing Act). The Whistle-Blowing Act protects employees in the public and private sector from occupational detriment should they expose corruption in the workplace, and helps managers to identify and manage risk and protect the reputation of their respective organisations. The Whistle-Blowing Act also encourages employees

32 Ibid.

33 Ibid.

34 Ibid.

35 Ibid.

36 Ibid.

to come forward with any information without fear of repercussion.³⁷ Interestingly, the Labour Appeal Court has recently held that, in certain circumstances, the Whistle-Blowing Act may apply post-termination of an employment relationship.³⁸

X COMPLIANCE

Anti-corruption campaigners and activists have been urging the South African authorities to consider the adoption of similar legislation to the Bribery Act 2010 in the United Kingdom in relation to the corporate offence of failing to prevent bribery, which effectively requires juristic entities in the United Kingdom to take robust anti-corruption measures.

While the South African government has not gone as far in this regard, it has introduced requirements for certain companies (such as state-owned and public companies) to adopt the international recommendations on combating bribery, bribe solicitation and extortion as contained in the OECD guidelines for multinational enterprises. These requirements are contained in the Companies Act 71 of 2008 and *inter alia* provide for the establishment of a social and ethics committee. A social and ethics committee must be established by every state-owned company, every listed public company, and any other company that has, in any two of the previous five years, had a public interest score of at least 500 points.³⁹

The social and ethics committee is tasked with a number of monitoring activities, including monitoring the company's activities in relation to good corporate citizenship, which includes the company's measures to address corruption.

While the implementation of a compliance programme may not necessarily absolve a legal entity of vicarious liability, if the company is able to show that it has taken all reasonable steps to prevent the commission of corruption, this may be a factor taken into account in mitigation.

37 Public Service Commission, 'Whistle-blowing: A Guide for Public Sector Managers Promoting Public Sector Accountability Implementing the Protected Disclosures Act', available online at: www.psc.gov.za/documents/docs/guidelines/PSC_odac_update.pdf.

38 *Potgieter v. Tubaste Ferrochrome and Others* (JA71/12) [2014] ZALAC 32.

39 The public interest score of a company is calculated, as the sum of the following, at the end of each financial year: the number of points equal to the average number of employees of the company during the past financial year; one point for every 1 million rand (or portion thereof) in third-party liability of the company, at the financial year end; one point for every 1 million rand (or portion thereof) in turnover during the financial year; and one point for every individual (natural person) who, at the end of the financial year, is known by the company, to directly or indirectly have a beneficial interest in any of the company's issued securities.

XI OUTLOOK AND CONCLUSIONS

i Current issues in South Africa

Media frenzy has arisen around the charge of Julius Malema, a South African politician and former president of the African National Congress Youth League, and now the leader of newly formed political party the Economic Freedom Fighters, with 16 counts of money laundering, fraud, corruption and racketeering in the Polokwane Regional Court.⁴⁰

The money allegedly flowed to Malema's Ratanang Family Trust, directly as dividends and indirectly as kickbacks from a 52 million rand contract that was allegedly awarded improperly to On-Point Engineering (Pty) Ltd (On-Point) by the province of Limpopo's roads and transport department.⁴¹

Malema is being charged under POCA, and it is reported that On-Point beat 15 other bidders by allegedly making false claims about its experience, qualifications and tax status. On-Point directors and co-accused Lesiba Gwangwa, Helen Mareroa, Makgetsi Manthata and Kagisho Dichabe have each been charged with four counts of fraud.⁴²

Once the contract was awarded to On-Point, millions allegedly flowed to Malema through two channels: dividends paid from On-Point to its shareholders, and kickbacks paid either directly or indirectly by service providers and subcontractors.⁴³

Malema and his co-accused maintained their innocence, publicly lashing out at the ruling political party, the African National Congress (ANC) and the President, Jacob Zuma, alleging that the charges against Malema are politically motivated.⁴⁴

The charges against Malema's co-accused were discharged in early 2014 on the basis that the evidence could not sustain the charges. Malema is currently out on 10,000 rand bail and his trial is anticipated to be heard from 30 September 2014 to 3 October 2014.

Zuma, has also recently been implicated in a major corruption scandal that erupted in 2002 (seven years before he won the presidency of the ANC) with the trial of his close associate Schabir Shaik.⁴⁵ The state alleged that Zuma used his position in government to enrich himself by benefitting from Shaik and the companies involved in the procuring of arms for the state.⁴⁶

On 29 June 2005, Zuma appeared in the Durban Magistrates Court on two counts of corruption, including bribery related to attempting to influence an investigation into the 1999 arms deal.⁴⁷

40 Owen Gagare Lionel Faull (2012), 'If it was a crime, did Malema know?' Mail & Guardian, available online at: <http://mg.co.za/article/2012-09-28-00-if-it-was-a-crime-did-juju-know>.

41 Ibid.

42 Ibid.

43 Ibid.

44 www.bdlive.co.za/national/politics/2012/09/28/news-analysis-malemas-claim-of-manipulation-could-weaken-zuma.

45 www.news24.com/SouthAfrica/News/The-Zuma-spy-tapes-all-you-need-to-know-20140829.

46 Ibid.

47 Ibid.

In 2009, the then NPA head, Mokededi Mpshe, announced that charges against Zuma would be withdrawn because the 'spy tapes' contained evidence that there was a conspiracy to remove Zuma from office.⁴⁸ Later that year, the leading opposition party, the Democratic Alliance (DA), approached the court to have Mpshe's decision set aside, but the application was dismissed by the North Gauteng High Court.⁴⁹

Following an appeal to the Supreme Court of Appeal in 2011, the NPA was ordered to hand over the reduced record of its decision to drop charges against Zuma in 2009 to the DA, including the spy tapes.⁵⁰

After about five years and six court cases, the DA finally secured the spy tapes on 4 September 2014, the contents of which it is believed could merit the reopening of the criminal charges against Zuma.⁵¹

ii The future

While it is clear that South Africa is plagued by corruption and bribery from grass-roots level to the highest reaches of government, the legislature has taken positive steps in an attempt to combat the problem.

