Law Schools Global League – Anti-corruption and Compliance Workgroup
2017 Comparative Law Research Project

Corporate Compliance in BRICS Countries: differences and similarities among Domestic Legal Frames and International Guidelines

ABSTRACT: This work is part of a broader research conducted by professors and students of member schools of Law School Global League. At this phase, we do not develop an analytical or comparative work, but we present reports describing the current status of anticorruption regulation in the BRICS countries. Despite some peculiarities and differences, we can observe several similitudes in defining rules and strategies to identify and investigate corruption practices, to finally punish individuals and legal entities.

THE REPORTS ARE PRESENTED IN THE ALPHABETICAL ORDER OF THE EXPRESSION BRICS:

BRAZIL
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1. INTRODUCTION

One of the fundamental economic characteristics of the post-war period was the internationalization of capital, both productive and financial. From the financial point of view, the post-war process of internationalization of money and capital markets was restructured from the London market due to regulatory restrictions in the US market until the beginning of the eighties.

The management of a large mass of United States dollars outside the US due to the foreign direct investments done by American companies, for example, made through a transnational banking system, had no limitations and regulations imposed by national monetary authorities. This reality was an entirely new fact in the international financial scene.

The lack of regulations was a basic feature of the international financial markets from the post-war to the beginning of the seventies. These were subject only to host country regulations for bank operations or in foreign currencies. Markets where these regulations were flexible have become preferred points for the location of the international financial markets. The non-existence of maximum ceilings for interest rates and minimum reserves on deposits enabled greater agility and profitability of these operations.

In June of 1974 a large private German bank, Bankhaus Herstatt, suffered irretrievable losses in the exchange market due to unsuccessful operations in the international financial markets. Losses in the international Herstatt operations spread to other banks outside Germany, that is the counterparty banks of Herstatt including the non-German banks, primarily American ones. Following the bankruptcy of Herstatt Bank (1974), the major commercial banks entered into an agreement through the Bank of International Settlement (BIS), taking responsibility for the operations of their foreign affiliates, at the same time

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1 After the financial chaos resulting from the crash of 1929 the Roosevelt structural reforms made the American financial system much more restrictive than the UK. However, this American restrictive regulation started to be dismantled since the 1970s, but principally in the Reagan governments (1981/1989).
as the Central Banks of their countries of origin, took formal steps to bail out these commercial banks in the difficulties arising from international operations.

The Bankhaus Herstatt failure compelled BIS to conceive the Basel Committee on Banking Supervision (BCBS) at the end of 1974. The lack of regulation in the international financial markets was the main reason to create BCBS with the purpose of establishing supervisory standards and guidelines including the formulation of statements of good practices in banking supervision.

The complexity and interdependence of domestic and international financial markets characterized by the globalization process led to the development and improvement of international regulation with relevant impacts on corporate governance. The compliance dimension is one of the standards of a more sophisticated corporate governance resultant of the globalization process.

In its first 30 years, the Basel Committee established a series of deliberations all related to the protection of the international financial system. Only in 2005, as part of the ongoing effort to address supervisory issues in banking organizations, the BCBS decided to issue a high level paper on compliance risk and the compliance function in banks. It must be pointed out, however, that several previous papers from the BCBS have dealt with measures related to good management practices.

This means that, at least in an undirected way, the compliance issue was a real problem in the organization.

Some of these papers are listed here:

- Enhancing Corporate Governance for Banking Organizations (September, 1999).
- Internal Audit in Banks and the Supervisor’s Relationship with Auditors (August, 2001)
- Customer Due Diligence for Banks (October, 2001)

The specific BCBS paper on Compliance from 2005 listed 10 precise responsibilities of bank’s board of directors and senior management in respect to compliance and the compliance function in the bank.

As well as in most of the western countries, the compliance wave in Brazil has its origin in the financial sector of the economy. The underlying purpose of establishing compliance mechanisms in public and private companies was the need of protecting the international financial system.

It is important to highlight that Brazil, as well as other countries that experienced the debt crisis of the 1980s, was excluded from the globalization process until overcoming the crisis in the early 1990s. In the Brazilian case after the overcoming the debt crisis it was also necessary to stabilize the economy, a fact that only occurred with the Real Plan in 1994. Only after these important moves Brazil gained again a voluntary access to international financial markets. As a result, for example, Brazil became a signatory party of the Basel Accords\textsuperscript{2}, with repercussions in domestic legislation.

In addition, Brazil acceded to the OECD Convention to curb transnational bribery in 2000; as well as the Inter-American Convention against Corruption of the OEA in 2002; United Nations Convention against Corruption of 2003 and the recommendations of the Securities and Exchange Commission (SEC). In short, to be part of the global economic community it is mandatory to endorse procedures and controls that ensure integrity-based behavior of agents.

As a consequence, following the ongoing concerns in respect to the protection of the international financial system, Brazil legislators established a series of laws and

\textsuperscript{2} Basel I; II; III issued by BCBS in 1998; 2004 and 2010 respectively.
resolutions with the purpose of protecting public companies from bad market practices as well as of implementing internal controls to avoid malpractices in the activities in the public sector of the economy.

It is worth to mention some of these legislation as part of the process of constructing a compliance environment in Brazil’s public and private companies:

1. Law 8.429/93 – Turns public officers objectively responsible in cases of proved administrative improbity.

2. Law 8.666/93 – also known as “bidding law“. Suspension of the right to participate in public biddings, prohibition of contracting with state owned companies, statement of deceitful companies for purposes of barring participation in future biddings.

3. Resolution 2.554/98 – issued by Brazil Federal Reserve Bank. Determines financial institutions to implement internal controls related to their activities, as well as to their financial, operational e managerial information systems.

4. Law 9.605/98 – establishes penal and administrative sanctions related to actions and offenses against the environment.

5. Law 9.613/98 – Establishes rules for regulating non self-regulated sectors in the economy in order to prevent money and assets laundering. This law created the COAF – Council for Financial Activities Control - under the jurisdiction of the Ministry of Finance with the objective of regulating, applying administrative sanctions, receiving pertinent information, examining and identifying suspicious occurrences of illicit activities related to money laundering.
6. Circular 3.461/2009 – issued by the Brazil Federal Reserve Bank, this circular establishes the procedures to be followed by the financial institutions in the implementation of internal controls for the prevention of money laundering crimes.


8. Law 12.846/2013 – also known as “anticorruption law”. Establishes the objective responsibility, both civil and administrative, of corporations in practicing acts against the Public Administration, either domestically or internationally.

A more detailed analysis of the Brazilian legislation on compliance and anticorruption is presented in this paper. There is still a long way to go but the country is deeply involved in having a consistent legislation capable of providing a more transparent, reliable and corruption-free environment thus asserting public and private companies better ways to provide their products and services.

2. BRAZILIAN ANTI-CORRUPTION LEGAL FRAMEWORK

ANTI-CORRUPTION LAW (LEI nº12.846/2013)

The Anti-corruption Law aims to regulate strict and administrative liability to legal persons who commit corruption acts against Public Administration (national or foreign), not being necessary to prove negligence or willful misconduct. There is no criminal liability in this legal instrument, what was kept to private individuals, since the Brazilian Criminal Code has that type of legal provision. Besides that, the Anti-corruption Law does not disqualify the subjective civil liability to the private individual who is involved in the act of corruption, being possible, hence, a double liability (criminal and civil).
This legal instrument establishes important sanctions from pecuniary fines to administrative penalties. In the event the corruption act is taken in a public bidding, for constructions or acquisitions by the government, the legal person will be prohibited to participate in public bidding and celebrate contracts with Public Administration. Moreover, to avoid joint liability, the legal person needs to implement a compliance policy in the company.

One of the main contributions made with the promulgation of this law was the creation of an effective legal mechanism to prevent legal persons from using the autonomous legal personality to cover illicit conduct and contrary to the public interest. The new law provides, for this purpose, means to prevent the practice of establishing new companies in order to escape administrative sanctions or maintain business relations with the Public Administration. This law therefore has the scope of fulfilling the commitments made by Brazil in ratifying international anti-corruption conventions: the "Convention on Combating Bribery of Foreign Public Officials in International Business Transactions" of the Organization for Economic Co-operation and Development (OECD); the "Inter-American Convention against Corruption" of the Organization of American States (OAS); and the "United Nations Convention against Corruption" of the United Nations.

It is also important to note that the law adopts the strict liability of the company (article 2), with no need, therefore, of proving deceit or guilty of the company or the individual responsibility of its managers, since it is impossible to consider the presence of the deceit or guilt of the company since the psychological factor of the individual is absent. If there is proof of the offer of undue advantage to a public official or any other illicit provided in the article 5 of the law, the company benefited directly or indirectly by the illegal conduct will respond for its conduct, thus removing the evidentiary difficulties of the subjective elements, but always considering the principles of conservation of the company and the maintenance of labor relations with regard to the administrative and civil penalties provided for therein. Regardless of the responsibility of the company in the criminal-administrative sphere, there is nothing to prevent their directors and
administrators from being penalized, provided that the existence of intent or gross negligence in their conduct, as provided for in article 3 of the law.

In addition to its objective liability, the anti-corruption law offers two other innovative legal mechanisms to combat corruption, namely: the compulsory disregard of legal personality (articles 14 and 19, section III and §1, items I and II, of Lei n. 12.846/2013), in a partial and temporary manner, only to allow the shareholders’ equity to be reached when there is an abuse of law with the purpose of facilitating, covering up or dissimulating the acts set forth in article 5 of the law; and the possibility of entering into a leniency agreement between the public administration and the companies that effectively collaborate with the investigations and administrative proceedings (article 16 of Lei n. 12.846/2013).

“LAW OF STATED OWNED COMPANIES” (LEI Nº 13.303/2016)

The purpose of the State Owned Companies Law is to frame a legal perspective regarding state owned companies and mixed private-state ownership companies of all entities of the Brazilian federation (municipal, state, Union and Federal District). It includes its subsidiaries, how is incorporated, the corporate structure, the company relations, and other typical matters of corporate law. In relation with anti-corruption concerns, the law requires compliance policies in all these companies, and it establishes some basic principles that explain the directives and the means to implement the fight against corruption.

Specifically on what concerns to corruption, the law establishes, in article 8, the minimum transparency requirements, which must be respected by public companies and mixed-capital companies, and provides, in article 9, § 1, the elaboration and disclosure of a Code of Conduct and Integrity, which should deal in general lines with the following topics: (i) the principles, values and mission of the public company, as well as the guidelines on the prevention of conflicts of interest and the prohibition of acts of corruption and fraud; (ii) the internal bodies entrusted with its updating and application; (iii) a channel of
denunciations that allows access to internal and external complaints regarding the noncompliance of the Code, as well as other internal norms of an ethical and obligatory nature; (iv) means of protection that prevent any form of retaliation against the persons who make use of said channel of denunciations; (v) the sanctions applicable in the event of violation of the rules of the Code; and (vi) the management's training, at least annually, on the risk management policy.

In addition to measures of a general nature, related to corporate governance and compliance matters (article 9, §§ 2, 3 and 4), punctual solutions can also be observed in this law, such as article 96, item II, whereby the provisions relating to simplified bidding procedures, which were adopted by Petrobras and were present in the General Petroleum Law (articles 67 and 68 of Lei n. 9.478/97), were revoked, as a direct response to the acts of corruption carried out under the contracts signed by Petrobras during the last years and revealed in the most current investigations of the Federal Police.

Finally, emphasis should be given to the fact that the law aims at harmonizing with the concept and rules of state corporate governance set out in the Organization for Economic Cooperation and Development (OECD) Guidelines on Corporate-State-owned Enterprises.

“LAW OF PUBLIC BIDDING” (LEI Nº 8.666/1993)

The statute establishes general norms regarding public bidding, public contracts and all public works in any sphere of power (municipal, state, Union, Federal District). Concerning anti-corruption provisions, the act considers that fraud, by any part (public or private) or abuse of power by a public agent may result in fines, temporary suspension and possible constraint to enter into contracts for future works with the Public Administration. Furthermore, the law creates some criminal offences (articles 95, 96, 97, and 98) in relation with corruption practices, which give penalties and even jail for the offenders.
Although the conduct and respective penalties in the Penal Code are already foreseen, the law sought to expand the protection of the interests that were sought to protect with the execution of the bidding processes. Accordingly, criminal provisions were inserted into law that aim the legal, moral, financial and economic correction of the State in the bidding and administrative contracting processes. In article 89 is provided the crime of dismissing or non requirement of bidding outside the hypotheses provided by law (bidding exempted, bidding expendable and non demanded bidding), which are to be construed as criminal offenses requiring specific intent, such as intention to cause harm to the treasury.

In addition to the aforementioned provision, there are others in sequence that address conducts also related to the bidding process and to contracts celebrated with the public authority, such as: article 90, which provides as a crime the conduct of frustrating or defrauding the competitive nature of the bidding procedure; the article 91, which criminalizes the direct or indirect sponsorship of private interest before the Administration; the article 92, in which it is defined as a crime to give cause to the modification or contractual advantage in the execution phase; the article 93, which addresses the conduct of preventing, disrupting and defrauding acts of the bidding procedure; the article 94, which deals with the conduct of debarring the confidentiality of a proposal submitted in a bidding procedure; article 95, which typifies the conduct of removing or seeking to remove bidders by illegal means; article 96, which typifies the crime of fraudulent bidding; article 97, which criminalizes the act of bidding or entering into a contract with those who do not possess suitability; and article 98, which deals with the unlawful conduct to frustrate participation in bidding.

“LAW OF ADMINISTRATIVE DISHONESTY” (LEI N° 8429/92)

The Act n. 8429/92 is an important legal instrument against the illicit enrichment through dishonest conducts in the public activity and the protection of the values of the Public
Administration. This law defines the hypothesis of dishonest acts and establishes important sanctions of public agents that illicitly abuse of their public position to accomplish their particular interests. The administrative improbity is defined as the dishonest conduct of public agents that results in their illicit enrichment, obtaining improper advantage, to himself or to another, or causes any damage to the national treasury.

In making reference to acts of improbity, the legislator sought, with this law, to extend to the maximum the scope of protection of the public patrimony (including, inclusively, the image of the Public Administration), protecting it against any harmful act, even those that eventually were not typified in criminal laws in force. To do so, the concept of acts of improbity was defined in the law, offering a classification of these in three species: acts of administrative improbity that import illicit enrichment (article 9, I to XII), acts of administrative improbity that cause damage to the treasury (article 10, I to XIII), and acts of administrative improbity that violate the principles of Public Administration (article 11, I to VII).

Article 2 defines what is understood as a public agent within the scope of this law, who may suffer the penal, civil and administrative sanctions provided by this law, if they commit the conducts prohibited in their provisions. They are all those who exercise, even temporarily or without remuneration, by election, appointment, nomination, hiring or any other form of investiture or bond, mandate, position, job or function in the institutions referred in article 1.

This legal instrument adopts the system of subjective civil liability associated to the obligation of compensating damages, hence, it will only be considered damages to the public property the acts resulting of willful misconduct or negligence. The sanctions of this law are autonomous and severe due to the pecuniary compensation, the loss of political rights to run for any public position, and the payment of civil sanctions, besides the administrative ones.
The crimes associated to the practice of corruption are typified by articles 316, 317 and 333 of the Brazilian Criminal Code as the conducts of extortion, bribery, active and passive corruption. The articles 316 and 317 regard the crimes perpetrated by members of the public sector against the public administration, while article 333 deals with crimes perpetrated by a private agent against the public administration. The advantage offered or promised to public servers is considered an illicit act as it aims to receive in exchange some public benefits. The criminalization of active corruption aims to protect the public administration itself and its good functioning.

Such crimes are foreseen in a much larger set, which includes several other criminal offenses of similar character and function, all of which are brought together in a single block of the Penal Code, Title XI, "Crimes against public administration”. In Chapter I, the crimes of passive corruption (art. 317) and of concussion (art. 316) divide space with a number of other crimes resulting from conduct of public officials which generate losses for the Public Administration and the Treasure, such as embezzlement of public money (article 312), irregular use of public funds and rentals (article 315), prevarication (article 319) and violation of confidentiality of a competition proposal (article 326). The crime of active corruption (article 333), in turn, is found in Chapter II, along with many others of a similar nature, among which we can highlight that of influence traffic (article 332) and of the impediment, disturbance or fraud in competition (article 335).

It is also worth mentioning that recently, in 2012, a new chapter was added to Title IX, with special attention to article 337-B, which typifies the crime of active corruption in an international commercial transaction, and article 337-C, which criminalizes the conduct of traffic of influence in an international commercial transaction.

PUBLIC AGENT AND PRIVATE AGENT RELATIONS
The state, a creation resulting from systematization into an element of juridical existence of human society, has the purpose of promoting the collective good. For this purpose, in the Brazilian case, as in many other examples around the world, it opted for a tripartite model in which each of the three functions (Executive, Legislative and Judiciary Powers) are considered essential for the better administration of the common good has its scope performance and seeks a harmonious coexistence with the others. Each of these so-called Powers has an administrative structure with specific administrative structure and operating rules as well as a body of professionals selected by a civil service exam (in the great majority), thus forming the so-called Public Administration.

The State, for the accomplishment of its activities, performs not only those of an essential character for community life, such as the promotion of health and education, but also activities aimed at economic and social development, such as administration of public companies, regulatory agencies and other activities. Concomitantly, the State also acts, through the Legislative and Judiciary Powers, respectively, in the creation and modification of norms and their application, interfering directly or indirectly in the functions mentioned above and belonging to the Executive Power.

It is through the exercise of these functions that the public sphere touches the private sphere, that is, it is through these activities that the work done and the decisions taken within the scope of the Public Administration affects the activities of the individuals that compose the society, individually (by each citizen) or collectively (by groups of citizens organized for economic or profit purposes, as well as in private companies, for non-economic and/or non-profit purposes, such as foundations, associations, cooperatives, etc.).

It is in the contact between the Public Administration and the private sector that the highest ethical and moral principles are then imposed, to ensure that neither party leaves injured or does not occur, consequently, damages to third parties, as a consequence of the fight of interests between these two poles that tend to move away in different situations of social life. For this, in addition to the classic laws, expressions of the
democratic State based on the rule of law, such as the Constitution, Civil, Criminal, Tax, Civil and Criminal Procedural Codes, other specific laws were necessary for a better rationalization and organization of Public Administration activity and relationship with the private sector. In this context, the anti-corruption rules (among which the ones presented above) have appeared in recent times as essential to control the misuse of purpose in the performance of public agents not only of Direct Public Administration, but also administrators of public and mixed-economy companies.

OVERLAPS AND CONTRADICTIONS OF LAWS

The enactment of many laws, often with considerable time intervals between them, led to concomitant treatment of equal conduct. This overlapping of standards, however, can sometimes be harmonic, but sometimes not, creating contradictions in the system and a practical problem for law operators.

Among the rules presented above, it is possible to observe an overlap and, according to some specialists, a legal antinomy, involving the Anti-Corruption Law (Lei n. 12.846/13) and the Law of Administrative Improbity (Lei n. 8.429/92), regarding private companies. In an attempt to circumvent the subjective responsibility of the private company within the framework of the conducts provided by Lei n. 8.429/92, in which is more difficult to prove, due to the need to prove the intent or guilt of the agent of the illicit conduct, and to reach it more effectively, instituted objective liability in Lei n. 12.846/13, both of which are directed at combating improbity conducts committed by companies, such as acts of corruption and illicit enrichment, by applying pecuniary (a civil fine that is variable according to the violation of the type of conduct) and administrative sanctions (such as a prohibition on contracting with public authorities or receiving incentives and tax and credit benefits).

