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Anti-Corruption

Introduction

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INTRODUCTION

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Bougartchev Moyne Associés AARPI was formed in January 2017, when Kiril Bougartchev and Emmanuel Moyne joined forces to create a law firm combining all the disciplines of business litigation, predominantly in criminal law. The establishment of this firm is the fruit of more than 20 years of professional experience gained by the two founding partners at Gide and Linklaters. They are supported by a team of around ten lawyers. As litigation lawyers recognised by their profession, the founders and their team assist public and private enterprises such as banks and financial institutions, insurance companies and their executives in all disputes to which they are a party, whether involving white-collar crime, civil and commercial law or regulatory matters. With wide experience of emergency, complex, cross-border and multi-jurisdictional proceedings, Bougartchev Moyne Associés' lawyers assist their clients both in France and internationally with the benefit of privileged relations with counterpart law firms on all continents. Primary practice areas are: white-collar crime (bribery and related offences), crisis and reputational injury management, civil and commercial litigation, regulatory disputes, compliance, and investigations. Bougartchev Moyne Associés advises clients in very sensitive matters, whether involving French, foreign or international public officials, private bribery or influence-peddling. The firm's lawyers also assist large companies in implementing the new compliance measures required by the Sapin II Law. Bougartchev Moyne Associés has been involved in matters concerning bribery or related offences for numerous leading firms and high-profile individuals, within France and internationally.

Authors

Kiril Bougartchev began his career in 1988 as an auditor at Arthur Andersen. A year later, after his final internship at Jean Veil et Associés and his admission to the French bar, he joined Gide where he became a partner in 1999 in the Litigation and White Collar Crime department, then moved to Linklaters in 2007, where he would become co-head of the Dispute Resolution practice of the Paris office and lead the Linklaters Global White Collar Crime Group. Since his admission to the French bar, Kiril has acted in numerous civil, commercial, criminal and regulatory disputes (notably before the Autorité des Marchés Financiers and the Autorité de Contrôle Prudentiel et de Resolution). A former "Secrétaire de la Conférence des Avocats" of the Paris bar, Kiril has lectured at the University of Paris II (DJCE), at the Faculty of Montpellier and also at EDHEC. He was a member of the Paris Europlace "Decriminalisation of business criminal law and business competitiveness" committee. He is the author of various articles relating to the offence of misappropriation of company assets, corruption, auditors' criminal liability, business secrecy.

Sébastien Muratyan, a senior associate, practises in the areas of white-collar crime (bribery and related offences), investigations and compliance. He has advised several clients on the design and content of their internal procedures, and contributed to the drafting of anti-corruption legislation of a foreign country. A member of the Paris bar since 2010, Sébastien graduated from Université Paris II Panthéon-Assas, Montreal University, Université Paris X Nanterre and Essec Business School. He worked for six years as a lawyer within the Dispute Resolution team of Linklaters LLP in Paris prior to joining Bougartchev Moyne Associés.

Edward Huylebrouck, a senior associate, has been involved in numerous cases relating to white-collar crime and commercial litigation, including competition and distribution litigation. Edward has developed particular expertise in various sectors such as the car and building industries, pharmaceuticals, consumer electronics and mass distribution. Edward graduated from Université Saint-Louis in Brussels and Université Paris II Panthéon-Assas. Prior to joining Bougartchev Moyne Associés, Edward worked for four years as a lawyer at Linklaters LLP in Paris. He has been a member of the Paris bar since 2012. Edward was a "Secrétaire de la Conférence des Avocats" of the Paris bar in 2015.

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We are truly delighted to introduce the second edition of Chambers' Global Anti-corruption Guide. The purpose of this Guide is to provide an overview of the current state of the anti-bribery and anti-corruption law in 18 countries as well as valuable insights into enforcement policies, trends and likely developments in this area, based on the opinion of leading lawyers in their respective countries.

A retrospective view of the global anti-corruption fight undoubtedly reveals a gradual shift in repression.

While the bribery of national public officials had been criminalised for a long time under many national legislations, anti-bribery has become a transnational concern over the course of the past 20 years as the governments began to tackle the bribery of foreign public officials.

The United States, with the introduction of the FCPA in 1977, became a pioneer in this field, inspiring a series of international conventions in the 90s and early 2000s and modelling national legislations of numerous foreign countries.

Legislative action was stimulated by the work carried out within international organisations, such as the Organisation for Economic Cooperation and Development (OECD), the Organisation of American States (OAS), the Council of Europe, the African Union and the United Nations. In parallel, national and worldwide NGOs, such as Transparency International, heightened the public's awareness about rampant corruption practices and encouraged their media coverage.