By enacting the PCCA, a piece of legislation that is broad and far-reaching in its application, the legislature has sought to abide by its obligations in terms of international conventions and protocols.

It is in the implementation of these laws where the real difficulties lie. Without an effective policing system, and with allegations of corruption in the government itself, without the appropriate political motivation it seems unlikely that the PCCA will achieve its aims.

It is, however, promising to note the OECD's Working Group comments that it has welcomed information provided by the South African authorities and the efforts to implement its recommendations, as well as the significant awareness-raising efforts through a cross-section of South Africa's public administration.⁵²

48 Ibid.

49 Ibid.

50 Ibid.

51 www.timeslive.co.za/thetimes/2014/09/05/da-spy-tapes-just-the-start.

52 See footnote 32.

Chapter 19

SPAIN

Jesús Santos Alonso, María Massó Moreu and Ana Torres Pérez-Solero¹

I INTRODUCTION

Nowadays, bribery and corruption are becoming a primary issue in Spanish politics, legislation and criminal proceedings ongoing at the criminal courts. There is great public awareness of this issue, with international and local media focusing their attention on significant cases related to bribery in Spain.²

In addition to this, Spain is influenced by the European Union, the Organisation for Economic Co-operation and Development (OECD), the UN, etc. to adapt its laws to the international standards.

Consequently, in recent years the Spanish Criminal Code³ has seen significant amendments, including Chapter V, Title XIX, Book II, Sections 419 to 427, related to bribery, which could be object of a new amendment in the near future by a draft bill passed by the Spanish government. In addition, the bribery of private entities or

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2 Indeed, in the past few years, corruption and fraud have become, according to the Spanish public's perception, one of the main problems in the country; this problem is now considered the second major concern after unemployment, whereas over 15 years ago it did not even appear in the Center for Sociological Research (CIS) surveys. In fact, in the past year corruption has come closer to unemployment as the major concern of Spanish society. Source: CIS, www.cis.es/cis/export/sites/default/-Archivos/Indicadores/documentos_html/TresProblemas.html (July 2014).

3 A translation of the legal text given by the Ministry of Justice can be found at: www.mjusticia.gob.es/cs/Satellite/es/1288774502225/TextoPublicaciones.html.

individuals (Chapter XI, Title XII, Book II, Section 286-bis) was introduced *ex novo* by amendment of the Criminal Code of December 2010.⁴

These changes show an inclination by the Spanish legislature to make penalties stricter and to increase the number of acts considered to constitute an offence and extend the range of individuals that may be held criminally liable for such conduct.⁵ This increasing trend of pursuing and punishing corrupt acts (including private, public and political acts),⁶ in addition to preventing such acts, has resulted in a series of interesting legislative developments in the past year. Along with the announced reform of the Criminal Code, currently pending the parliamentary phase, these developments directly or indirectly affect the fight against fraud and are analysed in detail below.

II DOMESTIC BRIBERY: LEGAL FRAMEWORK

The Spanish Criminal Code distinguishes between two offences: (1) bribery of a public servant or authority and (2) bribery of private entities or individuals). Since December 2010, legal entities⁷ can be held criminally liable for both crimes pursuant to Article 31-bis (also introduced by the above-mentioned amendment) where they fail to exercise proper control over their employees.⁸

According to the Spanish Criminal Code, bribery occurs whenever a public servant or authority receives or is offered a reward to (1) carry out an act or omission breaching the duties required of hi or her position; or (2) to carry out any act relating to the performance of his or her duties. The offence can take the form of so-called 'passive bribery', where the initiative to commit the offence originates with the public official

4 Organic Law 5/2010, 22 June, which amends Organic Law 10/1995, 23 November, of the Criminal Code.

5 In this regard, it is essential to refer to Constitutional Act 7/2012, dated 27 December, amending the Criminal Code with respect to transparency and the fight against fraud, which also includes political parties and trade unions, until now inexplicably excluded, in the general criminal liability regime for legal entities.

6 Referring to the problem of corruption, in his speech opening the new judicial year on 9 September 2014, the Attorney General stated that 'there is public corruption, which seriously damages the image of the public service and its treasury, which should serve social needs; in addition to political corruption, which undermines the democratic system based on the social pact; and private corruption, which seriously compromises financial stability and the distribution of wealth, giving rise to crises with social repercussions that extend inequality to intolerable limits'.

7 This liability does not extend to public and regulatory bodies, international organisations, political parties, trade unions and so on, unless the court finds that this legal form was used specifically for the purpose of avoiding criminal liability.

8 Some of the penalties that can be imposed on legal entities under Article 33.7 of the Spanish Criminal Code are: a fine; suspension of activity; closure of premises and establishments; and dissolution of the entity (which has been strongly criticised by some, who liken this measure to the death penalty for the legal entity).

or authority (i.e., soliciting a bribe), or ‘active bribery’, where the bribe is offered at the initiative of the individual paying it. To be punishable, it is necessary that such acts be committed maliciously, that is to say, intentionally.

It is necessary to clarify what is meant by ‘public servant’ and ‘authority’ under Spanish law. Section 24 of the Criminal Code defines an ‘authority’ as one who, either himself or herself, or as a member of an agency, tribunal or collective body, has the power to give orders or who exercises his or her own jurisdiction;⁹ and a ‘public official’ as one who, either by immediate provision of the law or by appointment of the relevant authority, participates in the discharge of public duties.¹⁰ Section 423 of the Spanish Criminal Code states that the offence of bribery can also be committed by juries, arbitrators, experts and ‘any person participating in the performing of a public service’.