The combination of these two laws leads to a situation of detachment of the company, by Lei n. 12.846/13, without excluding the individual responsibility of its directors or managers, which, at least in theory, would be subject to the sieve of Lei n. 8.429/92. In
other words, the legal person may be objectively liable, independently of the individual responsibility of its directors and managers, as well as of the other persons listed in the *caput* of article 3 of Lei 12.846/13, in respect of the same unlawful conduct (Illicit enrichment, damage to the treasury and violation of the principles of Public Administration).

The Criminal Code also deals with crimes of active and passive corruption, but does not conflict with the Anti-Corruption Law, since it covers only the administrative and civil liability of legal persons. In relation to the “Law of Administrative Dishonesty”, conduct of active and passive corruption, traffic of influence, concussion, prevarication and embezzlement of public money are, in a certain way, directly or indirectly, covered in the illicit conducts described in the “Law of Administrative Dishonesty”, however, his art. 12 establishes the application of civil and administrative penalties with the express manifestation that they do not compete with possible civil, penal and administrative sanctions provided for in the specific legislation, and penalties may be applied alone or cumulatively, according to the seriousness of the fact and with basis of the judge's personal conviction.

Finally, there is the issue of unlawful conduct relating to the bidding processes. The Criminal Code provides the crimes of violation of confidentiality of a competition proposal (article 326) and of impediment, disturbance or fraud of competition (article 335), both applicable in cases where the conduct is carried out by public official, which legal concept is presented in articles 327 and 337-D. This concept of public official, however, is identical to that established in Lei 8.666/93, which also presents the crimes related to the bidding. The criminal conduct prescribed in the two statutes partly overlaps, they are very similar in their descriptions and can often be confused, be covered or cover each other. However, the sanctions are different, both in terms of the duration of the sentence of detention and in the fact that in the Bidding Law crimes, even if simply attempted, lead the public servant to loss of office, job, position or mandate elective. In addition, the pecuniary penalty in the “Law of Public Bidding” has its own characteristics
different from the fine provided for in the Criminal Code (articles 49 to 52) and, while in
the Act it appears cumulatively the custodial sentence, in the Code they are alternatives.

This different treatment may therefore lead to contradictions in the application of
sanctions to the public agent who commits a crime in the context of a competitive bidding
or contract with the public administration.

3. THE OECD ANTI-BRIBERY CONVENTION

The OECD Anti-Bribery Convention was adopted by the Organization for Economic Co-
operation and Development (OECD) Council in May 1997. It establishes legally binding
standards to criminalize bribery of foreign public officials in international business
transactions and provides measures to enforce it. It was designed to be applied
coordinately and in conformity with the agreed common elements set out in its text and
further related Commentaries and Recommendations with the jurisdictional and other
basic legal principles of each participant country. It is the first and only international anti-
corruption instrument focused on the ‘supply side’ of the bribery transaction³.

The article 1 of the Convention determines that the Parties shall establish the offense of
bribery of foreign Public Officials as a criminal offense under their domestic law “for any
person that intentionally offers promises or gives any undue pecuniary or other
advantage, whether directly or through intermediaries, to a foreign public official, for
that official or for a third party, in order that the official act or refrain from acting in
relation to the performance of official duties”⁴. In the same extent as attempt and
conspiracy to bribe, complicity when committing an act of bribery must also be
criminalized under member States’ domestic law. This article must be understood as a

³ OECD Convention on Combating Bribery of Foreign Public Officials in International Business
⁴ Article 1 of the Convention on Combating Bribery of Foreign Public Officials in International Business
Transactions
standard to be met by the signatory Parties, although it does not require them to observe exactly the same terms on defining the offense under their domestic law.

Although the 1997 Commentaries on the OECD Convention have stated that small “facilitation” payments shall not be considered as an offense as they do not constitute payments “to obtain or retain business or other improper advantage” within the meaning of Article 1 (1), it is certain that the 2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions have urged “all countries to raise awareness of their public officials on their domestic bribery and solicitation laws with a view to stopping the solicitation and acceptance of small facilitation payments”.

The article 2 refers to the liability of legal persons, in which each member State must take necessary measures to establish their liability for the bribery of a foreign public official. If the criminal liability of legal persons is not under the domestic law system of a Party, the country won’t be required to establish it.

The article 3 determines that the sanctions of bribing a foreign public official shall be proportionate and effective criminal penalties, comparable to the ones applicable to the bribery of the Party’s own public officials. If the conduct was perpetrated by natural persons, the sanctions shall include deprivation of liberty sufficient to enforce the effectiveness of such sanction. In the case of a country where the criminal responsibility is not applicable to legal persons, that country must ensure that they are subjected to other kinds of sanctions, monetary sanctions for example, as long as they are effective and proportionate to the bribery act. In addition, each country shall take the necessary

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measures to seize and confiscate (including forfeiture) the results of the bribery or to apply monetary sanctions of comparable effect.

According to the already mentioned 1997 Commentaries, civil and administrative sanctions can be applied in addition or in substitution of criminal liability, such as exclusion from entitlement to public benefits, temporary or permanent disqualification to participate in public procurement or other commercial activities; placing under judicial supervision and judicial winding-up order.

Regarding jurisdiction, the OCDE Convention provides that Parties should take necessary measures to establish their jurisdiction over the conduct in question and make sure that the current jurisdiction is effective both to prevent and to fight the bribery of public officials. Investigation and prosecution can be ruled by domestic rules and principles but, as a matter of enforcement, they cannot be influenced by the national economic interest nor be potentially under effect of relations with another State. By these means, every possible act of bribery must be followed by investigation to be carried out by competent authorities with resources provided by national governments.

As a measure to fight the bribery of foreign public officials effectively and to prevent fraudulent records for the purpose of accomplishing the bribery, the signatory parties must pass regulations regarding maintenance of books and records, financial statement disclosures, and accounting and auditing standards. The legislation shall establish effective and proportionate civil, administrative or criminal sanctions for the omissions and falsifications in respect of the books, records, accounts and financial statements of companies, legal entities and even natural persons developing relevant economic activities.

The OECD Convention also determines the need of providing legal assistance to other State members to the fullest extent possible under the domestic laws and relevant treaties and arrangements in order to improve the criminal and non-criminal transborder investigations and proceedings. Accordingly, the bribery of a foreign public official needs
to be included as an extraditable offense under the domestic laws of the Parties and the extradition treaties between them. In the case that there isn’t an extradition treaty, the Party may consider the convention as the legal basis for doing it if necessary.

Countries need to “notify to the Secretary-General of the OECD an authority or authorities responsible for making and receiving requests, which shall serve as channel of communication for these matters for that Party”, especially regarding articles 4 (Jurisdiction), 9 (Mutual Legal Assistance) and 10 (Extradition) of the Convention.

In conclusion, the convention is applicable to all the Parties and it is open to OECD Non-Members which become full participants in the OECD Working Group on Bribery in International Business Transactions.7

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OCDE CONVENTION COMPARED WITH BRICS INTERNAL LEGISLATION - BRAZIL

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<th>PUBLIC OFFICERS RESPONSIBILITY</th>
<th>SIMILARITIES</th>
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<td>The Convention regulates criminal offense and the need to hold public officer’s liability who committed it. In addition, the OCDE’s Convention set forth rules regarding administrative offenses such as obtaining or retaining business or other improper advantage in conduct of business. According to Brazilian legislation, the public officer’s responsibility can be qualified in administrative and criminal sphere. In many cases, the law predicts the responsibility on both spheres that can differ depending on which crime was committed. As example, the Anti-Corruption Law regulates administrative and civil strict liability in Article 1.</td>
<td>The convention establishes the necessity to take measures to determine what is criminal offenses under each national law, for any person intentionally offer, promise or give any undue pecuniary or other advantage (directly or indirectly) to a foreign public official, or for a third party. Brazilian legislation, more than establishing criminal offenses by itself, also determines a series of specific duties for public officials, such as be trustworthy, just, fair and acting with integrity. These duties reveal an ideal behavior that the Convention does not establish or provide.</td>
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<td>LEGAL PERSONS RESPONSIBILITY</td>
<td>Both OCDE’s Convention and Brazilian legislation creates liability for not only natural person, but also legal person. It is important to pointed out that in most cases the legal person has the strict liability, in administrative and civil spheres, however, the natural person liability is not excluded and managers and CEOs can be responsible, according to Anti-Corruption Law in, articles 2 and 3. In addition, the legal person can be responsible regardless of liability of natural person.</td>
<td>Both OCDE Convention and Brazilian internal legislation have liability for legal persons. However, the OCDE Convention, in the Article 1, defines public officer bribery as intentionally offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party. The Brazilian Anti-Corruption Law, in article 5, item II and III, amplifies this scope, including the financing and support of any action qualified as offenses under applicable law and using another person (natural or legal) to hide criminal conducts prevented by the same law. Therefore, there is an increase of the scope of responsibility of legal persons. It is important to state that, the Convention was ratified in 2000, and until 2013, with the promulgation of the Federal Law N. N. 12.846/2013, there was no responsibility for legal persons in Brazil.</td>
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Concerning OCDE’s Convention, the sanctions to bribery of a foreign public official shall be effective, proportionate and dissuasive criminal penalties. All the Brazilian Laws that were analyzed predict very proportional punishments to the legal and natural persons, for example, there is a margin calculation for monetary sanctions. In addition, criminal responsibility is not applicable to legal person, according to Brazilian legislation, only to natural person. It is important to highlight that each sphere (civil, administrative and criminal) has its rules.

The Convention states that criminal penalties for bribery of foreign public officials should be effective, proportionate and dissuasive. Besides that, it also appoints that the range of penalties should be comparable to that applicable to the bribery of the party’s own public officials, and should also include, in case of natural persons, deprivation of liberty sufficient to enable effective mutual legal assistance and extradition. The penalties in Brazil could be criminal, civil or administrative. All these instances could punish different aspects of the same fact. For this multiplicity of instances, it is possible to determine certain unproportioned measure, since the defendant will have to defend himself in many different instances. Regarding the effectivity of the sanctions, it is not possible to affirm for sure the consequences of the more recent laws, but since the leniency agreement was created by the Anticorruption Law in 2013, several corruption investigations have based itself on the agreements, creating more evidences to judge and punish corrupt
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<tr>
<th>JURISDICTION</th>
<th>The OCDE’s Convention urge the necessity to establish which jurisdiction can punish the crimes. Regarding to Brazilian legislation, Brazilian courts have jurisdiction over crimes committed in national territory.</th>
</tr>
</thead>
<tbody>
<tr>
<td>MUTUAL LEGAL ASSISTANCE</td>
<td>In the article 9, the OCDE Convention establishes a mechanism of mutual legal assistance, where each party should sign treaties on criminal investigation and procedures concerning possible offenses included in the scope of the Convention. Although Brazil had signed OEA, OCDE and UN Conventions on combating corruption, currently, there is not any specific treaty with other countries, with the purpose to facilitate criminal investigation and proceedings.</td>
</tr>
</tbody>
</table>
Article 10 (1) of the Convention states that bribery of a foreign public official shall be deemed to be included as an extraditable offense under the laws of the Parties and the extradition treaties between them. More than that, the Convention establishes itself as a possible legal basis for extradition. In Brazilian legal system, the Constitution, in the Article 5, item LI, forbids extradition of native citizens. However, it is important to state that, if not native, it is possible to grant extradition for criminal offenses committed under our current legislation, in the terms of internal proceedings.


RUSSIA

Anti-Corruption Law and Compliance in the Russian Federation

Prof. Dr. Eduard Ivanov, the Russian Federation

1. INTRODUCTION

Preventing and combating corruption is one of the top priorities of domestic and foreign policy in the Russian Federation. In the last decade Russia made a significant progress in establishing an effective national anti-corruption system.

In 2008 Russia adopted the Federal Law “On Combating Corruption” which become cornerstone of the national anti-corruption system. In 2010 the President of the Russian Federation approved the National Anti-Corruption Strategy. The Strategy defined the necessary steps to implement the Federal Law “On Combating Corruption” on federal, regional and municipal levels (The National Anti-Corruption Strategy, Decree of the President of the Russian Federation No. 460 of 13 April 2010). In December 2013 the Presidential Anti-Corruption Directorate was established in the framework of the Presidential Executive Office (Decree of the President of the Russian Federation No. 878 of 03 December 2013). The Directorate supports implementation of state policy in the field of combating corruption and activities of the Presidential Council for Countering Corruption and of the Presidium of the Council.

On 1 April 2016, the President of the Russian Federation approved the National Plan for the Fight against Corruption for the period 2016-2017, which defined the following measures to combat corruption:

- Improving the legal basis and organizational mechanisms to fight corruption and identifying conflicts of interests of public servants
- Improving the control mechanism for expenses and income of state budget and property
Increasing efficiency to fight corruption in federal organs of executive power and state organs of the subjects of the Russian Federation

Furthering initiatives of federal and local organs to fight corruption

Establishing commissions for coordinating work against corruption in all regions of the Russian Federation

Increasing the efficiency of fighting corruption in state procurement and services to cover state and municipal needs

Increasing influence of ethical and moral norms for the activities of officials at all levels of governance

Increasing the use of mechanisms for international cooperation for the identification, confiscation, and return of all funds received as a result of corrupt activities

Increasing societal awareness to create an atmosphere intolerant of corruption (The National Plan for the Fight against Corruption for the period 2016-2017)


The Russian Federation has been actively cooperating with the UN Office on Drugs and Crime (UNODC), the Group of States against Corruption of the Council of Europe (GRECO), the OECD, the Financial Action Task Force on Money Laundering (FATF), the Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (MONEYVAL), the Eurasian Group on Combating Money Laundering and Financing of Terrorism (EAG), the APEC Anti-Corruption and Transparency Experts’ Working Group, and the G20 Anti-Corruption Working Group.

Cooperation in the framework of BRICS creates new opportunities for economic growth and sustainable development for all BRICS countries. An effective system of anti-corruption
measures is an important prerequisite for mutual investments and joint economic projects. In July 2015 the leaders of BRICS countries adopted the VII BRICS Summit Ufa Declaration and created a BRICS Working Group on Anti-Corruption Cooperation (the VII BRICS Summit Ufa Declaration).

2. OVERVIEW OF THE RUSSIAN ANTI-CORRUPTION LEGISLATION

2.1. Main Anti – Corruption Laws and Regulations

The main Russian legal acts in the field of combating corruption are:


The Federal Law No. 115-FZ dated 7 August 2001 «On Combating Legalization (Laundering) of Proceeds from Crime and Financing of Terrorism»,


The Federal Law No. 44 FZ dated 4 April 2013 “On contract system in the sphere of procurement of goods, works, services for provision of state and municipal needs”

The Criminal Code of the Russian Federation;

The Code of Administrative Offences of the Russian Federation;

The Decree of the President of the Russian Federation No. 309 dated 2 April 2013;


2.2. Definition of Corruption

General definition of corruption in the Russian legal framework is quite broad. In accordance with article 1 of the Federal Law No. 273-FZ dated 25 December 2008 “On Combating Corruption” the corruption means:
a) abuse of public office, giving or receiving bribes, abuse of powers, commercial graft or other illegitimate use by an individual of his/her official status against legal interests of society and the State to receive private gain in the form of money, values, other property or services involving property, and other property rights for himself/herself or for third parties, or illegal provision of such a benefit to the said individual by other individuals;

b) committing acts indicated in paragraph a) of this Section on behalf or for the benefit of a legal entity.

As follows from the definition, bribery is not allowed both in public and private sectors. Facilitation payments are not excluded from the definition of corruption.

There is no special chapter on crime of corruption in the Criminal Code of the Russian Federation. Corruption offences are contained in various chapters. However, the list of corruption offences is defined in the Order of General Prosecution Office and Ministry of Interior dated 11 September 2013 No. 387/11/2 (List of corrupted offences No. 23) adopted for purposes of criminal statistic.

This list consists of the following offences:

- Bribe – taking (Art. 290);
- Bribe - giving (Art. 291);
- Intermediation in bribery (Art. 291.1);
- Petty bribery (Art. 291.2);
- Bribery in a profit-making organization (Art. 204);
- Intermediation in bribery in a profit-making organization (Art. 204.2);
- Petty bribery in a profit-making organization (Art. 204);
- Abuse of official powers (Art. 285);
- Untargeted expenditure of budgetary means (Art. 285.1);
- Untargeted expenditure of means of state extra-budgetary funds (Art. 285.2);
• Illegal influence on the result of official sports competition or spectacular commercial competition (Art. 184);
• Abuse of authority (Art. 201);
• Illegal participation in entrepreneurial activity (Art. 289);
• Violation of the procedure for financing the election campaign of a candidate, an electoral association, the activities of an initiative group for holding a referendum, another group of referendum participants (Art. 141.1);
• Obstruction of justice and of the preliminary investigation (Art. 294);
• Encroachment on the life of a person administering justice or preliminary investigation (Art. 295);
• Threats or acts of violence in connection with the administration of justice or preliminary investigation (Art. 296);
• Coercion to testify (Art. 302);
• False testimony, conclusion of expert, specialist, or incorrect translation (Art. 307);
• Bribery or coercion to testify or evade giving testimony or to mistranslation (Art. 309)

The Order defines a number of other criminal offences which can be classified as corruption offences under certain conditions, e.g. committing offences by public servants or with mercenary motives (the Order of General Prosecution Office and Ministry of Interior 797/11/2.2016)

2.3. Liability for Corruption Offences

The Russian criminal law doctrine traditionally recognizes only natural persons as subjects of criminal liability. The Federal Law «On Combating Corruption» established general principles and rules regarding liability of legal entities. In accordance with article 14 in case when corruption offences or offences creating conditions for corruption offences are organized, prepared and committed on behalf or for the benefit of a legal entity, sanctions can be applied to that legal entity in accordance with Russian Federation laws. Application of sanctions for a corruption offence to the legal entity shall not exempt the guilty individual from liability for
the corrupt offence in question. Nor does bringing the guilty individual to criminal or other liability for the corruption offence exempt the legal entity from liability for that offence. The same provisions shall be applicable to foreign legal entities in cases provided for by Russian laws (Russia’s Federal Law 273-FZ 2008).

In absence of corporate criminal liability legal entities may be held liable for corruption offences under the Code of Administrative Offences of the Russian Federation. Article 19.28 foresees liability for illegal remuneration on behalf of the legal entity. In addition to fines under the Code of Administrative Offences legal entities committed the administrative offence are not allowed to participate in the public procurement during two years since the date of conviction (Russia’s Federal Law 44 FZ 2013). The Register of legal entities brought to administrative liability under Article 19.28 of the Code of Administrative Offenses is available on the official webpage of the Prosecutor General’s Office (https://genproc.gov.ru/anticor/register-of-illegal-remuneration/).

In 2011, the first year of application of Article 19.28, only 68 legal entities were held liable and fined. The statistical data for 2014-2017 from the Register of legal entities brought to administrative liability under Article 19.28 of the Code of Administrative Offenses demonstrate increasing application of Article 19.28 by the Russian courts (https://genproc.gov.ru/anticor/register-of-illegal-remuneration/).