This said, enforcement actions remained limited until the 2000s, even in the United States.

Over the last ten years, the fight against global corruption has entered into a new era, countries providing for increasingly deterrent sanctions and sharpening their enforcement tools.

Very recently, the execution of a former Brazilian President's prison sentence and the temporary custody imposed on the Vice-President of a major electronics group in Korea illustrated the severity of repression on corruption matters and gave a strong signal about the effectiveness of jail sentences.

In France, Law No 2013-1117 of 6 December 2013 brought about a substantial rise in the maximum amount of possible fines for bribery. For individuals, it was increased from EUR150,000 to EUR1,000,000 or double the proceeds generated by the offence. For legal entities, it was increased from EUR750,000 to EUR5,000,000 or double the proceeds generated by the offence.

Offenders shall also be imprisoned for a term of up to ten years, which is the maximum term possible for the middle category of offences under French law (called "délits"). Bribery of domestic judicial staff for the benefit or to the detriment of a person who is the subject of criminal prosecution is even viewed as a serious crime (called "crime" under French law) and punishable by a 15-year term of imprisonment.

As stiff penalties would remain merely a theory on paper if they were not accompanied by efficient enforcement actions, governments' fight against corruption employs a multi-dimensional approach and tailored solutions, such as dedicated bodies for investigation and prosecution.

The United Kingdom Bribery Act (UKBA) in 2010 and the French Sapin II Law in 2016 are key milestones in this all-out drive.

Often viewed by judges as secret or concealed (see eg French case law on limitation periods), corruption offences are difficult to detect and require time-consuming investigations involving significant staff resources, particularly when cross-border issues are at stake.

This is why traditional investigation and prosecution methods implemented by public bodies in a top-down manner are moving towards a more interactive mode relying on the shared efforts of players at all levels.

A first striking move is the emphasis put on preventing the perpetration of corruption offences. Destroying the root cause of the evil remains the surest way to combat it. Prevention of offences is no longer viewed as the reserved domain of public inspection bodies. On the contrary, its burden is resting more and more on the business communities' shoulders. France now requires that large companies, subject to administrative penalties, set up thorough compliance programmes internally. Argentina has made such compliance programmes a precondition for liability exemption or for contracts with the State. The UK has created an autonomous offence for companies for failure to prevent bribery.

Multiplying detection sources seems to be a second point of concern. Safeguards protecting whistle-blowers were introduced, allowing the latter to benefit from immunity against retaliatory measures by their employer and against criminal prosecution for breach of secrecy. Individuals can also be encouraged to report violations against remuneration, as in the United States. The company's disclosure of breaches found internally is also encouraged through dedicated mechanisms such as leniency in the United States (voluntary self-reporting regime), in Argentina and in Brazil, which can lead to substantial fine reductions.

The modern era of anti-corruption is also built on the possibility for companies to co-operate with the prosecuting authorities. Settlement tools without any guilty plea on the model of the American Deferred Prosecution Agreement (DPA) have been imported into other countries such as the Netherlands, the UK and even into a country with a legal tradition opposed to negotiation on criminal matters such as France. Under the French judicial public interest agreement (CJIP), accused legal entities agree to pay a "public interest fine" in proportion to the advantages gained from the offences within the limit of 30% of the annual average turnover and/or to set up a compliance programme for up to three years under the newly created French Anti-corruption Agency's supervision and/or to pay damages to the victim, this agreement requiring court approval.

Unity makes strength is definitely the motto of global anti-bribery and anti-corruption policies. International co-operation between State authorities shows a significant step up, regardless of the stage of the proceedings (information exchange, mutual judicial assistance and extradition). Co-ordinated multi-national settlements to resolve FCPA-related charges have also flourished over the past years, involving among others the Brazilian, Swiss, Dutch and Swedish authorities in addition to those in the US. On 4 June 2018, an agreement worth EUR500 million euros resulting from the co-operation of the French and US authorities terminated prosecution against a French bank regarding alleged acts of corruption in Libya as well as manipulation of the LIBOR.

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In light of these introductory remarks, which are inevitably made from a continental European perspective, the expert contributions in the following pages constitute an essential resource as they give precise insights about what is going on in each country.

We express our deep gratitude to all authors for their valuable work.

May practitioners find in this Guide all helpful information the better to capture and manage legal risks arising from anti-corruption rules globally.