‘Passive bribery’ is regulated by Sections 419 to 423 of the Criminal Code. There are also four different types of conduct that constitute ‘passive bribery’:¹¹

- a* those that consist in carrying out an act or omission breaching the duties required of the public servant or authority’s position (Section 419);¹²
- b* those that consist in carrying out an act relating to the performance of the public servant or authority’s duties (Section 420);¹³
- c* those that have as an intended purpose the reward of an act that has already been carried out (Section 421);¹⁴ or
- d* the acceptance of a reward offered to an authority or public servant in view of his or her office or duty (Section 422), even if he or she is not asked to carry out an act.¹⁵

9 In any case, members of the lower and upper houses of Parliament, the legislative assemblies of the autonomous communities and of the European Parliament shall be deemed an authority. Officials of the Public Prosecutor’s Office shall also be deemed an authority.

10 As Spanish courts have consistently held, the concept of public servant contained in the Criminal Code is only applicable for criminal law purposes, as is clear from Article 24, and that it is different from the term used in the administrative ambit.

11 Blanco Cordero, Isidoro: ‘La reforma de los delitos de corrupción mediante la Ley Orgánica 5/2010: nuevos delitos y aumento de penas’, *Diario La Ley*, No. 7534, Sección Tribuna, Dic. 2010, Ref. D-393.

12 Punished with imprisonment for a period of three to six years, a daily fine the amount of which will depend on the accused party’s assets and which may apply for 12 to 24 months, and specific disqualification from holding public office or employment for a period of seven to 12 years, in addition to the penalty for committing the act or omission.

13 Punished with imprisonment for a period of two to four years, a daily fine the amount of which will depend on the accused party’s assets and which may apply for 12 to 24 months, and specific disqualification from holding public office or employment for a period of three to seven years.

14 The penalties referred to in Articles 419 and 420 would also be imposed in this case.

15 Punished with imprisonment for a period of six months to one year and specific disqualification from holding public office or employment for a period of one to three years.

'Active bribery' is regulated in Sections 424 and 425 of the Criminal Code, which punish¹⁶ the conduct of a private individual who:

- a* offers or delivers a gift or remuneration of any kind to an authority or public servant (1) for the latter to perpetrate an act that is against the duties inherent in his or her office or an act inherent in his or her office; or (2) for him or her not to carry out, or to delay what he or she should carry out, or in consideration of his or her office or duty; or
- b* delivers a gift or remuneration following solicitation by the authority or public servant.

The Spanish courts have generally recognised that two key objective elements are necessary (apart from performing one of the above-mentioned acts) for a finding of bribery, namely:

- a* the reward should not be socially acceptable in the sector in which the public servant performs his or her duties; and
- b* the value of the reward should be high enough to be able to influence the public servant's decision.

All payments, rewards, presents or gifts shall be confiscated by the authorities (Section 431).

It is very difficult to draw firm conclusions as to what level of benefit would avoid any question of bribery arising under Spanish law. There is no legal guidance as to the value of any benefit and its capacity to influence a public servant's decision. Any analysis as to whether or not a criminal offence has been committed should be on a case-by-case basis.

Spanish courts have consistently demanded the existence of a causal link between the delivery of the gift or remuneration and the public office of the public servant. That is to say, the reason for the gift must be that the status or condition of the individual receiving the gift as an authority or public servant. However, under Spanish law, bribery is an offence that merely requires the act of bribery itself, which means that a result is not necessary (except in the act of receiving the bribe) and, therefore, can consist in requesting, accepting or receiving a gift, present, offer or promise, even if the prospective transaction ultimately does not take place.

Finally, it is necessary to analyse the offence of private bribery, one of the main innovations of 2010 amendment of the Criminal Code. This regulation, fulfilling the mandate contained in Framework Decision 2003/568/JAI, has been created to prevent acts intended to corrupt company management in a similar way to those of bribery.

As in the case of public bribery, the offence only requires the act of offering, accepting or receiving an unjustified benefit or advantage that, in this case, must be

¹⁶ The penalties imposed on private individuals who commit 'active bribery' are the same as those imposed on the public servant or authority to whom the reward is offered (Articles 419 to 422 of the Criminal Code).

intended to secure preferential treatment in the acquisition or sale of goods or in hiring professional services, in breach of the recipient's obligations.

This offence can be committed by any natural or legal person in the context of a commercial relationship. As in public sector bribery, a distinction can be made between 'active' and 'passive bribery' depending on who takes the lead in the act of corruption.¹⁷ Likewise, the criteria relevant to determining whether private bribery has occurred are the same as those applied to bribery in the public sector: the gift offered must be capable of influencing the other person's decision, and not be socially acceptable, and thereby obtaining an unlawful benefit from the other party. Article 286-bis of the Criminal Code punishes this conduct with penalties of imprisonment (for six months to four years), a fine and disqualification from the right to carry out an industrial or commercial activity.

To combat bribery, the Spanish government created an Anti-Corruption Prosecution Office,¹⁸ whose main purpose is to investigate and become party to all major cases related to financial offences or any offence committed by public officials or authorities that constitutes bribery.¹⁹

III ENFORCEMENT: DOMESTIC BRIBERY

Regarding recent legal cases and developments in Spain, the following cases are noteworthy:²⁰

a The enquiries in the Spanish high-profile bribery case *Malaya* began in 2005, with the purpose of exposing a network of associations serving as a cover for numerous illegal activities, including bribery, in the real estate industry, especially in the area of the Mediterranean coast. The main parties accused were various officials of Marbella city council, constructors, developers, judges and lawyers. The pretrial proceedings were initiated on 17 July 2007. In October 2013, a judgment was given in the case convicting 40 of the accused of active or passive bribery, among other offences and imposing penalties of imprisonment ranging from eight months to one year.²¹ In its judgment the court referred to the difficulties encountered in clarifying and determining the specific criminal or unfair acts performed in exchange for the consideration provided, in other words, in proving the causal link between the consideration and the specific act. The court considered that this circumstance should be interpreted in the interests of the accused and ruled a conviction for the mildest form of passive bribery. The judgment is currently subject to appeal before the Supreme Court.