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of legal entities brought to administrative responsibility under Article 19.28 of the Code of Administrative Offenses</th>
</tr>
</thead>
<tbody>
<tr>
<td>2014</td>
<td>239</td>
</tr>
<tr>
<td>2015</td>
<td>390</td>
</tr>
<tr>
<td>2016</td>
<td>397</td>
</tr>
<tr>
<td>2017 (January – September)</td>
<td>231</td>
</tr>
</tbody>
</table>
Article 19.29 of the Code of Administrative Offences foresees liability for illegal involvement in labor activity or performance of works or provision of services by the public or municipal official or former state or by the former public or municipal official.

2.4. General Anti-Corruption Measures

The main directions in preventing and combating corruption in the Russian Federation are the following:

- Criminalization of corruption
- Law enforcement measures
- Establishing obligations and restrictions for public officials
- Anti-corruption expertise of drafts of legal acts
- Special anti-corruption measures in public procurement
- Public-private collaboration
- Implementing anti-corruption compliance in organizations
- Developing international cooperation in preventing and combating corruption

The main Russian law enforcement authorities in the field on combatting corruption are the Prosecutor General’s Office, the Investigative Committee of the Russian Federation, and the Ministry of the Interior. These bodies form the organizational basis of the national anti-corruption system. Every Russian law enforcement agency has its own powers, including the authority to ensure international anti-corruption cooperation, the recovery of stolen assets, and particular functions in the framework of international legal assistance in order to achieve common goals.

One of the current trends in preventing and combating corruption in Russia is an active participation of the Financial Intelligence Unit (FIU). The Russian FIU was established at 1 of November 2001 as the Financial Monitoring Committee (FMC) by a Presidential Decree No. 1263, now called the Federal Financial Monitoring Service (Rosfinmonitoring). The Rosfinmonitoring is a central authority for combating money laundering and financing of terrorism (ML/TF) in the Russian Federation, an administrative-type FIU (Decree of the President of the Russian Federation 1263 2001). In 2012, the Rosfinmonitoring was placed
directly under the authority of the President of Russian Federation, though the Rosfinmonitoring still enjoys full operational autonomy. The structure of the Rosfinmonitoring includes the Central office and interregional offices in the federal districts of the Russian Federation.

The main powers and duties of the Rosfinmonitoring are:

- collecting, processing and analyzing the information about transactions which are subject to monitoring by designated reporting entities, and requesting further information about these transactions;
- creation of an uniform information system and administering and maintaining the federal AML/CFT database, in line with data protection and secrecy provisions;
- referring relevant information to the various law enforcement bodies and tax authorities upon request as well as upon the own initiative of the Rosfinmonitoring when there is a suspicion of ML or TF;
- carrying out co-operation and exchange of information with competent authorities of other countries in the AML/CFT sphere in accordance with international treaties of Russia;
- representing Russia in international organizations on issues of combating money laundering and financing of terrorism.

Corruption offences are predicate offences for money laundering among others under the Criminal Code of the Russian Federation. The Rosfinmonitoring is responsible for conducting financial investigations of money laundering cases related to corruption offences and forwarding relevant information and materials to law enforcement bodies for operative work and criminal investigations.

In accordance with the Federal Law No. 231- FZ dated 3 December 2012, which came into force on 1 January 2013 the Rosfinmonitoring should also provide information about transactions of state and municipal servants by written requests of federal ministers, heads of subjects of the Russian Federation and Head of the Central Bank of the Russian Federation for purposes of control incomes and costs. The procedure of submitting requests and the list of
positions of state and municipal servants are regulated by the Decree of the President of the Russian Federation No. 309 dated 2 April 2013. FIU’s information about obligatory controlled and suspicious transactions of public servants can be compared with their declarations of incomes and assets. This is an effective way to identify transactions in amount, which is significantly higher than declared official incomes of public servants.

The idea of public-private collaboration in fight against corruption has been becoming more popular in Russia in the last decade. The main business associations of the Russian Federation signed in 2012 the Anti-Corruption Charter of the Russian Business. Parties to the Charta are: the Chamber of Commerce and Industry, the Russian Union of Industrialists and Entrepreneurs, the All-Russian Public Organization „Delovaja Rossija“ (Business Russia), the All-Russian Public Organization of Small and Medium Business „Opora Russia“. The Charta is based on several main principles developed to prevent and combat corruption. The Charter is open to accession by any business person or company. The Charter covers relationships both within business community and between businesses and government authorities. The Russian Union of Industrialists and Entrepreneurs keeps the Register of parties to the Charta (The Anti-Corruption Charter of the Russian Business 2012).

Another Collective Action initiative started in Russia in 2012 is the Russian Compliance Alliance (RCA). The RCA includes a group of major multinationals, Russian companies, professional service firms, business associations, NGOs, and universities. The main goals declared by the RCA are:

to create a broadly shared understanding in the Russian market of fundamental ethics compliance concepts, based on global legal principles and Russian law, by creating an open-source self-evaluation instrument, available to any company, and

to encourage and facilitate using ethics compliance as a factor in choosing a business partner (https://www.compliancealliance.ru/homepageenglish.html).

2.5. Anti-Corruption Compliance

In December 2012 Russia enacted important amendments to the Federal Law “On combating corruption”, which came into force on January 1, 2013. The new Article 13.3 established
obligations for all organizations in the Russian Federation to take measures to prevent corruption.

Measures for prevention of corruption that can be taken by organization can include:

1) determination of units or officials responsible for the prevention of corruption;

2) cooperation with law enforcement agencies;

3) development and introduction of standards and procedures designed to ensure the ethical operation of the organization;

4) adoption of a code of ethics and official conduct of employees of the organization;

5) prevention and settlement of conflict of interest;

6) preventing the compilation of unofficial reports and using forged documents.

The Russian legislator does not use the term “anti-corruption compliance”. However, it is absolutely clear from the analyses of Article 13.3, that all the Russian organizations have to implement an anti-corruption compliance management system, which includes appointment of special officers or units, responsible for the countering corruption in an organization, adoption of a code of business ethics or corporate conduct, and adoption of an anti-corruption compliance programme.

Despite the general legal obligation there is no special liability under Russian law for not having anti-corruption compliance programme in the organization. However, the General Prosecutor's office, which is responsible for supervision over implementation of anti-corruption legislation, is entitled to order, or requests a court to order, companies to implement measures in accordance with Article 13.3.

Besides of the binding legal obligations under the Federal Law “On Combating corruption” the main reasons for Russian companies to implement anti-corruption compliance management systems can be classified into three groups: moral reasons, legal obligations and incentives in foreign anti-corruption laws, and market requirements.
The first group includes personal positions of shareholders and CEOs who do not want to accept corruption in any form and require zero tolerance in a company.

The second group includes provisions of foreign legal acts giving an opportunity to use the compliance programme as a defense to avoid criminal liability (UK) or mitigate punishment (Brazil, USA). Court decisions can also create legal incentives for companies. In May 2017 the German Supreme Court declared in its decision that an effective compliance management system and remedial action should be taken into account by calculating fines (1 StR 265/16(2017)). This statement is important for the future judicial practice in Germany and implementation of compliance management systems in companies doing business in Germany or with German companies. It should be mentioned here that large Russian companies implemented anti-corruption compliance programmes even before 2013 under the influence of foreign laws or foreign business partners.

The third group includes:

- requirements of counterparties to have compliance programme in place;
- requirements of counterparties to have certified compliance programme;
- requirements of counterparties to apply anti-corruption clause to contracts;
- participation in Collective Action initiatives.

The use of anti – corruption policy for protection of the company from administrative liability for illegal remuneration is not regulated in Russian administrative law. Rather, whether an anti–corruption policy will be taken into account depends on the judge in each particular case. At the same time it is important to mention that for legal entities and individuals in Russia administrative liability is fault-based. Article 2.1 of the Code of Administrative Offenses of the Russian Federation defines fault of a legal entity as a failure to take all measures within its power to comply with the Code’s requirements. Therefore, a legal entity may raise, as a defense, the measures it has taken to prevent bribery on its behalf. Recent enforcement practice confirms that a legal entity may avoid liability under Article 19.28 of the Code of Administrative Offenses if it proves that it has taken all reasonable measures to prevent corruption, including those recommended by Article 13.3 of Federal Law No. 273 “On Combatting Corruption”.
There is an open question for discussion whether implementation of the anti-corruption compliance management system should become a binding legal obligation for particular industries or categories of companies. The idea of mandatory anti-corruption compliance based on the opinion that existing legal incentives and market requirements motivate primarily large companies and their supply chain. These companies have long term strategic plans, care about business reputation and have sufficient resources to invest into compliance programmes. For other companies even in the same sectors or industries covering daily costs, saving money or surviving in the situation of financial crises can be more important than hypothetical reputational damage or even legal risk in case of corruption. For those companies only risk of supervisory inspection and punishment in a short term prospective can be a real motivation to have compliance programmes. When compliance programmes are implemented, responsible officers will at any way take measures to prevent corruption. The author participated in several working groups meetings in Russia when the experts discussed opportunity and appropriateness to establish such legal obligation for a number of industries. Another idea was to establish mandatory anti-corruption compliance for companies which use public funds. The both ideas were not implemented in the Russian legislation. However, in author’s opinion, they have a logical base and the discussion can be continued. The industries can be defined based on the statistical data about corruption offences and the damage from them. The impact of this decision can be similar to the establishing obligations for financial institutions and designated non-financial businesses and profession under AML/CFT law. The idea of mandatory anti-corruption compliance for companies which use public funds can be justified if we take into account the benefits which the companies receive.

To support implementation of anti-corruption compliance programmes by Russian companies the Ministry of Labor and Social Protection of the Russian Federation published the Guidelines for the development and adoption of measures for prevention and countering corruption in organization on 8 November 2013. Besides of this Guidance companies consider international soft law, foreign law which has transnational application, and compliance programmes of multinational corporations. Companies also use particular concepts and definitions, e.g. beneficial ownership from the AML/CFT law and compliance system.
Business ethics has also a significant influence on the anti-corruption compliance. Some large companies go beyond the law and develop value-based compliance programmes.

The function of anti-corruption compliance in Russian companies is exercised as a rule by compliance or legal departments/units. In middle-sized and small enterprises one person may be responsible for anti-corruption and other types of compliance. In some companies security or economic security departments/units may be responsible for preventing corruption what is rather unusual for western companies.

3. IMPLEMENTATION OF THE OECD ANTI-BRIBERY CONVENTION IN THE RUSSIAN FEDERATION

The Russian Federation ratified the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions in February 2012.


In despite of serious efforts of the Russian Federation to increase an effectiveness of the national anti-corruption system the Working Group on Bribery expressed serious concerns regarding Russia’s continued failure to implement key legislative reforms to enable it to effectively investigate, prosecute and sanction the offence of foreign bribery in the last Statement published on 25 October 2017 (http://www.oecd.org/corruption/russia-must-make-fighting-international-bribery-a-priority.htm)

There are several key critical recommendations made by the Working Group on Bribery:
• Adopting amendments to Russia’s foreign bribery offence to cover basic foreign bribery methodologies, such as offering and promising bribes, bribes that benefit third parties, and bribery of foreign public officials
• Strengthening the laws regarding corporate liability for foreign bribery
• Eliminating a defense commonly known as “effective regret”, as it applies to foreign bribery

All the recommendations may be subjects of discussion. Many of them are already implemented into Russian law and relevant legal provisions should be explained in details to the Working Group on Bribery:

Article 290 (Bribe - Taking) and Article 291 (Bribe – Giving) of the Criminal Code of the Russian Federation cover taking bribe by and giving bribe to Russian, foreign public officials and officials of public international organizations. Article 290 includes rather broad definition of foreign public official as any person who is appointed or elected to an any office in the legislative, executive or judicial body of a foreign state, and any person who exercise any public function for a foreign state including functions for a public administration or enterprise. An official of a public international organization is defined as an international civil servant or any person who authorized by such an organization to act on its behalf. Definition of bribery covers giving bribe to a third party (natural person or legal entity) at the direction of an official. Definition of bribe includes not only money but also securities, other property, unlawful rendering of services of a property nature, and the provision of other property rights. In accordance with Article 30 of the Criminal Code offering or promising bribe may be qualified as a preparation for a crime or attempt. Analyses of the above mentioned articles demonstrates that Russian criminal law covers basic foreign bribery methodologies, and bribery of foreign public officials.

However, Russian criminal and administrative laws do not have such a broad transnational application regarding bribery of foreign public officials as the FCPA or the UK Bribery Act have. Russian criminal law will be not applicable to a foreign company or citizen who is doing business in Russia in case of committing an offence of bribery abroad. Also a Russian parent company will be not held liable under Russian law for crime committed by its subsidiary or
abroad. These points will be probably subjects of discussion with the Working Group on Bribery:

There is a long term ongoing discussion in Russian academic and professional community regarding liability of legal entities for corruption offences. As per Article 2 of the OECD Convention States – parties to the Convention should establish the liability of legal persons for the bribery of a foreign public official in accordance with its legal principles. As it was discussed above the Russian criminal law doctrine does not recognize legal entities as subjects of criminal liability. General position of the Russian Federation regarding obligation under Article 2 of the OECD is that implementing administrative liability of legal entities for illegal remuneration on behalf of the legal entity is sufficient to fulfil obligations under Article 2. However, the Prosecutor’s General Office and the Investigative Committee of the Russian Federation have controversial positions regarding the implementation of idea of corporate criminal liability in Russia. The Investigative Committee introduced the draft of amendments to the Criminal Code to the State Duma and supports this idea in numerous panel discussions in international forums.

The concept of an effective regret is implemented in Article 291 of the Criminal Code. A bribe giver shall be relived from criminal liability if she/he has been active in assisting to the crime's clearing and/or investigation, or this person has been subjected to extortion on the part of a public official, or if this person after committing the crime has voluntarily informed the relevant law enforcement authority.

4. CONCLUSION

The Russian Federation created general legal and organizational framework in accordance with international anti-corruption law. Depending on the results of discussion with the OECD Working Group on Bribery necessary amendments related to transnational application of Russian anti-corruption law and corporate liability may be adopted.

Implementation of anti-corruption compliance programmes especially in the medium - sized and small enterprises needs further support and creating additional incentives. As a possible
solution Russia could adopt amendments to Article 19.28 of the Code of Administrative Offences and establish obligation for courts to consider an effective anti-corruption compliance programme as a defense.

The ideas of mandatory anti-corruption compliance for particular industries or types of companies can be a subject of broad discussion with the involvement of various stakeholders. It seems to be a good idea to develop BRICS standards or guidance on anti-corruption compliance in companies applicable also for small and medium – sized enterprises. The standards could include model codes of business ethics and anti-corruption compliance programmes, lists of data bases available for conducting due diligence, discersions of key risk factors, lists of indicators for counterparty risk assessment and identification of suspicious transactions based on international experience and national specifics of BRICS countries.

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Reports and publications of the international intergovernmental and non-governmental organizations

Phase 1 Report on Implementing OECD Anti-Bribery Convention by the Russian Federation

Phase 2 Report on Implementing OECD Anti-Bribery Convention by the Russian Federation

The Anti-Corruption Charter of the Russian Business

The Russian Compliance Alliance https://www.compliancealliance.ru/homepageenglish.html (last visited Nov. 28 2017)

**Court decisions and other judicial and prosecutorial acts**

http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=e7e52afeccef97aeefe7cebf0d750b91&nr=78723&pos=0&anz=1> (last visited Aug. 25 2017)

ANTI-CORRUPTION COMPLIANCE IN INDIA: CONVENTIONAL AND NON-CONVENTIONAL EFFORTS & INITIATIVES

CHAPTER I:

Corporate Compliance Journey: From Reputation to Innovation:

In the aftermath of SIEMENS compliance scandal CEO Peter Loscher said, *It’s completely clear that the management culture failed. Managers broke the law. But this has nothing to do with the lack of rules. The management culture simply was not practiced -*and famous investor Warren Buffett once notably mentioned, *It takes 20 years to build a reputation and five minutes to ruin it. If you think about that, you will do things differently!*
These quotes capture the very essence of significance of a compliance culture in an organization. There can be thousands of rules/corporate policies but if those are not implemented in spirit, the letter is redundant. Taking forward what Warren Buffett mentioned— in today’s corporate world it is no more about reputation, it has gone beyond the reputation—it is more about the spirit of innovation. If an organization habitually goes on indulging in improper payments, bribery and corruption—it ceases to innovate. That particular organization breaks the rules (internal as well as external) and believes in “buying” anything that is up for a “sale”!

However, the organization must know that proceeds from such an activity is for limited period—since, there is competition which believes in continuous improvement, diversification of business and products, disruptive use of technology and growing challenges from other competitors. Thus, making their exercise futile in a long run.

Moreover, having corrupt practices regime in an organization is not going to do harm to others or competitors but to the very organization which believes in selling and buying anything which can be bought with money and favours! That is the very reason why compliance is a competitive edge, why it is a core discussion point in board meetings, why individual liability has many compliance officers and CEO’s put behind bars. Compliance is not a need but is a prerequisite for successful, transparent and innovative business.
CHAPTER II: 
Anti-corruption challenges faced by Corporates in India

Businesses in India also are influenced by corruption, be it a multinational corporation or a small and medium enterprise. All the companies have to deal with someone in authority at one
time or the other and so they have to face corruption on a regular basis. Though there are many harmful effects of corruption on a regular business, the challenges are much more complex.

Just to throw more light on some of the ways in which Corporates can be impacted by Corruption are:

· Red-Tapism: A business may have to bribe the officials in order to get its tasks done and this may harm business’s budget. The business may have to cut down on it’s profit levels in order to bribe the officials on a regular basis. As per Transparency International, an organization aimed at tracking and recording corruption, 54% of Indians say they paid a bribe in the last year. Even if a small business owner decides not to bribe then the work that is to be approved generally gets postponed ad infinitum. The consequences may vary from losing expansion opportunities or precious clients due to the inability to deliver promised goods or services to them.

· Creation of Adverse Economic Environment: Another external factor that hampers growth of a business is that corruption creates a bad economic environment in the country. A lot of money is spent on corruption activities and that money drains out to the economy and thus leaves the country to face shortage of cash flow. This point is reinstated by the fact that most of the Indian Black money is said to be in the Swiss Bank and thus is out of the economy.

· Lack of FDI’s: If a country is perceived to be corrupt, then the foreign investors also hesitate to invest in that country as they will require additional money for bribes. The Indian Govt. has eased FDI rules in the recent past; we hope to see great returns- thanks to these moves.

· Scarcity of Resources: Corruption can also lead to the funneling of scarce public resources to uneconomic high profile projects rather than necessary projects such as infrastructure development or development of rural India. This hampers the overall development of society and often crushes innovation of budding entrepreneurs as they face much more hindrances in executing their business ideas. For example: If an entrepreneur does not have access to proper roads to transport his goods in a cheap manner then he may drop the idea of initiating a business.

9 Foreign Direct Investment
Not to be Overlooked in Indian Scenario: Major risks lie with the Small Scale Industry:

It is important to note the rapidly increasing role of emerging economies in international commerce, value creation for stakeholders and global development which in fact are supported by innovative opportunities as created by Small and Medium Enterprises (hereafter called SMEs) in the global market.

For a long time now, the primary focus of research both into the setting up of an unyielding compliance system and into methods of maintaining rigor around them has been on large enterprises. However, it should be noted that out of the 75 million companies existing across the globe, around 90 per cent are small and medium-sized enterprises and a significant part of SMEs are based in emerging economies which have tough environments to operate.

