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Anti-Corruption

Second Edition

Introduction
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INTRODUCTION

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, and specialising 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 LLP. They are supported by a team of around ten lawyers. As litigators have recognised throughout their profession, the founders and their team assist public and private enterprises such as banks, financial institutions and insurance companies – as well as 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, and with the benefit of privileged relations with counterpart law firms on all continents. Primary practice areas are: white-collar crime, compliance, investigations, regulatory disputes, civil and commercial litigation as well as crisis and reputational injury management. 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, in performing compliance and anti-corruption M&A due diligence as well as in their internal investigations.

Contributing Editors

Kiril Bougartchev began his career in 1988 as an auditor at Arthur Andersen. A year later, after 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 LLP in 2007, where he would become co-head of the dispute resolution practice of the Paris office and lead the Linklaters LLP global white-collar crime group. Kiril has been and is still involved in many notorious white-collar crime cases, including sensitive political and financial matters, both in France and internationally. He is also involved in regulatory disputes (including before the French Financial Markets Authority, the French Anti-corruption Agency and the French Prudential Supervisory Authority) as well as in complex civil and commercial litigation. He advises clients in the conception, implementation and strengthening of their anti-corruption and compliance programmes. 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 has published many articles about misuse of corporate assets, corruption, criminal liability of auditors, business secrecy, Sapin II Law, French Blocking Statute, crypto-currencies and ICOs.

Emmanuel Moyne began his career in 1997 as in-house counsel within asset management company White Gestion SARL, a subsidiary of Goldman Sachs, and was admitted to the Paris bar in the same year. He then practised for ten years in Gide's litigation and white-collar crime department before joining the dispute resolution practice at Linklaters LLP in Paris in 2007 as a counsel. Emmanuel has acted in numerous white-collar crime cases, in regulatory, civil and commercial disputes as well as in industrial and environmental accident claims. He advises his clients on complex proceedings, often involving several foreign jurisdictions, as well as on compliance programmes, anti-corruption due diligence and internal investigations. A former "Secrétaire de la Conférence des Avocats" of the Paris bar, Emmanuel is a member of the "Conseil National des Barreaux" working group on internal investigations and an Officer of the Criminal Law Committee of the International Bar Association. He has lectured at the University of Montpellier (mutual assistance and extradition proceedings) and the University of Sceaux (environmental criminal law) and authored various articles on the European arrest warrant, safeguarding business secrecy, managing criminal risk, corruption, Sapin II Law, tax fraud, French Blocking Statute, cyber-criminality, and restitution of artworks.

We are truly delighted to introduce the third 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 21 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.

On the occasion of the publication, on 20 March 2019, of its new study entitled "*Resolving foreign bribery cases with non-trial resolutions*", the OECD had the opportunity to recall that 20 years after the entry into force of its Anti-Bribery Convention, enforcement of anti-bribery laws remains a challenge and a key priority to fight corruption.

A retrospective view of the global anti-corruption fight undoubtedly reveals a gradual shift in repression since the last ten years, with (i) substantial reforms adopted by several countries such as France aiming to strengthen their anti-corruption legislation and (ii) an increased number of prosecutions and convictions on the grounds of corruption offences. In this regard, criminal courts seem to take more and more recourse to non-suspended prison sentences, as illustrated by the sentence on appeal, on 24 January 2018, of a former Brazilian President to 12 years' imprisonment for passive bribery and money laundering (although first-instance judges had sentenced the latter to nine years' imprisonment).

According to the OECD, this is not sufficient: as corruption is a global phenomenon independent of borders, transnational co-operation is viewed as indispensable at all stages of the proceedings (information exchange, mutual judicial assistance and extradition). Since 2008, when American and German authorities co-ordinated the conclusion of two agreements with a German major industrial group regarding acts of bribery of diverse foreign public officials, the last decade has seen a sharp increase in the use of co-ordinated multi-jurisdictional non-trial resolutions. This co-operation includes discussions between the prosecuting authorities to determine the nature and the quantum of the obligations imposed on the person concerned. For instance, in 2018, the American DOJ and the French National Prosecutor's Office co-ordinated their action in order to reach simultaneously the conclusion, with a French bank, of a Deferred Prosecution Agreement in the United States and a judicial public interest convention in France with respect to acts of bribery of Libyan officials. In that case, the bank committed to pay a fine of EUR250,150,755 in both jurisdictions.