17 González Blesa, Francisco Javier: 'Delito de corrupción entre particulares: comentarios y críticas al artículo 286 Bis CP', *Noticias Jurídicas*, May 2012.

18 The current Chief Public Prosecutor is Antonio Salinas Casado.

19 The number of bill of indictments filed by the Anti-Corruption Prosecution Office related to bribery reached a record in 2011 with 235; Report of the Public Prosecutor's Office, 2012.

20 Judgments regarding bribery increased by 75.5 per cent in the past year; Report of the Public Prosecutor's Office, 2014.

21 Málaga Provincial Court Judgment (Section 1), dated 4 October 2013, No. 535/2013.

- b* One of the most significant cases of bribery in Spain is the *Gürtel* case. Proceedings for this case began at the National Court in February 2009 to uncover a network of corruption headed by the business executive Francisco Correa. Various political leaders, mayors, directors-general and business executives have been charged in this case. The enquiry phase of these complex proceedings continues. Recently, in July 2014, the court investigating the case issued a judgment²² accusing a Spanish political party of ‘taking part for financial gain’,²³ claiming that it benefited indirectly from the alleged crimes of bribery under investigation.
- c* Finally, another major and highly publicised case of fraud and corruption in our country is the *Puerto* case. One of the most serious cases of police corruption, it is related to the theft of a container of drugs from the port of Barcelona, involving police agents. A judgment was given in July 2012 and is currently subject to a Supreme Court appeal. The Spanish courts encounter serious difficulties establishing convictions for bribery given that, as explained above, the instrument of the crime of bribery is the gift or object provided, favour or remuneration of any other kind, offer or promise and that there must be a cause–effect relationship between such an instrument and the subsequent act of the civil servant in exchange. This cause–effect relationship is not always easy to prove in the terms required by case law.

IV FOREIGN BRIBERY: LEGAL FRAMEWORK

The Spanish Criminal Code, in Section 445 (Chapter X, Title XIX, Book II), also regulates corruption in international transactions: it is an offence for any person to corrupt, or attempt to corrupt, the public servants or authorities of foreign countries or international organisations for their own benefit or the benefit of a third party. Such corruption is deemed to occur where any kind of benefit is directly or indirectly given, offered or promised to a public servant or authority, or where the foreign authority’s request for such a benefit is met, with the intention that the official in question will act (or refrain from acting) in the exercise of their public function, and the payer will thus obtain or retain a contract or other irregular benefit.

This offence may incur two to six years’ imprisonment, and a fine from one to two years or twice the value of the benefit or advantage obtained (whichever is the higher). The perpetrator will be also punished by disqualification from receiving public subsidies, contracting with public entities, obtaining tax or social security benefits and prohibition from participating in international transactions of public importance for seven to twelve years. An increased penalty is provided if the object of the business concerns humanitarian assets or services or any others of primary need.

22 Court order issued by the Central Examining Court No. 5 of the National Court of Justice on 29 July 2014, initiating a separate issue under Preliminary Proceedings 275/2008.

23 This concept is regulated by Article 122 of the Criminal Code, which states that ‘he who shares in the financial gain resulting from an offence or misdemeanour shall be obliged to return the object or repair the damage caused, up to the amount of such share’.

As for what is meant by ‘foreign public official’ under Spanish law, Section 445 provides a definition, specifying that a foreign civil servant is construed to be:

- a* any person who holds a legislative, administrative or judicial office in a foreign country, both by appointment or by election;
- b* any person who exercises a public duty for a foreign country, including a public body or a public company; or
- c* any officer or agent of an international public organisation.

As in public or private bribery, legal entities may be held criminally liable for foreign bribery under the terms of Section 31-bis of the Criminal Code.

As mentioned in Section II, *supra*, where we have analysed public bribery, there is a provision (Section 427) that specifically establishes that the terms and crimes provided in that section shall also be applicable when the acts concerned affect officers of the European Union or civil servants who are nationals of another EU Member State. The provision also gives a definition of ‘an officer of the European Union’, which differs slightly from the definition contained in Section 445. This can lead to problems of interpretation of a specific act in one or another offence. To resolve these interpretation issues, some legal writers have considered that there is no concurrence between the two sections since Section 445 refers only to international commercial transactions and the legal asset protected by this provision is the accurate development of international trade, rather than the impartiality of the public administration, as is the case in the provision concerning public bribery.

What appears certain is that this discussion will cease to be relevant if the draft bill of law amending the Criminal Code that has been approved by the Cabinet of Ministers finally enters into force because, as the bill’s Recital of Motives explains, the new text will contain a single and unified regulation.

V ASSOCIATED OFFENCES: FINANCIAL RECORD KEEPING AND MONEY LAUNDERING

Money laundering constitutes a criminal offence under Section 301 of the Spanish Criminal Code. This article punishes whoever acquires, possesses, uses, converts or conveys assets, knowing they originate from a criminal activity committed by that person or by any third party, or who perpetrates any other act to hide or conceal the unlawful origin of the assets.²⁴ Therefore, under Spanish Law, money laundering is a criminal offence no matter what criminal activity it is concealing, although it was intended to prosecute drug trafficking, terrorism and bribery-related acts.

Additionally, the Anti-Money Laundering and Counter Financing of Terrorism Act (Act 10/2010), passed in 2010, aims to tackle money laundering and terrorist financing.

²⁴ Penalties include imprisonment of up to six years, fines and being barred from the exercise of a profession or participation in an industry. When acts are perpetrated as a result of serious negligence the penalties imposed are lighter than those envisaged for cases in which there is criminal intent to commit the offence.