Out of these emerging economies India has stood out in recent times. India is fastest growing major economy in the world with a rate of growth of nearly 8% in its GDP per annum. Much of the credit has to be attributed to SMEs which provide in a unique way to this growth by contributing 45% of the industrial output, 40% of exports, 42 million in employment generation, creating 1 million jobs every year and by producing more than 8000 innovative and quality products for the Indian and international markets every year (Source: Small & Medium Business Development Chamber of India - SME Chamber of India).

The Indian market is growing rapidly and Indian industry is making remarkable progress in various sectors like Manufacturing, Precision Engineering, Food Processing, Pharmaceuticals, Textile & Garments, Retail, information technology, Agriculture and Service sectors.

Such expansion and diversification in this segment exposes it to many challenges as well. One such major challenge is to tackle corruption and the wide range of improper payments. In a variety of surveys, the organizations have indicated that non-transparent laws and regulations,

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11 Id.
priority to large corporations, the inefficiency of courts, red-tapism, a lack of transparency in procurement systems are the main factors that make corruption possible and create obstacles to the success of their business.\textsuperscript{13}

Acquiring such capabilities to operate in a compliant way applies to companies of all sizes, but small and medium companies are particularly vulnerable to non-compliance risks due to their limited resources, knowledge and experience.\textsuperscript{14} Taking the external environment into account adds an additional dimension to this discussion; namely that SMEs are in special need of a well-functioning business environment due to resource constraints and regulatory liabilities. This implies an explicit focus on developing countries and emerging markets as investment destinations, since cumbersome regulatory barriers and non-transparent business practices most commonly plague them.\textsuperscript{15}

**CHAPTER III: Enforcement Trends**

**INDIA: Recent FCPA Enforcement Actions**

- Mondelēz International, Inc. - 2017 - SEC said in an administrative order that both Cadbury Limited and Mondelēz violated the internal controls and books-and-records provisions of the FCPA. As a consequence, last January Mondelēz agreed to pay $13 million to resolve FCPA offenses related to payments by its Cadbury unit in India.

- Anheuser-Busch InBev - 2016 - The Belgium-based global brewery agreed to pay $6 million to settle charges that it violated the FCPA by using third-party sales promoters to make improper payments to government officials in India and threatened the whistleblower who reported the misconduct.


Embraer - 2016 - The Brazilian-based aircraft manufacturer agreed to pay $205 million to settle charges that it violated the FCPA to win business in the Dominican Republic, Saudi Arabia, Mozambique, and India.

New Enforcement Trends in India:

The Central Vigilance Commission (CVC) which is an apex Government of India body created in 1964 to address governmental corruption has the status of an autonomous, impartial body, free of control from any executive authority, charged with monitoring all vigilance activity under the Central Government of India, advising various authorities in central Government organizations in planning, executing, reviewing and reforming their vigilance work. The CVC has taken proactive actions, such as advising all central government departments on quicker disposal of pending corruption cases and launching the ‘VIGEYE’ mobile application to directly interact with citizens on matters of corruption.

The Serious Fraud Investigation Office (the investigative arm of the Ministry of Corporate Affairs) has also investigated cases of alleged fraud in 258 companies in the past four years, of which 116 investigations have concluded.

Further, the Supreme Court of India recently expanded the ambit of the definition of ‘public servant’ (under the Prevention of Corruption Act 1988) to include all officials of private banks, as their duties are public in nature (Central Bureau of Investigation, Bank Securities and Fraud Cell v Ramesh Gelli, February 23 2016).

Lastly, in 2015 - the Central Vigilance Commission (CVC) opened a suo moto inquiry against a private company (a subsidiary of a multinational corporation) for the first time, amid allegations that the company had bribed public servants in order to obtain certain clearances and permits in India.

CHAPTER IV:

India and International Anti-Corruption Conventions & Obligations
UNCAC and India: Legislative and Collaborative Approaches

In May 2011, the India ratified two UN Conventions16 –

- The United Nations Convention against Corruption (UNCAC) ; and
- The United Nations Convention against Transnational Organised Crime (UNTOC) and its three protocols.

The UNCAC recommends the State Parties to adopt such legislative and other measures as may be necessary to establish a whole series of criminal offences.

Including the following:

- Corruption of national or foreign public officials and officials of public international organizations;
- Embezzlement, misappropriation or other diversion by a public official of any public or private property;
- Trading in influence;
- Abuse of functions and illicit enrichment.

In the private sector anti-corruption, the Convention calls for the creation of offences of embezzlement and corruption. There are other offences relating to laundering the proceeds of crime, handling stolen property, obstructing the administration of justice, and participating in and attempting embezzlement or corruption.

Two Most Relevant UNCAC Provisions with Regard to Private Sector Compliance:

• Art 12 UNCAC: Private Sector

Each State Party shall take measures, in accordance with the fundamental principles of its domestic law, to prevent corruption involving the private sector, enhance accounting and

auditing standards in the private sector and, where appropriate, provide effective, proportionate and dissuasive civil, administrative or criminal penalties for failure to comply with such measures …..

• Art 16 UNCAC: Bribery of foreign public officials and officials of public international organizations

Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the promise, offering or giving to a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business…..

In this regard, the two most relevant Anti-Corruption Laws in Force in India are- The Prevention of Corruption Act and The Prevention of Bribery of Foreign Public Officials and Officials of Public International Organizations Bill, 2011 (latter law explained in detail in OECD section but arises from UNCAC ratification by India- The ratification of Convention requires criminalizing the act of foreign bribery and it would strengthen India’s existing anti-corruption laws that demonstrate India’s commitment to good governance and give more credibility in her fight against bribery and corruption)

The Prevention of Corruption Act Amendment Bill 2013:

- Broadens the definition of the “public servant” provided in the IPC to include “office bearers of cooperative societies receiving financial aid from the government, employees of universities.”17
- Penalizes public servants for “taking gratification other than his legal remuneration in respect of an official act or to influence public servants,” “for

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taking gratification to influence the public by illegal means and for exercising his personal influence with a public servant,” and for “accept[ing] a valuable thing without paying for it or paying inadequately from a person with whom he is involved in a business transaction in his official capacity.”  

- (Amendment) Bill 2013 –
  - “...seeks to establish a substantive offence for bribe giving which is to include [...] promise to bribe a public servant as well,” enhances punishment. “Establishes a substantive offence for bribery by commercial organization, which also provides that when a commercial organization is found guilty of the offence of bribery, all such persons who at the time at which the offence was committed were responsible or in charge of conducting the business of the organization will also be guilty of the offence—and liable to a minimum imprisonment of three years – extendable to seven years, as well as a fine. Similarly, where the offence has been committed due to the consent or connivance or neglect of any director, manager, secretary or officer of the company, such person will also be held guilty of the offence.”

- No exception for facilitation payments

- The Benami Transactions (Prohibition) Act
  - “The Act prohibits [...] purchase of property in false name of another person who does not pay for the property, except when a person purchases property in his wife’s or unmarried daughter’s name.”
  - “All properties that are held to be benami can be acquired by a prescribed authority and no money shall be paid for such acquisition.”

- The Prevention of Money Laundering Act

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18 Id.
20 Id
21 Id
o “…an offence of money laundering has been committed if a person is a party to any process connected with the proceeds of crime and projects such proceeds as untainted property. “Proceeds of crime” means any property obtained by a person as a result of criminal activity related to certain offences listed in the schedule to the Act.”

o “The Adjudicating Authority, appointed by the central government, shall decide whether any of the property attached or seized is involved in money laundering. An Appellate”

- The Lokpal and Lokayukta (Amendment) Act 2016

o “…requires a public servant to declare his assets and liabilities, and that of his spouse and dependent children. Such declarations must be made to the competent authority within 30 days of entering office. Further, the public servant must file an annual return of such assets and liabilities by July 31st of every year. The Lokpal Act also mandates statements of such declarations be published on the website of the relevant Ministry by August 31 of that year.”

Above mentioned, Prevention of Corruption Act, 1988, Amendment Bill 2013 is the Bill which makes giving a bribe a specific offence. There are diverging views on whether bribe giving under all circumstances must be penalised. Some have argued that a coerced bribe giver must be distinguished from a collusive bribe giver.

Also for the first time, Commercial bribery (private sector bribery) is being addressed through this legislation-To prevent bribery on the supply-side (i.e. paying a bribe) and to give the law more teeth to tackle corporates indulging in corrupt practices, the amendment proposed that corporations and their key managers be brought directly under the legal ambit of PCA.

Other Anti-Corruption legislations:

22 Id
23 Id
• Central Vigilance Act, 2003
• Right To Information Act, 2005
• Lokayukta Act, 2013 (Ombudsman Act)- A result of mass uprising resulted in change of Government in India
• Companies Act, 2013. Important Amendments to check Corporate Governance
• Whistleblowers Protection Act, 2014
  • The Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015
  • The Judicial Standards and Accountability Bill, 2010 (Yet to be passed)
  • The Citizen’s Charter and Grievance Redressal Bill 2011 (Yet to be passed)
  • The Public Procurement Bill, 2012 (Yet to be passed)

OECD and India: Legislative and Collaborative approaches:

Over the last decade India and OECD have come closer to work jointly on fighting corruption and setting benchmarks. This has also happened under the aegis of G20 Anti-Corruption Action Plan. India has sent representatives to OECD, since India is a non-member, in the meetings of the G20 Anti-Corruption Working Group to explore compliance to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Anti-Bribery Convention).

India was also part of the G20 Self-Assessment Report on Combating the Bribery of Foreign Public Officials.

India has joined 50 other countries in adopting a Ministerial Declaration of the OECD Anti-Bribery Ministerial Meeting, which reaffirms states’ commitments to fight foreign bribery and

corruption. India and the OECD engage together through active dialogue and regional activities on anti-corruption.

The OECD has conducted numerous visits to India to discuss the Anti-Bribery Convention and India’s engagement with the OECD Working Group on Bribery. OECD organized various conferences in collaboration with Indian industries and chambers to further the idea of Indian companies supporting the passing of foreign bribery bill in, which will help India to put in place very stringent and effective compliance and ethics measures and controls for preventing and detecting the bribery of foreign public officials.

India leads as an affiliate of the OECD Anti-Corruption Initiative for Asia and the Pacific since the year 2001, India has also supported and endorsed the ADB/OECD Anti-Corruption Action Plan for the mentioned region. This is a three-pillar plan for promotion of integrity in for public servants, private and corporate sector, and with the civil society involvement and is implemented through policy discussions, research studies, awareness and capacity building measures.

The Prevention of Bribery of Foreign Public Officials and Officials of Public International Organizations Bill, 2011, as highlighted in above section, is the main law, which showcases the compliances with the OECD and UNCAC, locally.

The OECD Anti-Bribery Convention establishes legally binding standards to criminalize bribery of foreign public officials in international business transactions and provides for a host of related measures that make this effective. It is the first and only international anti-corruption instrument focused on the ‘supply side’ of the bribery transaction.

From BRICS block, only India and China are the two non-OECD countries that are non-signatories of this instrument.

As per the Government notification, The Prevention of Bribery of Foreign Public Officials and Officials of Public International Organisations Bill, 2011 seek to prevent corruption relating

to bribery of foreign public officials and officials of public international organisations and for matters connected therewith or incidental thereto. The proposed legislation, inter alia,—

(a) prohibits accepting gratification by foreign public official or official of public international organisation and making such act punishable with imprisonment for a term which shall not be less than six months but which may extend to seven years and shall also be liable to fine;

(b) prohibits giving gratification to foreign public official or official of public international organisation and making such act punishable with imprisonment for a term which shall not be less than six months but which may extend to seven years and shall also be liable to fine;

(c) makes abetment and attempts of the acts specified at (a) and (b) above also punishable with imprisonment for a term which shall not be less than six months but which may extend to seven years and shall also be liable to fine;

(d) confers power upon the Central Government to enter into agreements with foreign countries enforcing the provisions of proposed legislation;

(e) makes provision declaring the offences under the proposed legislation as extraditable offences;

(f) makes provision for rendering assistance to a contracting State in certain cases to give effect to provisions of the proposed legislation;

(g) makes provision for reciprocal arrangements for processes and assistance for transfer of accused persons;

(h) makes provision for attachment, seizure and confiscation, etc., of property in a contracting State or India.

(i). It is also proposed that proceedings under the proposed legislation shall be taken in consultation with the contracting State against foreign public official to whom privileges and immunities under any law or Convention or treaty are accorded.

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The above-mentioned clauses have been proposed, in pursuance of Articles 16 (2) and 16(4) of UNCAC, broadly stated, makes bribe-taking by a foreign public official or official of a public international organisation punishable and makes giving of bribes to a foreign public official or official of a public international organisation punishable. However, an exception to the operation is carved out for commercial organisations if the expenses were reasonable and related to promotion, performance of a contract or the organisation had adequate procedures to prevent persons from engaging in such conduct.28

This Bill’s key requirement is to establish both offences having the existence of an undue advantage. In clause 3 of the Bill, the foreign public official or official of a public international organisation must obtain an undue advantage from what he accepts; the bribe-giver must give an undue advantage to a foreign public official or official of a public international organisation. Further, in clause 4, the bribe must be given to obtain an advantage relating to the conduct of global business.29

This Bill has lapsed twice and is under discussion. The bill has very forward-looking and avant-garde features as it covers not only the Government officers but also the officials serving with the International Organizations.

The Law Commission of India recommended to Prime Minister’s Office and Ministry of Law and Justice that the Bill’s application should be made to the instances of bribery that take place wholly or partly within India or on an Indian aircraft or ship; or where the bribery takes place in a foreign jurisdiction, to persons who are citizens or permanent residents of India or bodies that were/are incorporated in India. The Bill would also enable the Indian Government to enter into collaborative arrangements and agreements with foreign governments for enforcement purposes and for the trans-border exchange of information or cooperation in investigation of cases relating to any offense under this law.30

Apart from this Bill, there is no local or domestic legislation currently in force that addresses this type of act of bribery. The Prevention of Corruption Act, mentioned above, penalizes the

29 Id
30 http://www.traceinternational.org/blog/143/India (visited Nov. 04, 2017)
acceptance of bribes by local or domestic public officials, while the Prevention of Money Laundering Act, 2002, criminalizes the illegal channeling and flow of money through the attachment and confiscation of property. The latest Bill is a revised version of an earlier Bill introduced in Parliament in 2011, but which lapsed with the dissolution of the 15th lower house of Parliament.

There are few and defenses included in the Bill. These include reasonable and bona fide expenditures related to the promotion or demonstration of products or services, payments that are permitted under laws of a foreign country, facilitation payments, made to expedite or secure performance of any act of a routine nature that is part of the duties or functions of an FPO or OPIO, are also exempt.

With this Bill’s passage India will ultimately be able to satisfy its obligations under the International Obligations

The previous few versions of the above mentioned Indian Bill had three significant sections, dealing with, the offences, the processes for investigation and prosecution of the offences and the interrelation of the Bill with other legislations and miscellaneous matters. In line with other jurisdictions, the 2015 Bill criminalizes the offence of active act of bribery, which entails the offence of giving bribes to foreign officials. However, unlike most other countries, the Indian draft bill also criminalizes the offence of passive bribery, which entails the acceptance of bribes by foreign officials. Very few countries have criminalized the offence of passive bribery, including Malaysia and Switzerland in the recent past.

32 http://www.traceinternational.org/ (visited Nov. 07, 2017)
33 Id.
CHAPTER V

Non-Conventional Methods – Initiatives by Civil Society/ NGO’s in India to fight Corruption:

Initiative 1:

ZERO RUPEE CURRENCY NOTE:

A zero rupee note is a banknote imitation issued in India as a means of helping to fight systemic political corruption. The notes are "paid" in protest by angry citizens to government functionaries who solicit bribes in return for services, which are supposed to be free. Zero rupees notes, which are made to resemble the regular 50 rupees banknote of India, are the creation of a non-governmental organization known as 5th Pillar, which has, since their inception in 2007, distributed over 3 million currency notes.

http://5thpillar.org/ (visited Nov. 11, 2017)
Initiative 2: IPaidABribe.com

A website initiative by citizen group Janagraha, to tackle corruption by harnessing the collective energy of citizens. Citizens can report on the nature, number, pattern, types, location, frequency and values of actual corrupt acts on the website. The reports, perhaps for the first time, provide a snapshot of bribes being paid (or taken), across Indian cities. IPaidABribe uses them to argue for improving governance systems and procedures, tightening law enforcement and regulation.35

Initiative 3:

Disruptive Innovation-Civil Society/ Citizens Groups:

India Against Corruption (IAC) Movement:

A non-violent movement started in 2011 with the aim of eradication of corruption in the government through introduction of the Jan Lokpal Bill or Ombudsman law. Another aim, was the repatriation of black money from offshore tax havens and foreign banks.

This Movement was successful and as a result Lokpal Act 2013 (Ombudsman Act) was enacted.

Main Features of this Ombudsman Act are:

• Establishment of the institution of Lokpal or Ombudsman to inquire into allegations of corruption against public functionaries

• Movement wanted Prime Minister and Judges to be covered but the final Act excluded Prime Minister and Judiciary

• All the government employees are liable to declare their assets and liabilities

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• Ombudsman is required to conduct a preliminary inquiry within 30 days. If there is no prima facie case, the matter is closed.

If the case is established, the investigation has to be completed within six months.

Initiative 4:

2016 INDIAN BANKNOTE DEMONETISATION

On 8 November 2016, the Government of India announced the demonetization of all ₹500 (US$7.40) and ₹1,000 (US$15) banknotes of the Mahatma Gandhi Series. The government claimed that the action would curtail the shadow economy and crack down on the use of illicit and counterfeit cash to fund illegal activity and terrorism. The sudden nature of the announcement—and the prolonged cash shortages in the weeks that followed—created significant disruption throughout the economy, threatening economic output. The move was heavily criticized as poorly planned and unfair, and was met with protests, litigation, and strikes. However, the move is considered as a bold initiative and a policy innovation, which has a potential to change behaviors and introduce transparency in the economy.37

CONCLUSION:

Corruption can only be curbed via coordinated efforts among governments, businesses, civil society and international institutions. Isolated efforts may prove to be futile.

Through cooperation, mutual support and effective judicial processes, for BRICS it is possible to combat corruption more holistically. Joint efforts effectively address corruption in complex areas involving various stakeholders, such as private/corporate sector, public procurement and development aid funds. Further more, new approaches should also be encouraged.

Be it a corporate compliance programme or anti-corruption measures, one thing is clear that we have to innovate and come up with fresh ideas to fight corruption in each sector. More laws and regulations are not necessarily the answer. More laws can also cause more delays and widening of the gap between laws and technology can be clearly seen as laws move slowly and technology doesn’t wait for anyone. Some of the innovative approaches have been highlighted in Chapter V of the paper which have come through involvement of citizen groups and civil society to deal with daily harassment caused due to corruption, improper payments, bribes, influence paddling and red-tapism. Further, in the case of corporates and such organizations compliance departments are doing their best. The technology or the enforcements in developed countries are moving fast-the subsidiaries of these trans-national corporations in developing countries have to move fast as well and that is happening with the help of trainings, communications and skill development in this area but the next step is to take a big leap in the form of solution based long term approach -for instance Collective Action amongst Governments, Corporations and Civil Society/Think Tanks. Another area to be explored in the field of anti-corruption is the study of Behavioural approach to fight corruption. Behavioural approach is gathering a lot of steam of late. Behavioural studies present a promising-but the
most part unexplored-approach to improve development policies by incorporating a better understanding of how individuals make choices in their everyday lives, UK-DFID and its East Africa Research Fund (EARF) have been in the forefront. BRICS countries can establish cooperation in this field and open up research, exchange of ideas and centres of excellence for disruptive innovation via behavioural studies taking a cue from UK-DFID and EARF!