As the OECD emphasised, one recognised advantage that resolutions have over trials is that multi-jurisdictional cases can be resolved between several authorities at the same time, giving both prosecution authorities and companies some certainty in the amount of the combined financial penalty.

The implementation of the European Public Prosecutor, which notably will carry out, from November 2020, the prosecution of offences of active and passive bribery of domestic, foreign or international public officials which affect the financial interests of the European Union, most clearly reflects the growing desire of European countries not to see their investigations fail because of the complexity and transnational nature of the financial crimes being prosecuted.

Pursuant to Directive No 2017/1371/UE, dated 5 July 2017, which obliged all Member States to create in their national legislation offences of active and passive bribery of public officials affecting specifically the financial interests of the European Union, the French government amended the Penal Code by specifying that the fine incurred by an individual who committed such offences shall be increased to EUR2 million or to double the proceeds generated by the offence.

This year has confirmed the two striking moves recently observed in the fight against corruption: on the one hand, the emphasis on preventing the perpetration of corruption offences through the obligation for companies to set up efficient compliance programmes, such obligation being subject to financial penalties, and the use of non-trial instruments to resolve corruption cases, which requires companies to co-operate with the prosecuting authorities in order to terminate or prevent criminal proceedings on the other hand.

Thus, Argentina has made such compliance programmes a precondition for liability exemption or for contracts with the State and the UK has created an autonomous offence for companies for failure to prevent bribery. The Enforcement Committee of the French Anti-corruption Agency, in charge of monitoring the quality and efficiency of compliance measures implemented within companies and public entities, rendered its first public decision on 4 July 2019. It held that the alleged breaches of Article 17 of the French Sapin II Law, requiring that large companies, subject to administrative penalties, set up thorough compliance programmes internally were no longer continuing at the time of the hearing and therefore refused to issue any order or to impose any financial penalty on the company or on its CEO. The FAA Director welcomed the fact that the control carried out by his services and the prospects of a sanction had prompted the company concerned to improve its anti-corruption measures.

Besides, the OECD report dated 20 March 2019 noted that, for all 44 parties to the Convention, non-trial resolution instruments have become the primary enforcement vehicle of anti-foreign bribery laws. In particular, the US, Germany and the UK used non-trial instruments to resolve respectively 96%, 79% and 79% of their foreign bribery cases.

INTRODUCTION

Out of the 23 parties who have successfully concluded a foreign bribery action, (i) seven countries (Australia, Brazil, Chile, Israel, the Netherlands, Spain and Switzerland) only opted for non-trial resolutions, (ii) eight countries enforced through both trial and non-trial resolutions (Canada, France, Germany, Italy, Norway, Sweden, the United Kingdom and the United States) and (iii) eight countries only enforced through trials (Austria, Belgium, Bulgaria, Hungary, Japan, Korea, Luxembourg and Poland).

Among the countries that have relied on both trial and non-trial resolutions, the vast majority of their resolutions were, on average, concluded through non-trial resolutions. France is the jurisdiction least likely to conclude a foreign bribery matter without trial, concluding only two of 18 resolutions (11%) through its public-interest judicial convention. Italy was the most likely to resort to a non-trial resolution, having reportedly concluded 20 of 21 foreign bribery resolutions (approximatively 95%) through its Patteggiamento procedure.

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Even if a key feature of all non-trial resolutions systems is the incentive for a reduced sanction, companies should not forget that if they are innocent, it is not the natural way to go. This is why the decision whether to defend themselves in trial or co-operate with the prosecuting authority should be made seriously and further to criminal lawyers' advice. In France, the asymmetry of information between the Public Prosecutor's Office and the company concerned, which has very little visibility over what it incurs, contrary to the US where the Sentencing Guidelines define precise coefficients and score ranges, makes this decision even more delicate.

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 to better capture and manage legal risks arising from anti-corruption rules globally.