The law transposes European Directive 2005/60/EC, the Third Money Laundering Directive. Under the new system, the Executive Service of the Commission for the Prevention of Money Laundering and Monetary Offences (SEPBLAC) is responsible for compliance supervision. Sanctioning powers lie with the Ministry of Finance.

As the Supreme Court has held, taking into account that bribery and money laundry are usually perpetrated by organised groups, a distinction should be made between those who generate the unlawful profits and those who manage the money laundering structure. However, the author of the prior offence can also carry out acts subsequently to launder the profits resulting from this crime, leading to a concurrence of two offences, as the protected legal asset is different in each offence.²⁵

Additionally, it is obvious that bribes are connected to other types of offences, such as accountancy offences or tax evasion.²⁶ Regarding corporate books, Section 310 of the Spanish Criminal Code punishes the person obliged by law to keep corporate accounting, books or tax records when:

- a* he or she absolutely fails to fulfil the obligation stated in tax law;
- b* he or she keeps different accounts that, in relation to the same activity and business year, conceal or simulate the true situation of the business;
- c* he or she has not recorded businesses, acts, operations or economic transactions in general, in the obligatory books, or has recorded them with figures different from the true ones; or
- d* he or she has recorded fictitious accounting entries in the obligatory books.

In any case, the connection between bribery and money laundering or accountancy offences has been settled by the Supreme Court: if the illegal benefits come solely from the bribe, 'a judgment for bribery, which constitutes the illicit origin of the money, absorbs the other illegal acts related to the first one'.²⁷ Consequently, even if bribery is connected to other kinds of offences, it may be the only act that can be punished by the court.

Of extraordinary importance in this regard is the recent (May 2014) passing of the Anti-Money Laundering Implementing Regulations.²⁸ By passing these regulations, which serve to supplement Act 10/2010, legislators aim at 'firstly, completing the new approach to preventive law in Spain and, secondly, incorporating the main developments in international legislation that have arisen as a result of the approval of

25 Molina Mansilla, M^a del Carmen: 'Análisis de la nueva doctrina jurisprudencial sobre el delito de blanqueo de dinero', p. 1. *La Ley, La Ley Penal*, No. 45, Sección Jurisprudencia aplicada a la práctica, Enero 2008, *La Ley* 6586/2007.

26 Pipaón Pulido, Jorge Guillermo: 'El cohecho y el delito fiscal. Concurso de normas'. *La Ley* 20885/2009.

27 Sentence from the Supreme Court, 28 March 2001 (*La Ley* 3306/2001), *Urralburu* case. Speaker: Conde-Pompidou Tourón, Cándido.

28 Royal Decree 304/2014, dated 5 May, passing the Implementing Regulations of Act 304/2014, dated 28 April on anti-money-laundering and the financing of terrorism. The regulations appear in the Official State Gazette: www.boe.es/boe/dias/2014/05/06/pdfs/BOE-A-2014-4742.pdf.

new recommendations by the International Financial Task Force' (Preamble to the Royal Decree). This approach, which is based on identifying the risk and the prevention thereof and which is more relevant in the implementing regulations than in the Act itself, results in the need to take measures that enable an increase in the efficiency and efficacy of the use of the subject's resources, to highlight the situations, products and clients that are at the greatest risk.

VI ENFORCEMENT: FOREIGN BRIBERY AND ASSOCIATED OFFENCES

In the past few years we have witnessed a succession of cross-border cases regarding bribery and corruption of intermediaries in international business transactions, despite the proliferation of international legal instruments designed to combat bribery of foreign public officials in the course of this kind of activity.

We provide here a few recent examples, the first of which is the *Green* case.²⁹ In this case, the indictment alleged that the defendants bribed a Thai government official to obtain contracts to run the Bangkok International Film Festival. The official and the defendants agreed on the value of the contract, which was inflated by the amount of the bribe. When the defendants received payments from the Thai authorities under the contract, they transferred the portion of the payment representing the bribe to bank accounts held by the official's daughter or friend in the United Kingdom, Singapore and Jersey.

In the *Statoil* case,³⁰ Statoil, a Norwegian oil and gas company, entered into a vaguely defined consulting services contract with an offshore company located in the United Kingdom. The real purpose of the contract was to channel funds payable under the contract to an Iranian official who wielded enormous influence in the Iranian oil and gas industry. Under the agreement, Statoil was to pay over \$15 million in bribes over 11 years. The payments were routed through a US bank into a Swiss bank account. In return, the Iranian official provided Statoil with non-public information concerning oil and gas projects in Iran, and showed Statoil copies of bid documents. This informational advantage allowed Statoil to obtain a number of contracts in Iran.

Finally, we refer to the *Aon* case,³¹ Aon being a major insurance and reinsurance company in the United Kingdom. From 2005 to September 2007, Aon had a code of

29 Grand Jury Indictment, Criminal Case No. CR08-59(A)GW (US District Court, Central District of California) (1 October 2008); Source: OECD Working Group on Bribery in International Business Transactions, 'Typologies on the Role of Intermediaries in International Business Transactions: Final Report' (October 2009).

30 Information 06-CRIM-960 (US District Court, Southern District of New York) (13 October 2006); Source: OECD Working Group on Bribery in International Business Transactions, 'Typologies on the Role of Intermediaries in International Business Transactions: Final Report' (October 2009).

31 Final Notice, UK Financial Services Authority, 6 January 2009; Source: OECD Working Group on Bribery in International Business Transactions, 'Typologies on the Role of

conduct that specifically prohibited employees from using a third party to perform any act that the employee could not engage in directly. Employees were required to make annual written declarations that they had read and understood the code. However, the company made no other significant efforts to implement a compliance programme. As a result, the company paid €3.4 million to third-party agents in Bahrain, Bangladesh, Bulgaria, Burma, Indonesia and Vietnam. Aon did not question the purpose and nature of these suspicious payments, even though it was reasonably obvious that there was a significant risk that the agents might use the funds to bribe foreign officials, and there was no genuine commercial purpose to paying the agents.