As seen in the paper, not all BRICS members are signatories to OECD norms. Some, including India, have made progress but one size can’t fit all – there are cultural specific realities, practical impediments, and legislative delays. Therefore, more emphasis should be laid upon the new methods and innovative approaches, which promote collaboration amongst the BRICS countries.

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1. A HISTORICAL REVIEW OF CHINA’S ANTI-CORRUPTION POLICIES

Corruption is a universal phenomenon of public institutions and has never spared any government of any form in history. In contemporary time, however, it is notably more pervasive in developing and transitional countries.

There is no denying that corruption has been a serious issue throughout Chinese history. Anti-corruption laws formed an important part of ancient Chinese legal system, and the systematization, legalization and institutionalization of the punishment of corruption-related crimes appeared as early as in the slavery society of China. Many of the oldest and draconian laws against corruption are found in China in various forms, and over the long and rich tapestry of Chinese cultural development, there are instances where harsh and sometimes effective actions have been taken against individuals and even the system. However, throughout the history, those measures failed more often than succeeded in those fights, and in fact, no dynasty has ever escaped the cycle of rise and fall that was linked to the phenomenon of corruption.39

Although it is important for us to look into the past before we move on to discuss various initiatives against economic crime that are being taken in modern China, the history after the founding of the People’s Republic of China (PRC) seems more relevant to this report.

To implement those anti-corruption obligations, the Chinese Communist Party (CCP) set up a special governmental organization named Commission for Discipline Inspection

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solely for investigating and penalizing Communist Party members who violated party discipline. The government also established a **supervisory committee**, which is designed for supervising activities of government institutions and civil servants to ensure their honest behaviour; and it had the authority to rectify improper activities and punish those who breached their duties. **The People’s Procuratorate** was also established at that time, which was responsible for investigating and prosecuting those who were alleged to have corrupt activities. These institutions were functional institutions for combating corruption after the foundation of the PRC.

From 1957 to 1976, anti-corruption movements in China were seriously disrupted due to the “Anti-Rightists” movement and the “Cultural Revolution”, which seriously damaged the substantive anti-corruption efforts. Institutional developments stagnated, and those governmental agencies specifically dealing with corruption were dissolved.

However, Chinese government issued various directives and regulations that were designed to control economic crime, in particular corruption, throughout the unstable period of first 30 years. In the beginning, on April 21, 1952, under the provision on severely punishing corruption in the Common Creed of the People’s Political Conclusive Conference of China, which was the provisional constitution law of the PRC, the government promulgated “Rules on Punishing Corruption of the People’s Republic of China”. This rule was developed based on the legislation in the Democratic Revolution Period, and has been placed as the basic rule on punishing corrupt officials before the enactment of China’s first Criminal Law.

After the end of the “Culture Revolution”, the Third Plenary Session of the Eleventh National Congress of the CCP convened, where the CCP central committee made a decision on “striking hard” against economic crimes and once again gathered nation’s attention towards anti-corruption.

On July 1, 1979, the National People’s Congress (NPC), the top legislature within China, officially formulated the Criminal Law of the People’s Republic of China, which clearly defined the crime of corruption and bribery. According to article155 and 185:
[...] any state functionary who takes advantage of his office to embezzle public property shall be sentenced to fixed-term imprisonment of not more than 5 years or criminal detention; if the amount embezzled is huge and the circumstances are grave, he shall be sentenced to fixed-term imprisonment of not less than five years; if the circumstances are especially grave, he shall be sentenced to life imprisonment or death. For the crime mentioned above, the offender shall be sentenced concurrently to confiscation of property or ordered to make restitution or compensation.

If any person entrusted by state organs, enterprises, institutions or people’s organizations to perform public duties commits the crime mentioned in the first part of this article, he shall be punished in accordance with the provisions of the two preceding parts, any state functionary who takes advantage of his office to accept bribes shall be sentenced to fixed-term imprisonment of not more than five years or criminal detention. The illicit funds or properties he received as bribes shall be confiscated, and public funds or properties shall be recovered. Whoever commits the crime mentioned in the preceding part and causes the great damages to the state or citizens shall be sentenced to fixed-term imprisonment of not less than five years. Whoever offers or introduces a bribe to a state functionary shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention.

In 1979, the NPC also formulated “the Ordinance on Arrest and Detention”, “the Criminal Procedural Law” and “the Law on the Organization of People’s Prosecution Services”, which provide the standard procedure for the Prosecution Service to investigate and prosecute crimes of corruption and bribery. Further, article 13 of “the Criminal Procedure Law” robustly reflected the special attention that had been given by the legislature on the limits of jurisdiction in filling and investigating such cases of corruption and bribery. It stipulated that:

[...] cases involving crimes of corruption, violation of the citizens democratic rights and dereliction of duty (including bribery), as well as other cases which the people’s procuratorates consider necessary to handle directly themselves shall be placed on file by the people’s procuratorates, and the people’s procuratorates have the right to decide whether or not to initiate a public prosecution.
Prosecution system was interrupted due to cultural revolution (1966-1976). The restoration of the Prosecution system began on March 5, 1978. The “Constitution of the People’s Republic of China” 1978 version was adopted at the First Meeting of the Fifth National People’s Congress. People’s Prosecution Service was restored according to the Constitution and the People’s Prosecution Service again begun to shoulder the responsibilities to investigate and prosecute corruption and bribery cases. In the following year after the Criminal Law and Criminal Procedure Law promulgated, the Prosecution Service in total investigated and prosecuted over 4,000 cases of economic crimes, among which 43 percent were corruption cases, with 89 cases involving over one million Chinese Yuan. In 1981, the prosecution service again directly investigated and prosecuted over 31,000 cases of economic crimes. It can be seen that the number of cases of economic crimes being prosecuted by People’s Prosecutorates rose sharply in the following two years after the corresponding legislation and institutions established and they had been taking really effective control of such crimes related to corruption.

Central commission for discipline inspection, (the CCDI), which was dismissed during the Cultural Revolution, was restored at the Third Plenary Session of the Eleventh Central Committee in December 1978, under the leadership of Deng Xiaoping. The CCDI is regarded as the highest internal-control institution of the CCP, tasked with enforcing internal rules and regulations and combating corruption and malfeasance within the party. Interestingly, as the vast majority of government officials at all levels are also Communist Party members, as a result, in practice, the commission is the top anti-corruption body in China. The first plenary meeting of the commission was held in January 1979, at which a Decision endorsed its mission, functions and powers, as well as organizational framework was adopted. Since then, a series of directives against various malpractices, irregularities and corruption were issued by the CCDI on behalf of the party; many directives have also been issued by the Central Committee of the Party directly.

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40 Huang, H. (1980), Working Reports of Supreme People’s Procuratorate, 2 September.
In the following years, the CCP attempted to bring order out of chaos and to change the focus of future work from class struggle to economic construction. Indeed, the party and the government did not fully understand the nature of corruption in China so that they failed to adopt effective measures to control it; they thought that it was merely an unhealthy tendency and naively wished it could be rooted out once directives and summons were put into the place. The People’s Daily issued an editorial entitled “Come out Boldly and Strike Firmly–Unhealthy Tendencies in Economic Arena!” in 1981. The editorial said: The main problem of eliminating unhealthy tendencies now is not that of lack of clarity between right and wrong, or is that of issuing directives and summons. It is a problem whether the leaders are bold enough to strike out at those tendencies, and to self-criticize. It is a spiritual problem. Someone has said corruption in contemporary China is often seen as a function of changing political economy, in particular the transition from state socialism to a market economy. In 1978, the new leader Deng Xiaoping carried out the economic reform and “open up policy”, which on one hand stimulated China’s economic growth and created massive business activities, while on the other hand, the economic reform had also involuntarily contributed a great deal of opportunities for public officials to seek private gain by abusing their offices. The centrally planned economic system allowed public officials to make illicit gains from selling goods and materials from state-owned enterprises to the market due to the price margin. Therefore, all this made the situation much more complicated and brought China to a new leaf in curbing such unhealthy tendency.

2. FEATURES OF CHINA’S ANTI-CORRUPTION LAW

One outstanding feature of Chinese anti-corruption movement is its overlapping with management of officials, especially party member leading cadres. Public officials, include staff in the Chinese Communist Party (CCP), government, legislature, judiciary, state-owned

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enterprises (SOEs) and other public organizations. These public officials have been the main perpetrators of corruption in China for the past 20 years.

Secondly, China’s anti-corruption law used to focus on recipients of bribe, because officials serve as the main agents of state power. Corruption is inevitable if their power is unrestrained. The degree of corruption at any one time depends to a large extent on the quality of officials. Management of officials is a dynamic anti-corruption process that covers three stages: prevention, supervision and punishment. This covers the entire process of the delegation, operation and regulation of state power, and constitutes the dynamic framework of traditional anti-corruption institutions.

Now China is not just focusing on the role of government officials in accepting bribes (the demand side of the bribe), but also on commercial bribery (the supply side or the payor of the bribe). The payor is often a multinational company that makes a payment to Party, government, or private individuals for the purpose of gaining some business advantage. The crackdown on commercial bribery means that China's antibribery laws now reach both the supply side (the payor) of the bribe and the demand side (the recipient) of the bribe and constitute a comprehensive anti-bribery law.

As an indication of China's new focus on the payor of the bribe, China has enacted new laws that focus on the payor. China has also enacted legislation that further details the elements of a criminal bribery offense. Furthermore, in 2006 China enacted legislation consistent with its international obligations under the United Nations Convention Against Corruption by enacting a law that prohibits Chinese companies from giving bribes to foreign official when these companies do business overseas.

As many other jurisdictions, corrupt behavior may lead to either criminal responsibility or administrative liability. Some corrupt behaviors are considered ethics violations and may be processed administratively, other corrupt practices are treated as crimes and will land in criminal justice system. Generally speaking, cases which are subject to disciplinary settlements can be considered non-typical corruption in that they are less serious and are, in Chinese official terms, “unhealthy tendencies.” Typical corruption, on the other hand, involves large amounts
of monetary value and has significant importance; such cases are therefore punished by criminal law.

In the reform period, three types of government agencies are charged with anticorruption missions. The Central Commission for Discipline Inspection (zhongyang jiliu jiancha weiyanhui)—A Party’s disciplinary apparatus, and The Ministry of Supervision (jiancha bu)—An administrative agency of the central government which oversees the behavior of government agencies and employees, and the Supreme People’s Procuratorate (zuigao renmin jianchayuan)—An arm of the judiciary. The General Bureau of Anti-Corruption was created within the Procuratorate in the reform period to focus on corruption cases.

Allegations about corruption are initially directed to the Ministry of Supervision in the case of government officials or to the Commission for Discipline Inspection in the case of party members. The two agencies overlap in their functions since the majority of government officials are Party members. As a result, they work together closely for anti-corruption missions. The disciplinary apparatuses are delegated with the authority of inspection, investigation and sanction. Several forms of administrative punishment are at their disposal: reprimand, demotion, dismissal or referral to the procuratorate for criminal prosecution. Corruption cases have been largely processed by the Commission and its branch offices at the local government levels.

3. LEGAL FRAMEWORK FOR COMBATING CORRUPTION AND BUILDING A CLEAN GOVERNMENT

Based on the Constitution of China, a series of laws and regulations have been enacted for combating corruption and building a clean government, and based on the Constitution of the Communist Party of China (CPC), a series of intra-Party rules and regulations have been worked out, thus gradually establishing a legal framework for combating corruption and

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43 Available at http://news.163.com/10/1230/09/6P53DKFR00014JBS.html
building a clean government with scientific contents, rigorous procedures, well-matched regulations and effective administration.

A. Intra-Party Rules and Regulations on Combating Corruption

In order to ensure that leading cadres work in a clean and honest way, the CPC has issued a series of codes of conduct and ethical rules for Party members who hold leading positions, and is building and improving a system to prevent conflicts of interest. The Guidelines of the Communist Party of China for Party-member Leading Cadres to Perform Official Duties with Integrity, released for trial implementation in 1997 and for implementation after revision in 2010, clearly prohibit Party-member leading cadres engaging in profit-making activities and seeking illegitimate gains by taking advantage of their positions and power in violation of the established rules. The Guidelines have provided relatively comprehensive regulations on Party-member leading cadres in performing their official duties with integrity under the conditions of the socialist market economy, and have thus become the basic intra-Party rules regulating the behavior of Party-member leading cadres. In view of the new situation and problems arising in power-for-money cases, the CPC promulgated the Regulations of the Central Commission for Discipline Inspection of the Communist Party of China on the Strict Prohibition of Seeking Illegitimate Gains by Misuse of Office in 2007, specifying methods of handling eight types of misconduct of Party-member cadres, including abuse of power for personal gain, which might appear during economic and social interactions. The Regulations on the Executives of State-owned Enterprises for Performing Management Duties with Integrity (Trial) released in 2009 clearly prohibit leading officials of state-owned enterprises to seek profit through misuse of office for either themselves or any related parties, undermine the interests of the enterprises. To regulate leading cadres’ performance of official duties with integrity, a number of regulations have been promulgated, including the Regulations on Implementing the System of Registration for Gifts Received in Domestic Social Activities by Functionaries of Party and State Organs, which clearly demand that the functionaries of Party and state organs must not accept any gifts or grants that might influence their impartial performance of official duties; the Regulations on Leading Cadres’ Report of Relevant Personal Matters, which requires leading cadres to honestly report their incomes, housing and investment owned or made either by themselves or together with their spouses and children living with them, as well as the
employment status of their spouses and children; and the Interim Regulations on Strengthening Management of State Functionaries Whose Spouses and Children Have Emigrated Abroad. These regulations play an important role in safeguarding the national interests and in the management of Party members and state functionaries in accordance with the law, as well as in enhancing the sense of leading cadres in performing their official duties with integrity.

B. **Laws and Regulations on Supervision over the Exercis of Power**

To ensure the proper exercise of public power, China has enacted a series of laws and regulations to strengthen restraint and supervision over the exercise of power by leading cadres. The Law of the People’s Republic of China on the Supervision of Standing Committees of People’s Congresses at All Levels enacted in 2007 strengthened the supervisory role of those committees in the form of law over the administrative, judicial and procuratorial powers of the people’s governments, people’s courts and people’s procuratorates at corresponding levels. Also enacted are the Law of the People’s Republic of China on Administrative Supervision, Audit Law of the People’s Republic of China, Administrative Reconsideration Law of the People’s Republic of China, Administrative Procedure Law of the People’s Republic of China to establish the systems of administrative supervision, audit supervision, administrative reconsideration and administrative procedure to strengthen supervision over the administrative organs and their staff. The CPC Central Committee formulated the Regulations of the Communist Party of China on Intra-Party Supervision (Trial), Regulations of the Communist Party of China on Inspection Work (Trial), Interim Measures on Conducting Admonition Talks and Written Inquiries with Party-member Leading Cadres, and Interim Regulations on Report by Party-member Leading Cadres on Their Work and Integrity, institutionalizing and improving various aspects of intra-Party supervision.

C. **Laws and Regulations on Punishment of Corrupt Behavior**

To crack down on corruption in line with law and discipline, China have been enacting and continuously improving substantive laws and regulations that punish violations of law and
discipline, including criminal punishment, Party discipline and administrative discipline. In the case of criminal punishment, by formulating and revising the Criminal Law of the People’s Republic of China, the liabilities of corruption-related crimes, such as embezzlement, bribery, dereliction of duty, holding a huge amount of property with an unidentified source, have been defined. The Supreme People’s Court and the Supreme People’s Procuratorate have worked out relevant judicial interpretations for the law, making them an important legal basis for punishing crimes of corruption. In the case of Party discipline, the CPC promulgated the Regulations on Disciplinary Sanctions of the Communist Party of China and supporting provisions, which clearly define conducts of Party members that go against the Party’s stipulations for clean government and self-discipline, embezzlement and bribery, as well as acts in violation of financial and economic discipline, and prescribe five measures for enforcing Party discipline: explicit warning, stern warning, removal from post within the Party, probation within the Party and expulsion from the Party. In the case of administrative discipline, the state has promulgated the Regulations on the Punishment of Civil Servants in Administrative Organs, which specify the principles, power limit, the types of misconduct and the punishment standards, including explicit warning, recording of demerit, recording of major demerit, demotion, dismissal from post and discharge from office.

D. Criminal Procedure Law

China attaches great importance to enacting and improving procedural laws to guarantee the enforcement of the afore mentioned substantive laws and regulations. The Criminal Procedure Law of the People’s Republic of China, Criminal Procedure of the People’s Procuratorates and Measures of Supervisory Organs for the Investigation and Handling of Administrative Disciplinary Cases by the state legislature, judicial authorities and relevant organs, as well as the regulations enacted by the CPC, including the Regulations of the Communist Party of China on Inspection Work of Disciplinary Inspection Organs, provide a legal basis for the acceptance, investigation, trial and appeal work in respect of criminal and discipline-breaching cases, and have established systems of witness and reporter protection, case transfer and coordination, as well as the system of the protection of the rights of the defendants and those being sanctioned.

E. Laws and Regulations on Corruption Prevention
In addition, China has enacted a series of laws and regulations closely related to corruption prevention. The Administrative License Law of the People’s Republic of China regulates the establishment and implementation of administrative licenses, and guarantees and supervises the effective administration of administrative organs. The Civil Servant Law of the People’s Republic of China regulates the management of civil servants and strengthens supervision over civil servants, so as to make them diligent and honest in performing their official duties. The Government Procurement Law of the People’s Republic of China, Anti-monopoly Law of the People’s Republic of China and Bidding Law of the People’s Republic of China regulate administrative discretion and give play to the market’s fundamental role in allocation of resources so as to effectively prevent corruption. The Judges Law of the People’s Republic of China, Procurators Law of the People’s Republic of China and People’s Police Law of the People’s Republic of China clearly stipulate the qualifications, administration and supervision of judicial officers, and fortify the requirement of law enforcement with integrity. In accordance with the Constitution and state laws, the various localities and departments have also enacted and issued their own local and departmental regulations to combat corruption, thereby improving the legal framework for combating corruption and building a clean government in China.

4. CHINESE ANTI-CORRUPTION LAWS AND INTERNATIONAL CONVENTIONS

China is a party state of The United Nations Convention Against Corruption44 (hereinafter UNCAC) and The United Nations Covention against Transnational Organized Crime45 (hereinafter UTOC), but hasn’t joined the Anti-Bribery Convention yet.

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The People’s republic of China’s National People’s Congress amended the 1997 Criminal Law in February 2011 in order to cover bribery of foreign government officials or officials of international public organisations, with the Amendment coming into effect on 1 May 2011. Known as the Eighth Amendment to the Criminal Law, this Amendment, inter alia, brought the PRC into line with Article 16(1) of the UN Convention against Corruption:

*Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the promise, offering or giving to a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business.*

Some commentators have declared that the Eighth Amendment is the first step to the PRC joining the organisation for Economic Co-operation and development’s Convention on Combating Bribery of Foreign Public officials in Business Transactions, or the Anti-Bribery Convention, as it is referred to here.

5. ONGOING INSTITUTIONAL ADJUSTMENTS OF ANTI-CORRUPTION MOVEMENTS IN CHINA

The new leadership of Chinese Communist Party (CCP) led by President Xi Jinping has robustly initiated an anti-corruption campaign as soon as he took over as the party chief in the end of 2012. One of the big moves is the reorganization of the anti-corruption agencies in China.

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Generally speaking, corruption cases involving CCP members are first investigated by the discipline inspection commission. Once the facts are clear, the case is sent to the people’s procuratorate for formal investigation and indictment in accordance with the Criminal Procedure Law. Officials who are inspected and charged by the discipline commission are generally indicted by the procuratorate. Therefore, the discipline commission is in fact the main force, though not the “regular army”, in the investigation of criminal corruptions in China.

Under Chinese Criminal Procedure Law, all occupational crimes, or corruption crimes in broader sense, committed by state workers, or public officers, shall be investigated by two investigation departments of procuratorates at all levels. They are the department of anti-dereliction of duty and infringement on human rights, and the department of anti-embezzlement and bribery. There is also a department of preventing those occupational crimes in each procuratorate. As the procuratorates are basically under the leadership of the CCP committee and the government at the same level, this system has the demerits of decentralization with both horizontal and vertical dispersion of force.

Besides the discipline commissions and the procuratorates, the police departments at all levels are also in charge of investigation of corruption crimes committed by non-state workers, or commercial bribery in private sectors.

On the whole, the present anti-corruption system in China is a decentralized model, with the feature of “controlling the waters with many dragons”. Even though the three agencies have a division of labor, there is bound to be some overlap in the investigation of corruption cases. It is not rare to see the repeated work between the discipline committee and the procuratorate or between the procuratorate and the police.

However, fighting corruptions requires establishing a homogenous and consolidated system, and building up a nation of rule of law requires the investigation of corruption crimes within the legal framework. Therefore, reorganization of anti-corruption agencies is a must for China now, and the roadmap is from decentralization to centralization.
Under the draft Supervision Law, the Supervision Commission, which combined the commission for discipline inspection with the supervisory committee and the anti-corruption section of People’s procuratorate, should become both the “mainforce” for investigating corruption crimes in China. In another word, all corruption crimes shall be directly investigated by the Supervision Commission. The reason for this institutional reform is that corruption crimes by state workers and non-state workers certainly do not occur in two isolated worlds, and it is more efficient to be investigated by one single organ. This adjustment will not only help to establish the homogenous and consolidated corruption crime investigation system but also help to improve the effectiveness of fighting corruptions in the country.

In China today, the problem of corruption has become both severe and universal, shaking the foundations of China’s state authority and poisoning the environment for social conduct, for which reason the fight against corruption has become a national priority. There is a saying in Chinese traditional medicine that for a serious illness, first treat the symptoms, and then treat the causes. Now, it is the anti-corruption strategy in China. The reorganization of anti-corruption agencies is mainly for “treating the symptoms” of corruption, while the more challenging mission is to treat the causes of corruption. In October of 2014, the Fourth Plenary Session of the 18th National Congress of CPC laid out the general objective for the nation to build “the socialist system of rule of law with Chinese characteristics”, marking the beginning of China’s effort to go from treating symptoms to treating causes of corruption. The rule of law is a good way for fighting corruption, while fighting corruption is a good reason for promoting the rule of law. China still has a long way to go for this objective.

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48 [http://www.npc.gov.cn/npc/lfzt/ryw/2017-12/27/content_2035460.htm](http://www.npc.gov.cn/npc/lfzt/ryw/2017-12/27/content_2035460.htm)
1. INTRODUCTION

Large scale corruption in South Africa can be traced back to the apartheid regime. Major Banks, mining houses, hotel groups, politicians, and politically connected individuals were allegedly involved in what is known as ‘apartheid grand corruption’ where state coffers were looted just before the new democratic government took over power.\(^\text{49}\) Post-apartheid, South Africa, like its counterparts in the BRICS bloc, continues to experience rife corruption. Media reports abound on corruption both in the public and private sector. In the public sector, corruption manifests in what is colloquially branded ‘state capture’.\(^\text{50}\) This is a phenomenon where the power of individuals and corporations to shape policy, regulatory and legal environments to their own advantage and at the expense of the rest of the economy is brought to bear. The power is usually exercised through a system of private payments to public officials and politicians to


\(^\text{50}\) After various complaints around the capture of state institutions by corporations and politically connected individuals, the Office of the Public Protector investigated the complaints and issued a report titled ‘State of Capture’. This report made damning ‘findings’ against the state President but directed that an independent judicial commission of inquiry be established to fully investigate the extent to which state institutions including state-owned companies have been ‘captured’ by other politically connected corporations and individuals for nefarious and corrupt ends. The report is available at saflii.org/images/329756472-State-of-Capture.pdf (last visited Nov. 30, 2017).
change the rules of the game in favour of those who make the payments. In South Africa, state capture is largely associated with the awarding of high value state tenders particularly by state-owned companies to non-deserving, politically connected corporations and individuals allegedly supported by a network of affiliates in the private sector. For example, prominent international companies such as KPMG, McKinsey, Bell Pottinger, SAP Software Solutions, Liebherr and capital equipment manufacturer, Shanghai Zhenhua Heavy Industries have recently been implicated in the mounting scandal implicating the incumbent President of South Africa. As will be demonstrated below, this large-scale corruption occurs despite the existence of a comprehensive and robust legal and regulatory framework that is arguably compliant with both regional and international standards and norms.

On the corporate compliance front, South African companies are expected to comply with a plethora of legal and regulatory mechanisms. These include: The Companies Act, regulations thereto, the King IV Report on Corporate Governance, and the Johannesburg Stock Exchange (JSE) Listing Requirements. Additionally, they have to comply with laws that regulate the financial markets, employment, broad economic empowerment of previously disadvantaged groups, and protection of clients’ personal information to mention the critical ones.

South Africa is also party to international and regional conventions such as the United Nations Convention against Corruption (UNCAC) which came into force in 2005, the African Union

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51 See generally Hellman J. S., Jones G. & Kaufmann D. Seize the state, seize the day: State capture and influence in transition economies, 31(4) 2003 Journal of Comparative Economics, 31(4), 751-773.
53 Companies Act 71 of 2008.
54 Companies Regulations 2011.
55 King IV on Corporate Governance, 2016.
56 Stock Exchange Listing Requirements
58 For example, the Labour Relations Act, 1995; Employment Equity Act, 1998; and the Protected Disclosures Act, 2000.
60 Protection of Personal Information Act 4 of 2013.
Convention against Corruption, the OECD Anti-Bribery Convention and the SADC Protocol against Corruption. Some of the key features of the UNCAC are the requirements to take steps to prevent corruption; criminalise corruption; cooperate with other countries in the fight against corruption and recover assets.

2. DOMESTIC LEGISLATION OVERVIEW

This section provides an overview of key legislation and anti-corruption agencies in South Africa. It highlights the main aspects addressed by different legislation, the mandates and jurisdiction of various anti-corruption agencies and comments on their complementarity or lack thereof. The main legislation that have a direct bearing on corruption are the Prevention and Combatting of Corrupt Activities Act, the Prevention of Organised Crime Act, the Protected Disclosures Act, and the Financial Intelligence Centre Act. This section also deals with the main corporate compliance laws and voluntary codes, namely, the Companies Act read with the King IV Report on Corporate Governance and the JSE Listing Requirements.


The Prevention and Combatting of Corrupt Activities Act (PRECCA) is the main statute that deals with corruption. The Act deals with all manifestations of the crime of corruption. It definitions it in broad terms that cover situations where a person offers or agrees to accept a ‘gratification’ (bribe) in return for granting certain favours. The gratification (bribe) may

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61 Space constraints do not allow for a thorough analysis of the entire legal and regulatory framework which, aside from the main legal instruments discussed in this report, include the following: the Constitution of the Republic of South Africa, 1996; the Competition Act, 1998; the Promotion of Access to Information Act, 2000; the Promotion of Administrative Justice Act, 2000; the Public Finance Management Act, 1999 and Regulations; the Public Audit Act, 2004; the Municipal Finance Management Act, 2003 and Regulations; the Public Service Act, 1994; the Executive Members Ethics’ Act and Code; and the Witness Protection Act, 1998.


63 Act 121 of 1998.

64 Act 26 of 2000.

include money, gifts, promotion, prevention of a loss, paying off a loan and various other favours.66 In addition to the general offence of corruption, the Act provides for specific offences and these include corrupt activities relating to the following persons: public officers, foreign public officials, agents, members of legislative authorities, judicial officers, and members of prosecuting authorities.67 It further provides for offences in respect of corrupt activities relating to witnesses and evidential material during certain proceedings, contracts, tenders, auctions, sporting events, and gambling or games of chance.68 The Act further sets out the procedures for reporting and investigating acts of corruption.

Importantly, the Act imposes a legal duty on all persons in positions of authority, including corporate actors such as managers, secretaries, and directors to report corrupt transactions. It is interesting to note that the relevant section provides that a person who ‘knows or ought reasonably to have known or suspected that any other person has committed’ acts listed in the Act has a duty to disclose such information to the law enforcement agencies. Therefore, a person may be found guilty of the offence of non-disclosure based on either intention or negligence.69 A study on disclosure practices of South African companies with respect to their anti-corruption programmes found that most of the listed companies disclosed their programmes on anti-corruption while unlisted companies were not so forthcoming.70

In terms of the Act, a South African court will have extra-territorial jurisdiction over acts committed outside the country even if the alleged acts do not constitute an offence in their place of commission provided the person to be charged is a citizen of South Africa; is ordinarily resident in the country or is a corporation incorporated in South Africa.71

66 Section 3 of the Prevention and Combatting of Corrupt Activities Act (2004).
67 See generally Part 2 of the Act.
68 See generally Part 4 of the Act.
69 Section 34 of the Prevention and Combatting of Corrupt Activities Act (2004).
Penalties under the Act are hefty. A person convicted of an offence may be sentenced to a fine and/or a period of imprisonment of up to 18 years. The Act also provides for a tender register for recording blacklisted companies and individuals convicted of acts of corruption. Consequences of endorsement in the register are dire; contracts with the state may be terminated and the individuals and companies concerned will be unable to do business with the state for a period of up to 10 years.

As at the writing of this report, a Bill amending PRECCA is pending. It provides for passive corruption by foreign public officials; introduces the definition of ‘facilitation payment’; extends the notion of unacceptable conduct relating to ordinary witnesses to include whistleblowers and members of the accounting profession; and increases the monetary sanctions provided for in the Act.

2.2 Anti-corruption agencies

The Directorate for Priority Crime Investigation

The Directorate for Priority Crime Investigation (also known as the Hawks) is an independent directorate within the South African Police Service. The Hawks is the primary anti-corruption agency in South Africa. It is responsible for the combating, investigation and prevention of national priority crimes such as serious organised crime, serious commercial crime and serious corruption. In terms of the law, any acts of corruption are reportable to the Hawks.

Special Investigating Unit

The Special Investigating Unit (SIU) was established in terms of the Special Investigating Units and Special Tribunal Act. It has a dual mandate of investigating and litigating against any individual or entity to recover and prevent financial losses to the state caused by acts of corruption, fraud and maladministration. It has the power to subpoena, search, seize and

72 See generally Chapter 5.
73 Prevention and Combatting of Corrupt Activities Act (Amendment Bill) (B) (PRECCA17).
74 Established in terms of Section 17C of the South African Police Service Act, 1995 (as amended)
75 Section 34(1) of the Prevention and Combatting of Corrupt Activities Act 12 of 2004 read with The South African Police Service Amendment Act 10 of 2012.
76 Act No 74 of 1996.
interrogate witnesses under oath. It operates closely with other sister anti-corruption agencies such as the Hawks in the South African Police Service (SAPS), the National Prosecuting Authority (NPA) and the Asset Forfeiture Unit (AFU) in the NPA.

**South African Revenue Services**

The primary mandate of the South African Revenue Services (SARS) is tax collection. However, the law prohibits tax deductions from income derived from corruption or a corrupt activity as contemplated in Chapter 2 of the Prevention and Combating of Corrupt Activities Act.\(^77\) The prohibition not to deduct tax from proceeds of crime necessarily renders SARS an anti-corruption agency.\(^78\) To avoid deducting taxes from proceeds of crime, it must conduct investigations particularly where there is suspicion of corruption and money laundering. In order to effectively enforce the tax and customs laws, it has to work with and support other anti-corruption agencies in the fight against corruption and money laundering.\(^79\)

**National Prosecuting Authority**

The National Prosecuting Authority (NPA) is a creature of the Constitution.\(^80\) It’s made entails instituting and conducting criminal proceedings on behalf of the State and to carry out any

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\(^77\) See section 23(a) (i) of the Income Tax Act 58 of 1962 and SARS Interpretation Note 54 (Issue 2).

\(^78\) SARS detects possible cases of foreign bribery through tax audits and investigations. Since 1 January 2006, the Income Tax Act 1962 has been amended to provide for the express non-deductibility of bribe payments. No conviction is required to deny a tax deduction for a bribe to a foreign public official; as reference is made in the provision only to disallowing a deduction in relation to specific activities, including the payment of bribes. The provision is not aimed at a criminal conviction for bribery but simply the disallowance of expenditure related to such activities. However, because of the general rule applicable under South African law that “he who alleges must prove”, the onus of proving that a payment constitutes a PCCA offence and is therefore not deductible will be on the State. With regard to cooperation and communication between the tax administration and law enforcement authorities, the South African tax laws contain general provisions on the preservation of secrecy, which precludes the South African Revenue Service from disclosing information on the affairs of taxpayers to other persons. However, specific exceptions exist for disclosing information to the SAPS or the NDPP on condition that a judge issues an order allowing the South African Revenue Service to disclose certain information. Furthermore, specific acts also provide for the possibility to override statutory secrecy imposed on the South African Revenue Service, without the necessity of a court order. Notably, section 71 of the POCA provides for this possibility.

\(^79\) There is an open channel of communication between the NPA and SARS through membership in the ACTT and conviction data is shared in that forum. As regards exchange of information with tax authorities at the international level, the South African Revenue Service may only exchange information with a foreign tax authority if there is an exchange of information article in the tax treaty with the foreign country. South Africa party to the following bilateral tax treaties.

\(^80\) Section 179 of the Constitution of South Africa, 1996.
necessary functions incidental to instituting and conducting such criminal proceedings. Alive to the negative effects of corruption on the national economy, the NPA prioritised the prosecution of corruption. It has established specialised commercial crimes unit with specialised and dedicated commercial crime prosecutors.

**Office of the Public Protector**

The Office of the Public Protector has a mandate of supporting and strengthening constitutional democracy in South Africa by, inter alia, investigating, reporting on and remedying improper conduct in all state affairs. In the discharge of its mandate, the Office of the Public Protector has pronounced on corrupt activities of both public and private sector entities. It recently issued reports exposing large-scale corruption perpetrated by, amongst others, major corporations during apartheid and post-apartheid. Both reports have, however, been challenged in the courts of law.

**National Anti-Corruption Forum**

The National Anti-Corruption Forum (NACF) is not a government agency. Rather, it is a tripartite corruption fighting platform comprising civil society, business and government. It was established to combat and prevent corruption, build integrity and raise awareness around the negative effects of corruption. It advises government on strategies to combat corruption; sharing of information and best practice on sectoral anti-corruption work; and advises different business sectors on the improvement of sectoral anti-corruption strategies. Different businesses are represented in the NACF by their industry bodies such as the Consumer Goods Council of SA (CGCSA); National Association of Automobile Manufacturers of SA (NAAMSA); South African Banking Risk Information Centre (SABRIC); South African Fraud Prevention Service (SAFPS); South African Insurance Association (SAIA); Life Offices’ Association of SA

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82 See *South African Reserve Bank v Public Protector and Others* 2017 (6) SA 198 (GP) (15 August 2017) where the report on apartheid grand corruption was challenged. A court decision on the ‘state of capture’ report is currently pending.
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(LOA); Chamber of Mines (COM); Security Industry Alliance (SIA); Johannesburg Securities
Exchange (JSE); South African Post Office; and the Retail Motor Industry (RMI).

2.3 The Prevention of Organised Crime Act (1998)

The Prevention of Organised Crime Act (POCA) is primarily aimed at money-laundering and
racketeering or illegal business activities. The Act provides that the offence of racketeering
occurs where one possesses property which they knew or ought to have reasonably known to
have been linked to any illegal business activity. The offence of money-laundering is
committed where a person knew or ought to have reasonably known that they acquired any
property or derived proceeds from an unlawful activity. Thus, culpability can be based on either
intention or negligence.

Importantly, the Act provides for the forfeiture of assets obtained through criminal activities. The
forfeited assets are then used to compensate crime victims or are forfeited to the state. The
Act also imposes hefty fines and/or imprisonment if a person is successfully convicted. These
range from a fine not exceeding R100 million or imprisonment for a period not exceeding 30
years.

POCA is implemented by the Asset Forfeiture Unit (AFU) whose motto is ‘Taking the profit
out of crime’. The AFU is established in the Office of the National Director of Public
Prosecutions to focus on the seizure of criminal assets. One of its strategic objectives is to
develop test cases in order to create legal precedents for future cases. It has recorded a number
of successes against major crime syndicates and corporations used in the perpetration of crime.

2.4 The Protected Disclosures Act (2000)

The Protected Disclosures Act, 26 of 2000 (PDA) protects both public and private sector
employees and workers by providing for procedures to be followed with the aim of disclosing

83 It is important to note the existence of The International Cooperation in Criminal Matters Act, 1996 which
provides for cooperation and mutual legal assistance between South Africa and other foreign countries in the
investigation and freezing of assets suspected to be the proceeds of crime.
84 This is in line with Chapters 5 and 6 of the Prevention of Organised Crime Act.
information in a responsible manner regarding any unlawful or irregular conduct committed on behalf of their employers or other co-employees. Employers are under a legal duty in terms of the PDA to authorise appropriate internal procedures for receiving and dealing with information about improprieties to ensure that employees are able to disclose in line with the PDA and the authorized company procedure.

To qualify for protection, the employee or workers must prove that s/he was (1) subjected to an occupational detriment and (2) the disclosure made was protected in accordance with the PDA. The forms of occupational detriment contemplated by the PDA are wide-ranging and include instances where the employee is subjected to any disciplinary action, or dismissal. The employee must prove that the disclosure, as defined by the PDA, was the reason for the detriment occurring. The PDA protects two types of disclosures: a protected disclosure and a general protected disclosure. A former disclosure may take the form of a disclosure to certain persons or bodies or it may take the form of a general protected disclosure. In this regard, a protected disclosure is a disclosure that must be made to a prescribed person or body, such as a legal adviser or a member of Cabinet.