VII INTERNATIONAL ORGANISATIONS AND AGREEMENTS

Since the beginning of the 21st century, Spain has traditionally participated, as a party, signatory or a member, in many international legal instruments created to combat bribery and corruption, including:

- a* the OECD Anti-Bribery Convention (ratified by Spain in 2000);
- b* the United Nations Convention against Corruption, UNCAC (ratified by Spain in 2006);
- c* the United Nations Convention against Transnational Organized Crime (ratified by Spain in 2002);
- d* the Civil Law Convention on Corruption (ratified by Spain in 2009);
- e* the Criminal Law Convention on Corruption (Ratified by Spain in 2010);
- f* the Additional Protocol to the Criminal Law Convention on Corruption (Ratified by Spain in 2011);
- g* the Ibero-American Code of Good Government (2006);
- h* Resolution (99) 5 of the Committee of Ministers of the Council of Europe (Agreement establishing the ‘Group of States against Corruption (GRECO)’ adopted in 1999; and
- i* Resolution (97) 24 of the Committee of Ministers of the Council of Europe (On the Twenty Guiding Principles for the Fight against Corruption) adopted in 1997.

VIII LEGISLATIVE DEVELOPMENTS

Some of the cases mentioned above have raised many questions about the funding of political parties by private donations and when they can be considered bribery. This, combined with the difficulties found by the courts in the actual application of the regulation of bribery offences (as certain acts cannot be subsumed under the current criminal definition), is why in October last year, the Cabinet of Ministers approved the text of the draft bill amending Organic Law 10/1995 of 23 November, even though only a short period of time has passed between this draft bill and the previous amendment to the Criminal Code (22 June 2010). This new draft proposes changes that concern bribery.

Intermediaries in International Business Transactions: Final Report’ (October 2009).

The draft bill intends to clarify the offence of bribery and make it easier to punish this offence in Spain. It includes stricter penalties for cases with special relevance, new criteria to extend the Spanish jurisdiction to pursue these kinds of offences and a new definition of 'foreign public official' that simplifies the definition currently in force.

Regarding the improvements to increase the legislation's effectiveness, the amendment follows the trend from other jurisdictions towards punishing the acceptance of the gift or present without linking it to a certain act made by the public official. This approach overcomes the limitations imposed by the current Spanish legislation, which requires proof of the link between the bribe and the act of the public official. This change will simplify and facilitate the pursuit of these acts.

Additionally, the punishment for bribery will depend on the seriousness of the acts, the value of the gift, the involvement of criminal organisations or groups, etc., with different penalties envisaged depending on these factors.

This new legislation will change the definition of 'foreign public official' contained in the Criminal Code, which is too exhaustive, and will make it more suitable for international purposes.

Finally, as mentioned, any gift, reward or asset resulting from a bribe should be confiscated by the authorities. However, the confiscation aspect has not been properly developed in the current Spanish legislation (although the Bill of Law for the Reform of the Criminal Code deals with the issue in more depth).

Consequently, taking into account the US model, international means and European Union concerns, Law 4/2010, dated 10 March has been passed on the Execution of European Judgments regarding Confiscation of Illegal Assets and the national transposition of the 2007 Council Decision on Asset Recovery Offices.

This law makes it easier for EU Member States to confiscate assets derived from serious and organised crime and protect their economies; it also simplifies existing rules and fills important gaps that are being exploited by organised crime groups. It enhances the ability of EU Member States to confiscate assets that have been transferred to third parties; it also makes it easier to confiscate criminal assets even when the suspect has fled, and ensures that the competent authorities can temporarily freeze assets at risk of disappearing if no action is taken.³²

In relation to the latter, and as mentioned above, the proposed ambitious reform of the Spanish Criminal Code is extremely important. As explained in the Preamble to the Bill of Law, the reform takes into consideration both the regulation contained in Framework Decision 2005/212/JAI, currently in force, and the new European Directive on the seizure and confiscation of the proceeds of crime in the European Union, which is currently being processed.

The changes particularly affect three issues: confiscation without a court ruling, extended confiscation and the confiscation of a third party's assets. Traditionally, the confiscation of the proceeds of crime has been linked to the existence of a prior conviction for the offence committed. On this basis, it had been said that 'confiscation without a court

32 Jiménez Villarejo Fernández, Francisco: 'Novedades Legislativas en Materia de Decomiso y Recuperación de Activos', *Lex Nova*, 3 January 2012.

ruling’ was necessarily a breach of the presumption of innocence. However – according to the legislators – this interpretation is determined by a traditional analysis and does not take into account that ‘confiscation without a court ruling’ does not refer to a criminal context by nature. With regard to ‘extended confiscation’, which was introduced in the reform of the Criminal Code that took place in 2010 for crimes of terrorism and those committed by criminal organisations, the extension under the new reform applies to cases in which criminal activity is often sustained over time and can produce substantial financial profits (money laundering and receiving of stolen goods, corruption in the private sector, computer crime, bribery, embezzlement, etc.). The reform is completed with the introduction of a procedural regulation regarding confiscation that guarantees third parties affected by such confiscation the possibility of defending their rights in the proceedings to which they are party.

Finally and in relation to a different issue, the reform creates a new section called ‘Crimes of Corruption in Business’, which includes bribery to gain competitive advantage. The amendment is also used to introduce improved techniques in regulating such crimes, which are aimed at ensuring the application of the provisions to all cases in which an advantageous position is obtained in business relations by means of a bribe. In the case of cross-border bribery, the criminal regime is amended and possible difficulties resulting from the co-existence of the regulation with those regulating bribery in the current Criminal Code have been overcome.