Where it is not possible to disclose to these persons, a disclosure may be made to a person or body mentioned in section 8 of the PDA provided certain additional requirements are met. These are that: the disclosure was made in good faith; the employee held a reasonable belief that the impropriety fell within the description of matters which are dealt with by that body;

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85 Section 1 of the PDA defines the term ‘employee’ as follows: “(a) any person, excluding an independent contractor, who works or worked for another person or for the State and who receives or received, or is entitled to receive, any remuneration; and (b) any other person who in any manner assists or assisted in carrying on or conducting or conducted the business of an employer”. A “worker” is defined to mean: (a) any person who works or worked for another person or for the State; or (b) any other person who in any manner assists or assisted in carrying on or conducting or conducted the business of an employer or client, as an independent contractor, consultant, agent; or (c) any person who renders services to a client while being employed by a temporary employment service”.

86 S 1 of PDA defines the term ‘occupational detriment’.

87 Section 1 of the PDA defines the term ‘disclosure’.

88 Sections 5 - 7 of the PDA.

89 Namely, the Public Protector; the South African Human Rights Commission; the Commission for Gender Equality; (aC) the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities; (aD) the Public Service Commission; (b) the Auditor-General; or (c) a person or body prescribed for purposes of s 8 of the PDA, as amended.
and the employee held a reasonable belief that the information disclosed was substantially true. The disclosure will be protected where these requirements are satisfied. Stringent requirements apply to general protected disclosures; where the disclosure is made to outside parties such as the media.

Any competent court may be approached by the whistleblower for appropriate relief, including the Labour Court of South Africa where a number of legal remedies may be awarded. Relief may be sought both in terms of the PDA and in terms of section 186(2)(d) of the Labour Relations Act, 66 of 1995 (LRA). The latter provision gives effect to the PDA by providing for compensation and protection from victimisation for employees who disclose information regarding any unlawful or irregular conduct by their employers or fellow employees. Specific remedies are made available in terms of both the PDA and the LRA. The 2017 amendments to the PDA extends legal protection to persons employed by temporary employment services (TES) by imposing joint and several liability on both the employer and the client if this employee is subjected to an occupational detriment by the employer, under the express or implied authority or with the knowledge of the client.

Furthermore, the PDA empowers courts to grant immunity from civil, criminal or disciplinary proceedings if by disclosing the employee or worker contravenes any other law, oath, contract, practice or agreement requiring him to maintain confidentiality or otherwise restricting the disclosure of information with respect to a particular matter. An employee or worker who has, however, participated in the disclosed impropriety is excluded from this protection and is not granted immunity from civil or criminal liability. In addition, an employee or worker may be convicted of a criminal offence if either party intentionally discloses false information knowing

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90 Section 8 of the PDA.
91 STATE INFORMATION TECHNOLOGY AGENCY (PTY) LTD V SEKGOBELA (2012) 33 ILJ 2374 (LAC) at para 28.
92 See section 9 of the PDA.
93 See s 4 of the PDA.
94 Section 4 of the PDA; ss 193 and 158 of the LRA.
95 Protected Disclosures Amendment Act, 5 of 2017 (PDAA).
96 Section 9A (1) of the PDA.
97 Section 9A (2) of the PDA.
the information to be false, or ought to reasonably have known that this is the case; possessed the intention to cause harm to the affected party; and this harm was realised as a result of such disclosure being made.  

2.5 The Financial Intelligence Centre Act (2001)

The FICA introduces mechanisms and measures aimed at scrutinizing and reporting individuals and transactions related to money-laundering activities by encouraging compliance and self-regulation by designated institutions susceptible to exploitation. To ensure that the objectives of the FICA are met, the Act establishes the Financial Intelligence Centre (FIC), a legal person accountable to the Minister of Finance. The FIC acts as a watchdog with its main objectives being to assist accountable and reporting institutions to identify the proceeds of unlawful activities; to combat money laundering activities and the financing of terrorist and related activities; and to assist in the implementation of financial sanctions pursuant to resolutions adopted by the UN Security Council under Chapter VII of the Charter of the UN.

The FICA’s three primary control measures aimed at facilitating the detection and investigation of financial crimes are implemented by way of introduction of a number of legal duties imposed on accountable (legal practitioner, mutual banks and estate agents) and reporting (business owners dealing in motor vehicles or Kruger rands) institutions that may be used for money laundering purposes and the financing of terrorist and related activities to report suspicious transactions.

The first of these measures includes the requirement to “Know Your Client” (KYC). The Act requires institutions to establish and verify the identity of all clients in accordance with both the requirements of the FICA and the institution’s own risk and compliance framework prior to establishing a business relationship or concluding a transaction. Institutions are required to

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98 In terms of s 9B of the PDA, the employee or worker concerned is guilty of an offence and is liable on conviction to a fine and/or to imprisonment for a period not exceeding two years. The Director of Public Prosecutions has the authority to decide whether a prosecution should be instituted or not.

99 For the list of accountable institutions, see Schedule 1 of the FICA.

100 For the list of reporting institutions, see Schedule 3 of the FICA.
recognise transactions that are inconsistent with the client’s profile by adopting customer due
diligence measures including with respect to beneficial ownership and persons in prominent
positions; and must introduce a risk-based approach to client identification and verification. These institutions are allowed to create their own risk and compliance framework and to apply
different levels of oversight depending on the client they are dealing with. Low-risk clients, who receive smaller amounts and make regular payments, will likely face a lighter compliance burden, whereas, high-risk clients will experience enhanced oversight. More importantly, the FICA expressly prohibits the establishment of a business relationship or the conclusion of a single transaction with an anonymous client or one using an apparent false or fictitious name.

The 2017 amendments to the FICA have broadened its scope of application through the inclusion of the term ‘beneficial owner’, defined as a natural person who, independently or together with another person, directly or indirectly owns the legal person; or exercises effective control of the legal person, thereby including people associated with legal persons. The legal definition of a ‘client’ has also been broadened to include, in relation to an accountable institution, a person who has entered into a business relationship or a single transaction with an accountable institution. Significantly, the FICA earmarks for heightened scrutiny a range of high risk clients such as foreign prominent public officials (a foreign Head of State, member of a foreign royal family, or senior judicial official); domestic prominent influential persons (the President, Deputy President, or a government minister); and their family members and close known associates. In this regard, employees are required to obtain senior management
approval to engage these individuals in any business relationship; must take ‘reasonable measures’ to establish the source of wealth and the source of funds of the client and conduct enhanced ongoing monitoring of the relationship.

101 For example, in Annex Distribution (Pty) Ltd and Others v Bank of Baroda (52590/2017) [2017] ZAGPPHC 608 (21 September 2017), the High Court examined the Bank’s compliance with the applicable FICA provisions dealing with high risk clients.
102 For a full list of ‘foreign prominent public officials’, see Schedule 3B of the FICA.
103 For a full list of ‘domestic prominent influential persons’, see Schedule 3A of the FICA.
104 Sections 21F, G and H of the FICA.
In terms of the second control measure, institutions and bodies have the duty to keep records of customer due diligence reports and transaction records. Reporting obligations are imposed on institutions and certain persons as the third control measure, in respect of, but not limited to, any cash transaction above a prescribed limit, property associated with terrorist of related activities, suspicious and unusual transactions. The FIC is empowered to direct the institution not to proceed with a transaction where there is suspicion that it is linked to a financial crime. The Act, moreover, imposes a duty to provide access to records to authorised representative on the authority of a warrant in respect of reports required by the FIC. The reports produced by these institutions and persons are collated by the Financial intelligence Centre (FIC) and subsequently sent to appropriate bodies for further investigation and action.

To further promote compliance by accountable institutions, the FICA introduces control measures in the form of Risk Management and Compliance Programmes, and imposes specific duties on the board of directors (alternatively, the senior management) to ensure compliance with the provisions of the FICA and the aforementioned Programme. A compliance officer must be appointed to assist the board in this regard. The duty to ensure compliance extends to include the most senior authority of an accountable institution that is not a legal person (excluding accountable institutions comprised of a sole practitioner). This institution is, furthermore, required to meet the FICA’s requirement of appointing a compliance officer. Moreover, an accountable institution must provide ongoing training to its employees to enable them to comply with the provisions of the Act and the Risk Management and Compliance Programme which are applicable to them. Directives issued by the FIC or a designated supervisory body must be complied with; and any costs incurred in complying must be borne by the accountable institution, reporting institution or person concerned.

The FICA establishes various enforcement mechanisms where there has been a failure to comply with these obligations. Firstly, the FIC may refer a matter of non-compliance to an  

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105 The terms ‘non-compliance’ is defined to mean “any act or omission that constitutes a failure to comply with a provision of this Act or any order, determination or directive made in terms of this Act and which does not constitute an offence in terms of this Act, and ‘fails to comply’, ‘failure to comply’, ‘non-compliant’ and ‘not complying’ have a corresponding meaning”, see section 1 of the FICA.
investigating authority for further determination. In the event that this matter is not satisfactorily dealt with, the FIC is empowered to take steps to ensure that the suspected contravention ceases or the suspected failure is rectified. Primary responsibility for supervising and enforcing compliance by accountable institutions is, however, delegated to designated supervisory bodies. A written report produced by the supervising body concerning any action taken against any accountable institution must be submitted to the FICA. The FIC may intervene in respect of any accountable institution by instituting proceedings only if a supervisory body failed to institute proceedings despite any recommendation of the FIC or failed to institute proceedings timeously.

The FICA, moreover, empowers the FIC Director or the head of a supervisory body to appoint an inspector with the authority take certain measures to determine compliance with its provisions, including the a qualified right of entry and inspection of premises.

A failure to comply with the FICA may amount to a specific offence and may attract either an administrative or criminal sanction. The offences listed under the Act are numerous and include the following: the failure to identify persons; failure to comply with duty in regard to customer due diligence; failure to keep records; destroying or tampering with records; failure to report property associated with terrorist and related activities; and failure to report suspicious transactions.

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106 Section 44 of the FICA; According to section 1 of the FICA, an ‘investigating authority’ means an authority that in terms of national legislation may investigate unlawful activities.
107 The designated supervisory bodies may require an accountable institution supervised or regulated by it to submit a report concerning compliance with the Act; it may issue or amend any licence, registration, approval or authorisation and determine whether a person is fit and proper to hold office in an accountable institution.
108 Section 45(3) of the FICA.
109 An authorised inspector is empowered to enter the premises, excluding a private residence, of an accountable institution or reporting institution to inspect their affairs. Entry into and inspection of a private residence; or an unlicensed business premises may be undertaken on the authority of a warrant if the FIC or a supervisory body reasonably believes that the residence or premises are used for a business to which the provisions of the FICA apply.
110 According to sections 45C and 68 of the FICA. Any of the following administrative sanctions may be imposed: a caution not to repeat the conduct which led to the non-compliance referred to in subsection (1); a reprimand; a directive to take remedial action or to make specific arrangements: the restriction or suspension of certain specified business activities; or a financial penalty not exceeding R10 million in respect of natural persons and R50 million in respect of any legal person.
or unusual transactions; and a failure to report cast transactions. The FICA, moreover, permits the search, seizure and forfeiture of cash or a bearer negotiable instrument in excess of the prescribed amount by the FICA where there has been a failure to report the particulars of the conveyance to and from South Africa.

2.6 The Companies Act (2008)

State owned companies, listed public companies and companies that meet prescribed thresholds with respect to turnover, third party liabilities, number of employees and number of shareholders must establish a Social and Ethics Committee in terms of section 72(4) of the Companies Act, 2008 read with Regulation 43. The Committee must comprise a minimum of three directors or prescribed officers of the company, one of whom must be a non-executive. The function of the Social and Ethics Committee is to monitor the company’s activities in a

111 The FICA creates a special defence if a person who is an employee, director or trustee of, or a partner in, an accountable institution is charged provided it can be proven that s/he had complied with the applicable obligations in terms of the Risk Management and Compliance Programme relating to the reporting of information of the accountable institution; or reported the matter to the person charged with the responsibility of ensuring compliance by the accountable institution with its duties under this Act; or reported the matter to his or her superior, if any, if the accountable institution had not appointed such a person or established such Risk Management and Compliance Programme; the accountable institution had not complied with its obligations in section 42(3) in respect of that person; or the Risk Management and Compliance Programme was not applicable to that person.

112 Further offences include the following: Failure to give assistance; Failure to advise Centre of client; Unauthorised disclosure; Failure to report conveyance of cash or bearer negotiable instrument into or out of Republic; Failure to send report to Centre; Failure to report electronic transfers; Failure to comply with request; Failure to comply with direction of Centre; Failure to comply with monitoring order; Misuse of information; Failure to comply with duty in respect of Risk Management and Compliance Programme; Failure to register with Centre; Failure to comply with duty in regard to governance; Failure to provide training; Offences relating to inspection; Hindering or obstructing appeal board; Failure to attend when summoned; Failure to answer fully or truthfully; Failure to comply with directives of Centre or supervisory body; Obstructing of official in performance of functions; Conducting transactions to avoid reporting duties; Unauthorised access to computer system or application or data; and Unauthorised modification of contents of computer system.

113 Section 70 of the FICA.

114 The relevant thresholds are determined by the Minister of Trade and Industry from time to time by way of regulations. This means that the criteria can be readily amended to cater for a changing commercial environment. Currently (in addition to state owned companies and listed public companies) and company which has in any two of the previous five years scored above 500 points in terms of regulation 26(2) is obliged to appoint a Social and Ethics Committee. Regulation 26(2) determines that every company must calculate its ‘public interest score’ at the end of each financial year. The public interest score is calculated by totalling points allocated for the average number of employees of the company during the financial year, the third party liability of the company at the financial year end, the turnover of the company during the financial year and the number of persons who hold or have an interest in the securities of the company. All companies with a public interest score above 500 points must appoint a Social and Ethics Committee. Since these items and the points to be allocated in respect of each are also contained in a regulation, they are flexible and can be readily amended by the Minister as required.

115 Regulation 43(4).
range of areas including the prevention of corruption. To this end the Social and Ethics Committee is required to monitor the social and economic development of the company including the company’s standing in terms of the goals and purposes of the 10 principles set out in the United Nations Global Compact Principles (Principle 10 states that businesses should work against corruption in all its forms, including extortion and bribery) as well as the OECD recommendations regarding corruption. The Social and Ethics Committee must draw matters within its mandate to the attention of the board of directors as occasion requires and must also report on such matters to the shareholders at the company’s annual general meeting. One of the weaknesses of this is that the Act does not require the board of directors of the company to act upon the report of the Social and Ethics Committee. Since the Social and Ethics Committee must report to the annual general meeting (‘AGM’) of the company it would fall to the shareholders of the company who attend the AGM and other stakeholders to monitor and the findings of the Social and Ethics Committee and insist that the company complies where it falls short of the required standards. However, the culture of shareholder activism in South Africa is not well established and shareholders (especially shareholders of listed entities) are notoriously apathetic with respect to such matters as long as they are satisfied with the financial performance of the company. As will appear from the introductory paragraph of this report, state owned enterprises are also not renowned for taking decisive action in cases of corruption or bribery and there are numerous examples of recent scandals which have been reported in the media without visible consequences for the enterprise or other parties. Therefore, although the incorporation of the Social and Ethics Committee in the statute is a potentially powerful weapon in the fight against corruption and bribery it will be largely ineffectual if the necessary shareholder activism or political will to utilise the mechanism is not present.

It is notable that King IV (discussed below) recommends that even companies which are not obliged to establish a Social and Ethics Committee should consider doing so as a matter of good corporate governance.117

116 Regulation 43 (5) (b) and (c).
117 Recommended practice 8.62.
2.7 The King IV Report on Corporate Governance (2016)

King IV is a Corporate Governance Code which applies to all South African organisations, irrespective of their form of incorporation.\(^{118}\) It became effective on 1 April 2017. Compliance with the Code is voluntary, but companies listed on the JSE Securities Exchange are required to comply with certain selected principles in order to maintain their listing in good standing.\(^{119}\) The application regime for King IV is ‘apply and explain’. This means organisations must explain and disclose to shareholders (usually in the annual report) which recommended practices have been implemented by the organisation and how these achieve or give effect to the 17 King IV principles referred to below. Company directors of all companies would be well advised to, where applicable, have regard to the principles of King IV in the fulfilment of their duties under the Companies Act failing which they can incur civil liability under sections 76 and 77 of the Companies Act or criminal liability under the Criminal Procedure Act of 1997.

As alluded to above, King IV establishes 17 governance principles which serve as a guide to organisations on what they should set out to achieve. These principles are intended to complement existing laws and regulations. King IV also contains a series of recommended practices which serve as guidelines on how to achieve each governance principle. The aim of King IV is that, provided the principles and practices are effectively applied, they result in the following outcomes for the organisation: an ethical culture, good performance, effective control and legitimacy. For the purposes of this report the ethical culture and legitimacy outcomes are the most relevant.

King IV establishes principles and makes recommendations in relation to both ethical leadership and ethical governance\(^ {120}\) and provides that the governing body of an organisation should ensure that it is, and is seen to be, a responsible corporate citizen.\(^ {121}\) It is a recommended practice that the governing body attends to this responsibility by overseeing and

\(^{118}\) See Wiese T. Corporate Governance in South Africa with International Comparisons (2\(^{nd}\) ed. 2017).
\(^{119}\) The NPA and South African Courts are responsible for compliance with any relevant provisions of the Companies Act. The JSE Securities Exchange is responsible for compliance of listed entities with relevant provisions of King IV.
\(^{120}\) Recommended practices 2.4-10.
\(^{121}\) King IV at 25 and Recommended practice 1.1.
monitoring, on an ongoing basis, how the consequences of the organisation’s activities and outputs affect its status as a responsible corporate citizen. The oversight and monitoring should be performed against measures and targets agreed with management in a number of areas including the organisation’s prevention, detection and response to fraud and corruption.

The international codes and conventions which are regarded as providing guidelines to companies regarding their ethical obligations include the United Nations Global Compact; International Corporate Governance Network Global Governance Principles; OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions; OECD Guidelines for Multinational Enterprises; and United Nations Convention against Corruption.

It is generally accepted that King IV is in line with internationally accepted corporate governance standards and practices. Furthermore, the ethical compliance structure is underscored by the various international instruments referred to above from which South African companies and board of directors must take their lead when interpreting the ethical obligations of the company which go far beyond mere compliance with the criminal laws of the country. However, compliance must not be reduced to a ‘box-ticking exercise’ in which formal rather than substantive compliance with these obligations is tolerated by stakeholders and the JSE. In order to give effect to the provisions of King IV public statements and

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122 The 10 UN Global Compact principles establish a set of core values which includes an anti-corruption stance. Companies are expected to incorporate the core values into their strategies and procedures in order to establish an ethical corporate culture. Note that this instrument is also referred to specifically in the context of the functions to be performed by the Social and Ethics Committee as discussed above.

123 In terms of Principle 4.2 the board of directors of a company should ensure that the management has established stringent policies and procedures to mitigate the risk of bribery and corruption and should avoid company involvement in any such behaviour. Principle 4.3 requires the company to establish a whistle-blower mechanism.

124 This is analysed in detail in the final part of this report. From the perspective of a director of an errant company it is noteworthy that the Convention allows transnational companies to be prosecuted for corruption in their country of incorporation and abroad and also permits the extradition of company officials involved in corruption and for the recovery of assets by countries.

125 The OECD Guidelines (at 14) recommend that multinational companies (in addition to complying with the laws of each host country) should develop ethical guidelines and abstain from bribery and encourage whistleblowing.