IX OTHER LAWS AFFECTING THE RESPONSE TO CORRUPTION

In the Spanish legal system, and with the same objective, the following anti-corruption laws and instruments complement and develop the above-mentioned international legal anti-bribery instruments:

- a* the Code of Good Governance for members of the government and high-ranking officials of the General Administration of the State (2005);
- b* Law 5/2006 on Conflicts of Interest for Members of the Government and High-Ranking Officials of the General Administration of the State (2006);
- c* the registry of activities of high-ranking officials (2009);
- d* the registry of goods and economic rights of members of government and secretaries of state (2012);
- e* the Statute for Public Employees and Civil Servants, including rights (Article 14) and a code of conduct (Article 53) (2007);
- f* the Central Government Agencies Act (2006);
- g* the Public Sector Procurement Act (2007);
- h* Section 5 of the Public Prosecutors Law (Law 24/2007, dated 9 October);
- i* Organic Law 8/2007, 4 July, on Political Party Financing; Law 5/2012, 22 October, reforming the previous Law on Political Party Financing;
- j* the previously mentioned Criminal Code amendment of 2010 (Organic Law 10/2010, 22 June);
- k* the above-mentioned Organic Law 10/2010, 22 June;

- l* The aforementioned Royal Decree 304/2014, dated 5 May, passing the implementing regulations of Act 10/2010, dated 28 April on Anti-Money Laundering and Counter Financing of Terrorism; and
- m* Act 19/2013, dated 9 December 2013, on Transparency, Access to Public Information and Good Governance.

Passed only a few months ago, Law 19/2013, 9 December is the result of the demands expressed by Spanish society in relation to the transparency, access to public information and rules of good governance, which, according to legislators, must be the basis of all political acts. As explained in the Preamble to the Act, 'only when the acts of public officers are subject to control and citizens able to know how the decisions affecting them are taken, how public funds are used and what criteria govern the acts of our institutions, will we be able to speak of a new process in which public authority is accountable to a society that is critical, demanding and requires the participation of public officers'. In line with the above, the Act states that public bodies, including political parties, are subject thereto. The duty of such bodies is to publish updated information on a regular basis, the knowledge of which is necessary to ensure the transparency of their acts in relation to the functioning and control of public authority.

Certain bills of law (pending parliamentary approval) directly or indirectly affect the fight against fraud and corruption:

- a* the aforementioned Bill of Law dated 4 October 2013 to amend the Constitutional Criminal Code Act 10/1995, dated 23 November;
- b* the Constitutional Act on the Financial–Economic Control of Political Parties, dated 28 February 2014;
- c* Bill of Law Regulating the Performing of Senior Positions in the General Administration of the State, dated 28 February 2014; and
- d* the Constitutional Act Bill of Law to supplement the Act on Rationalisation of the Public Sector and other administrative reform measures, amending the Constitutional Judiciary Act 6/1985, dated 1 July.

X COMPLIANCE

As mentioned, the Criminal Code amendment of 22 June 2010 established important changes concerning legal entities including, for the first time in Spanish criminal law, the criminal liability of legal entities.

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

Additionally, the Criminal Code envisages some actions that may be considered as mitigating circumstances and one of those circumstances is to have taken, prior to the commencement of the trial, effective measures to prevent and detect any offences that could possibly be committed in the future using the resources or under the aegis of the legal entity.

Despite the unfortunate wording of this new regulation, the vast majority of Spanish legal writers or authorities understand that its final aim is the implementation of corporate compliance programmes within companies.

Undoubtedly, through this new regulation, legal entities and their officers are being urged to cooperate with the authorities and to take on themselves the challenge of preventing the commission of offences. It appears, therefore, that we are establishing in Spain the criminal pursuit of a company when that company ‘fails to implement the necessary compliance reforms, changes to its corporate culture or to undertake other measures designed to prevent a recurrence of the criminal conduct’.

However, the above-mentioned draft bill will probably improve the understanding of these corporate compliance programmes and their contents. In this respect, the proposed amendment will require legal entities to prove that:

- a* the directors have adopted and executed in an efficient manner a model of organisation and management including supervision and control measures capable of preventing such crimes, prior to the commission of the crime;
- b* responsibility for the functioning and compliance of the adopted prevention model has been bestowed on a body of the legal entity with independent powers of initiative and control;
- c* the individual authors have committed the criminal offence while fraudulently eluding the organisation and its adopted prevention model; and
- d* there has been no omission or insufficient exercise of the supervision and control functions by the body mentioned in item (b).

If all of the above-mentioned requirements cannot be proven, the existence of some of them will be considered as mitigating circumstances for reducing the sentence.

Furthermore, the supervision and control functions concerning small legal entities, which are companies allowed to present simplified accounts, may be carried out by the directors on a case-by-case basis.

The draft bill defines the prevention model that every legal entity must have to avoid criminal liability. This model must:

- a* identify the activities in which the offences to be prevented can happen;
- b* establish the protocols or procedures defining the legal entity’s decision-making process and the execution of such decisions;
- c* implement adequate financial resources management models, to prevent the offences from occurring;
- d* impose the obligation to report potential risks and breaches to the body in charge of supervising compliance with the prevention model and its functioning; and
- e* establish a disciplinary system to appropriately punish any breaches of the measures established by the model.

In addition to the above, the legal entity shall adopt an individual compliance programme in accordance with its size and activities; it should be verified periodically and include a disciplinary system.

XI OUTLOOK AND CONCLUSIONS

As has been mentioned throughout this chapter, bribery and corruption are one of the most discussed topics in Spain, especially when the cases relate to political scandals. Politicians, civil society activists and media commentators have expressed concern³³ that the most high-profile cases of bribery and corruption have caused a decline in citizens' trust of Spanish politicians.³⁴

Therefore, Spain has tried to make improvements to its laws to facilitate the pursuit and punishment of corruption. Some improvements have already been identified:³⁵

- a the Anti-Corruption Prosecutor's Office has been strengthened, providing this office with real criminal investigation groups, which include public officials, special police forces and other civil servants;
- b the judicial police units have also been strengthened, with their investigations carried out in criminal proceedings under the authority of a judge, and consequently known by the parties to the proceedings. This is an improvement because, being answerable to a judge rather than to their superiors in the police force, the police are more independent; and
- c technological support has been provided to the Public Prosecutor's Office, reducing the time spent on each investigation.

With these improvements, it becomes essential to speed up the judicial process in these kinds of proceedings, as the vast majority of corruption cases are investigated by examining magistrates' courts, which are not specialised and are overworked.

Additionally, it may be necessary to introduce internal controls within the General Administration of the State, such as inspections or interventions, which could obviate the need for criminal proceedings, solving the problem at its source. This trend towards strengthening the prevention of corruption (and not only its pursuit and punishment) has been furthered recently by different institutions adopting measures accordingly: firstly, the passing of a series of Acts (particularly, the Transparency Act and the Anti-Money Laundering Implementing Regulations) and secondly, the strengthening of a range of preventive mechanisms.

Indeed, as explained by the Attorney General in his speech in September 2014 to open the new judicial year: 'one of the most important problems we are dealing with is the return to society of the funds embezzled, given that preliminary measures and enforcement do not always reach their objectives'. This means that there is a need to structure prevention mechanisms that deal with the problem at source, before it arises,

33 The Corruption Perceptions Index, published by Transparency International since 1995, is based on the perceptions of the degree of corruption as seen by business people, risk analysts and the general public; in 2012 Spain was placed 30th of 176 countries and territories, just after Cyprus and before Estonia. Source: Transparency International, www.transparency.org/cpi2012/results.

34 Heywood, Paul M: 'Corruption in Contemporary Spain', *PS: Political Science and Politics* Vol. 40, No. 4, October 2007. University of Nottingham.

35 Final Considerations and Action Plan; Report of the Public Prosecutor's Office 2012.

requiring early alert systems within public institutions, political parties, trade unions, companies, foundations and other entities involved in the management of public property; reinforce those that currently exist, such as the Court of Auditors and its regional bodies; and carry out a comprehensive campaign to raise citizens' awareness within society, which could begin at school. The fight against corruption and organised crime should not be seen merely as a functional task to be performed by legal professionals and the police but as a challenge that requires the cooperation of all, because the very essence of our democracy is at stake.

In any case, all efforts are necessary to fight this blight on society, which weakens the government's effectiveness and the smooth running of the economic institutions.

Appendix 1

ABOUT THE AUTHORS

DARRYL BERNSTEIN

Baker & McKenzie

Darryl Bernstein is a partner in Baker & McKenzie's Johannesburg office.

He has advised corporate clients, both locally and abroad, across a broad spectrum of commercial interests and ventures. In addition to advising clients through complex local and international disputes, including litigation and arbitration proceedings, Mr Bernstein advises clients on a range of transactions. His practice areas are extensive within the commercial litigation sphere and include, among others, aviation, banking, insurance, construction and engineering, mining and resources, information technology, labour law and insolvency.

MARÍA MASSÓ MOREU

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María Massó Moreu obtained both her law degree and her qualification in international relations from Comillas Pontifical University ICADE (Spain, 2006). She subsequently completed a course in criminal forensic practice and procedural criminal law at the Spanish Judicial School for the Judiciary (2007–2008).

She specialises in either defending or accusing in criminal proceedings related to tax fraud proceedings, misappropriation crimes, dishonest appropriation of the proceeds of a trust, misuse of trade secrets, bankruptcy involving criminal negligence or corporate crime.

She is a senior associate at Baker & McKenzie, where she has worked since 2008. Previously, she worked at Garrigues in the criminal litigation department.

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Ana Torres has been an associate at Baker & McKenzie since September 2013. She usually advises clients on matters regarding white-collar crime, fraud, money laundering and implementation of compliance programmes, among others. From 2011 to 2013 Ana practised as a junior associate in the litigation and arbitration department of a major Spanish law firm. She holds a law degree from the University of Navarra School of Law (Spain) together with a degree in Anglo-American law.

JESÚS SANTOS ALONSO

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Jesús Santos Alonso is partner at Baker & McKenzie from 2012 and head of the criminal litigation department. After becoming Public Prosecutor in 1985, he started to work in the National Court (Audiencia Nacional) in 1989, where he was appointed Prosecutor in Chief.

During his career, Mr Santos Alonso has participated in many trials against national and international terrorism, international criminal organisations and economic offences.

Consequently, he was appointed as coordinator of the Islamic Terrorism Prosecutors' Group created in May 2004.

He has developed an extensive international work and has as, for example, been appointed United Nations consultant to the International Criminal Court for the former Yugoslavia, and appointed as linked magistrate between Italy and Spain in 2004.

Mr Santos Alonso is a professor in the Complutense University of Madrid, Villanueva University (where he directs a criminology and forensic science degree) and the Stock Market Institute and the IE Law School.

He has been elected, by the President of the Republic of France, Knight of the National Order of the Legion of Honour and he has received the international prize for 'social determination' given by the Italian authorities. He has been awarded the First Class Cross from the Order of St Raymond of Peñafort, the Order of Civil Merit, the Spanish Society of Criminology and Forensic Science Gold Medal, the cross of the Order of Merit of the Civil Guard and the cross of the Order of Police Merit.

NIKITA SHAW

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Nikita Shaw is an associate in the litigation department in the Johannesburg office and focuses her practice primarily in the corporate and commercial area.

Ms Shaw has experience in anti-corruption and compliance issues in the employment context.

She has considerable experience in commercial advisory work relating to local labour and human resources issues, insolvency-related disputes and resolution of claims in estate administration, as well as providing legal advice in respect of business restructuring.

In addition, she has exposure to multi-jurisdictional mediation and arbitration proceedings in the construction and engineering sphere, and limited exposure to commercial advisory work in the IT, banking and finance and other commercial sectors.

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