126 The Convention was ratified and adopted by South Africa in 2004. It requires signatories to establish criminal offences to address corruption and to co-operate with other countries which are parties to the Convention in the fight against corruption.
compliance claims made by companies should be thoroughly interrogated by activist stakeholders and the relevant regulators, and any instances of non-compliance or transgressions must be addressed and decisively dealt with. Unfortunately, there is not much evidence to support the conclusion that this is currently the situation – annual reports follow an almost formulaic format which is rarely questions and corruption and bribery allegations and scandals reported in the public domain appear to attract no repercussions. An important and heartening exception here is the KPMG/Gupta Family auditing scandal which has reportedly had serious commercial consequences for the firm as clients distanced themselves from the unethical behaviour by terminating their services. The Regulatory Board of Auditors has also acted swiftly and decisively in commencing with its investigation.127

2.8 Johannesburg Stock Exchange Listing Requirements
The JSE Securities Exchange is responsible for compliance of listed entities with relevant provisions of King IV and the Companies Act. The amended listing requirements make it mandatory for listed companies to apply all the King Code *principles* and only the King Code *practices* that are made mandatory by the JSE. This means that listed companies, unlike unlisted ones, do not have the choice to apply only some of the King Code principles and explain the ones they have not applied. Although the amended listing requirements do not require listed companies to apply all King Code recommended practices, there are, however, some practices that the listing requirements specifically require listed companies to apply. They include the appointment of a company secretary, audit committee, a social and ethics committee, and a remuneration committee. Incidentally, these are already mandatory under the Companies Act. It is noteworthy that any listed company that fails to comply with the listing requirements may be de-listed by the JSE. This is a deterrent that ensures that listed companies comply with governance and legal requirements and uphold the highest standards of transparency.

3. Key challenges confronting anti-corruption agencies

There are several key challenges facing anti-corruption agencies. The first challenge relates to overlapping mandates. Some agencies like the Special Investigating Unit (SIU) have very broad mandates that overlap with other agencies’ mandates such as that of the Asset Forfeiture Unit (AFU). For instance, in terms of different laws, recovery of public funds and assets can be executed by either the AFU or the SIU. Although different agencies see their mandates in combating corruption as unique, in practice these mandates overlap. This leads to the second challenge of coordination or lack thereof. Since all the agencies have a stake in the fight against corruption, they need to better coordinate their efforts in order to achieve maximum efficiency and effectiveness. To achieve better coordination, an Anti-Corruption Task Team has been established to provide a more ‘structured, consolidated and coordinated governmental and societal approach to fight corruption.’128 In practice, however, various anti-corruption agencies still operate in a territorial manner. The third challenge relates to structural uncertainties and lack of independence. Some agencies have been disbanded and new ones created while others have been structurally reorganised.129 There is, however, a sense in some sections of society that the motivations for these structural changes are not to achieve maximum operational efficiency but rather to weaken those agencies that have their sights on politicians and other politically connected individuals and corporations. The other challenge facing many agencies is the inadequacy of both human and financial resources which hampers their efforts to effectively fight corruption. Finally, there is a negative public perception around the resolve of some agencies to diligently fight corruption particularly those that are seen to be shielding politicians and politically connected individuals and corporations. These negative perceptions give rise to legitimacy crisis.

129 Helen Suzman Foundation v President of the Republic of South Africa and Others; Glenister v President of the Republic of South Africa and Others 2015 (2) SA 1 (CC) (27 November 2014). In this case, the constitutionality of the legislative scheme that created the Directorate for Priority Crime Investigation (DPCI), otherwise known as the ‘Hawks’ was tested and the Constitutional Court held that the legislative scheme, as it was, compromised the independence of the institution.
4. COMPARATIVE ANALYSIS WITH OECD CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS

The South African legal framework is in many respects aligned with many regional and international instruments. For example, the Southern African Development Community Protocol against Corruption, the United Nations Convention against Corruption, and the African Union Convention on Preventing and Combatting Corruption. South Africa has also enacted the Protection of Constitutional Democracy against Terrorism and Related Activities Act. This Act creates ‘convention offences’ as defined in various international instruments to which South Africa is party and serves to align the South African legal framework with international conventions. South Africa is one of the eight non-OECD countries that have ratified the OECD Anti-Bribery Convention. The table below presents a comparison of South African law with the OECD Convention. It highlights areas where the domestic law is aligned with the Convention as well as areas where it falls short.

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130 Ratified by South Africa in 2003.
131 Ratified by South Africa in 2005.
132 Ratified by South Africa in 2005.
133 Act 33 of 2004.
134 Ratified by South Africa in 2007.
135 The table was adapted from three monitoring reports generated by the OECD Working Group on Bribery. For more on these reports, see http://www.oecd.org/southafrica/southafrica-oecdanti-briberyconvention.htm (last visited Nov. 30, 2017).
### MEASURES AND PROVISIONS OF THE SOUTH AFRICAN LAW

<table>
<thead>
<tr>
<th>OECD CONVENTION</th>
<th>Offence of Bribery of Foreign Public Officials</th>
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<tbody>
<tr>
<td>ARTICLE 1:</td>
<td>OECD Offence expressly included in key national policy documents (including, the National Development Plan, 2014-2019 Medium Term Strategic Framework; and National Security Strategy) and laws (For example, section 5 of PRECCA).</td>
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<td></td>
<td>Various structures established to coordinate and manage detection and prosecution of serious corruption offences, e.g. Anti-Corruption Ministerial Committee (ACIMC). At an operational level, <strong>Anti-Corruption Task Team (ACTT)</strong> established as central body implementing government strategy – various government department, investigative and prosecutorial agencies involved.</td>
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<td>The ACTT focuses not only on the bribery of foreign government officials to secure or retain international business, but also on all cases on the matrix for other states where South Africa has been implicated as being the recipient of the bribes.</td>
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<td>Specific reference to OECD recommendations regarding corruption in Companies Act, 2008: Social and Ethics Committees of must monitor activities of company and standing of company with respect to these goals and purposes and report at Annual General Meetings.</td>
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<td></td>
<td>All official development assistance agreements (incoming ODA) processed and signed since 2006 have an anti-corruption/anti-bribery clause included in line with section 5 of PRECCA. Where South African procurement procedures are followed, the Public Finance Management Act is adhered to and where the donor procurement is followed, the rules are also clear on anti-corruption/anti-bribery. All ODA contracts are to have a clause regarding anti-corruption and bribery which</td>
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should also state that should such a practice be uncovered, it is to be reported to the relevant authorities through the appropriate channels. The OECD published list of companies that have been convicted of foreign bribery are consulted as part of the due diligence process before any contract is awarded.

- OECD offence may be primarily detected through a variety of sources, for example, ordinary reporting by member of public to SAPS; anonymous reporting via whistleblowing mechanisms; section 34 of the PRECCA reports filed by public and private enterprises; reporting by public and private auditors during course of auditing of public and private enterprises; and credible media reports
- **Threshold for initiating an investigation** on the basis of an allegation is a **reasonable suspicion** which may exist in an inadmissible format, because the purpose of the investigation is to convert suspicion into proof beyond reasonable doubt. The dedicated ACTT investigators take investigative steps under the direction of the dedicated prosecutor utilising all the available investigative tools

| ARTICLE 2: Responsibility of Legal Persons | South African law applies to **natural and legal persons**
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<tr>
<td></td>
<td><strong>State-owned and state controlled enterprises</strong> can be held liable for statutory offences</td>
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<td>South African law: Criminal liability of legal person depends on <strong>culpable act by representative of legal person</strong></td>
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<td><strong>Section 332 of the Criminal Procedure Act</strong> provides for the prosecution of corporations and members of associations.</td>
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<td>To prosecute the corporate body, it must be proved that a director or servant has committed an offence.</td>
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<td></td>
<td><strong>Prosecution Policy Directives</strong> issued by NDPP – Part 42 deals with prosecution of corporations and members of associations – and binding on all prosecutors – must be observed in prosecution of corporate bodies for any offences</td>
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<td>ARTICLE 3: Sanctions</td>
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<td>▪ In terms of <strong>Companies Act</strong> possible liability for directors of non-compliant companies depending on facts. Successful prosecutions rare.</td>
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<td>▪ The <strong>Protected Disclosures Act</strong>, 2000 extends protection to whistle-blowers and establishes mechanisms for disclosure of corrupt activities.</td>
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<tr>
<td>▪ <strong>Financial Intelligence Centre Act</strong> – addresses, inter alia, foreign bribery offence with respect to legal persons.</td>
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<td>▪ Imprisonment sentence (can be imposed on natural persons for acts of bribery – see section 51 of Criminal Law Amendment Act 1997) and fines may be imposed for corruption offences</td>
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<td>▪ Chapter 2 of the Criminal Procedure Act 1977 provides for the application and granting of search warrants, seizure, forfeiture and disposal of property connected with any offence;</td>
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<td>▪ <strong>POCA:</strong></td>
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<td>▪ <strong>POCA</strong> provides for the freezing and confiscation of bribes and proceeds of foreign bribery;</td>
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<td>▪ Under <strong>Part 3 of Chapter 5 of the POCA</strong>, a High Court may, on application of the public prosecutor, impose a <strong>restraint order</strong> on property belonging to a defendant where the defendant is being prosecuted or is to be charged with an offence, and a confiscation order has been made or there are reasonable grounds to believe that a confiscation order may be made against the defendant.</td>
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In addition, in terms of section 38 of the POCA, the High Court may make a preservation order in respect of proceeds and instrumentalities of crime. This property can eventually be forfeited to the State if the Court finds, on the balance of probabilities, that the property concerned constitutes the proceeds of unlawful activities.

POCA also provides for the possibility of confiscating proceeds of crimes in the hands of third parties;

Section 14 of POCA provides for the confiscation of “any property held by the defendant concerned”, as well as “any property held by a person to whom that defendant has directly or indirectly made any affected gift.”

Test in forfeiture in both Chapters 5 & 6 of POCA is on the lower standard of proof, namely, a balance of probabilities – same test applied in respect of restraint and preservation orders.

Criminal Law (sentencing) Amendment Act, 2007 amends the POCA, and makes provision for discretionary minimum sentences for certain serious offences (including, bribery). Courts empowered to impose even harsh penalties which are sufficiently effective, proportionate and dissuasive in line with’ the Convention and 2009 Recommendation.

PRECCA:

Where foreign bribery offence also constitutes an offence under sections 12 and 13 of PRECCA (corrupt activities relating to contrail and tenders), additional sanctions may be applicable to natural and legal persons.

Fines prescribed by s 26(1) (a) of the PRECCA, were increased with effect from 1 February 2013; others are pending.136

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136 Section 5 of PRECCA Amendment Bill (2017) provides for the increase of max fines which may be imposed by lower courts and extending ambit of s 26(3) of PRECCA so as not to limit the fine to 5 times the value of the gratification involved.
Additional fines prescribed by s 26(3) of the PRECCA - courts empowered to impose fine equal to 5x value of gratification involved

The **principal and supplementary penalties** applicable under the PRECCA are the same for bribery of a domestic and foreign public official.

**Section 26 of PRECCA** sets out prescribed **penalties** applicable to legal persons;

30 January 2013, Min of Justice issued **Government notice** increasing maximum fines which may be imposed by lower courts;

Criminal Law Amendment Act 1997 permits foreign bribery cases to be systematically tried by the High court or Regional Magistrates Court acting with the same jurisdiction;

**NPA’s Prosecution Policy Directives** requires all OECD offences to be treated as potential High Court cases – placing the within penal jurisdiction of HC as opposed to lower courts;

In terms of **section 28 of PRECCA, court may order endorsement on a Register** – applies to any other future enterprise wholly or partially controlled by the convicted enterprise;

In terms of **Section 28(3) of PRECCA**, the Court may further order that endorsement in the Register be accompanied by termination of any ongoing agreement with the National Treasury

- **If the bribe cannot be seized** (for instance, in a foreign bribery case, where the bribe has left the country), and provided a monetary value can be attributed to the bribe, monetary sanctions of comparable effect may be available under **section 26(3) of the PRECCA** - can only be imposed if a conviction for a PRECCA offence is pronounced.
Despite measures taken, the investigation and prosecution of high profile public officials has proven problematic, as demonstrated by a number of court cases where the NPA’s decisions not to prosecute are challenged.

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<th>ARTICLE 4: Jurisdiction</th>
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<tr>
<td><strong>COMPANIES ACT</strong></td>
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<tr>
<td>In terms of <strong>Companies Act</strong> possible liability for directors of non-compliant companies depending on facts. Successful prosecutions rare.</td>
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<tr>
<td><strong>Section 35 of the PRECCA</strong> establishes extra-territorial jurisdiction, in respect of natural and legal persons</td>
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<tr>
<td><strong>PRECCA</strong> affords the South African courts jurisdiction over foreign bribery offences (as well as other domestic bribery offences).</td>
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<tr>
<td>South African companies or external companies subject to domestic jurisdiction must comply with <strong>Companies Act</strong></td>
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<th>ARTICLE 5: Enforcement</th>
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<td>Rules and principles regarding investigation and prosecution of a foreign bribery offence are essentially contained in (i) the PRECCA; (ii) the Criminal Procedure Act; and (iii) the National Prosecuting Authority Act 1998. The Special Investigating Units and Special Tribunals Act 1996 may also be relevant in certain circumstances. Directives for the prosecution are included in the Policy Directives for Prosecutors.137</td>
</tr>
<tr>
<td><strong>Investigation:</strong></td>
</tr>
<tr>
<td>SAPS responsible for police investigation into foreign bribery offence – reasonable suspicion required for initiation of investigation;</td>
</tr>
<tr>
<td>Responsible unit within SAPS: Detective Service Division</td>
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137 Despite measures taken, the investigation and prosecution of high profile public officials has proven problematic, as demonstrated by a number of court cases where the NPA’s decisions not to prosecute are challenged.
South African Police Service Amendment Act, No 68 of 1995 (SAPS Act) has a number of provisions, which require that all members of the DPCI perform their functions without fear, favour or prejudice.

- Specific provisions under the PCCA also provide for the possibility of opening of investigations by the National Director of Public Prosecutions (NDPP) regarding property relating to corrupt activities.
- The Special Investigating Units and Special Tribunals Act 1996 has set up a Special Investigating Unit (SIU), directly accountable to the President of the Republic of South Africa. The SIU is charged with the investigation of serious malpractices and maladministration in State institutions, State assets and public money, as well as any conduct which may seriously harm the interests of the public.
- Directorate for Priority Crime Investigation created within the SAPS, comprising of investigators of the Directorate of Special Operations and members of the SAPS”s Organised Crime and Commercial Crime Components - Directorate for Priority Crime Investigation has competence over the foreign bribery offence.

Prosecution:

- The National Prosecuting Authority of South Africa (the NPA), established under section 179 of the Constitution and further regulated under the National Prosecuting Authority Act 1998 (the NPA Act), is the centralised prosecuting authority. Its functions and duties are to institute and conduct criminal proceedings on behalf of the State, and carry out any necessary function incidental to instituting such criminal proceedings.
- NPA and SAPS subject to constitutional and legal guarantees requiring all officials involved with OECD offences to perform their duties without ‘fear, favour, or prejudice’;
Section 179(5)(d) of the Constitution enables the NDPP to review any decision to prosecute or not to prosecute after consultation with all the affected parties. Any person (the right to make representations is not limited to the complainant, but to any member of the public and any public interest body) aggrieved with a decision not to prosecute by the dedicated prosecutor, may have such decision reviewed by the NDPP. In the event of the NDPP confirming the decision not to prosecute, any member of the public (including public interest bodies) having the necessary interest in the matter, may have such decision reviewed by a High Court of South Africa.

NDPP adopted a Code of Conduct for Prosecutors (hereafter called the Code), which came into effect on 18 October 2010 and was subsequently published in Government Notice R1257 of 29 December 2010. This Code required that the decision to institute and stop criminal proceedings be exercised independently and free from political, public and judicial interference.

On 1 June 2014, the Prosecution Policy Directives, issued in terms of section 179(5)(b) of the Constitution, came into effect again requiring that prosecutors perform their functions without fear, favour or prejudice and prescribing that the foreign bribery offence must be a High Court case (Part 12, para 3.p). In terms of section 179(5) (c) of the Constitution, the NDPP may intervene in any process which is in breach of the policy directives.

Article 5 considerations:

- Investigations may only be suspended by the SAPS when there is no substantial evidence available to prove the offence, the final decision resting with the NPA. Article 5 considerations do not enter into play at this stage.

- With respect to prosecutions, South African prosecutors retain discretionary power to decide whether to initiate prosecution. Public interest an essential factor.
- **National Prosecution Policy**, issued in terms of section 179(5) (a) of the Constitution, was amended so as to **exclude economic considerations** from being considered in making decisions not to prosecute. The Minister for Justice and Correctional Services concurred to the amendment on 5 June 2013 and the amended policy was included in the 2013/2014 NPA Annual report to Parliament.

- **Complaints may be made to the Independent Police Investigative Directorate (IPID)**, which has been established to ensure independent oversight over SAPS and the Municipal Police Services (MPS), and to conduct independent and impartial investigations of identified criminal offences allegedly committed by members of the SAPS and the MPS, and make appropriate recommendations.

- **Besides legislative guarantees**, **governance arrangements within the ACTT support objective investigations and prosecutions**. The management of both the investigations and prosecutions of foreign bribery-related offences is conducted by a Senior Deputy Director of Public Prosecutions in the Office of the NDPP and reporting via a Deputy NDPP directly to the NDPP and a Colonel in the DPCI, reporting via the Head of the Anti-Corruption Component (Operational Commander).

- **The NDPP has in this regard invoked section 20(3) (b) of the NPA Act to exclude all foreign bribery-related matters from the jurisdiction of Directors and Special Directors**. The recommendations regarding the institution of investigations are submitted to the Operations Management Committee of the Anti-Corruption Task Team (ACTT).

- Conduct of each investigation is personally overseen by the **dedicated prosecutor** (NPA) and the **Operational Commander** (DPCI). The dedicated prosecutor is responsible for the decision whether or not to prosecute and the conduct of prosecutions. In this regard his functions fall under the direct supervision of the NDPP and a designated Deputy NDPP.
The Serious Commercial Crimes Unit (SCCU) operating under auspices of NDP, tasked with managing foreign bribery cases. Strengthening South Africa’s prosecutorial capacity to address foreign bribery cases, by increasing funding for foreign bribery prosecutions, the number of investigators and level of experience.

- **NPA’s Regional Asset Forfeiture Unit offices** have been established in all major centres to ensure that all the law enforcement requirements relating to the securing of restraint and forfeiture orders are met.
- **Forensic audits form part of the investigation component** and consequently the appointment of forensic accountants is the responsibility of the Directorate for Priority Crime Investigation.
- South African authorities make use of various legal and investigative tools to gather evidence, including, as appropriate, the issuing of subpoenas to natural and legal persons when investigating foreign bribery cases
- In terms of **Companies Act** possible liability for directors of non-compliant companies depending on facts. Successful prosecutions rare.

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<tr>
<th>ARTICLE 6: Statute of Limitations</th>
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<tr>
<td>- Section 18 of the Criminal Procedure Act provides that the right to institute a prosecution for any offence lapses after the expiration of a period of 20 years from the time when the offence was committed.</td>
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<th>ARTICLE 7: Money Laundering</th>
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<td>- Section 4 of POCA establishes offence of money laundering</td>
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<tr>
<td>- South African money laundering offence covers proceeds from all unlawful activities, therefore, applies in the same manner where the predicate offence is domestic bribery or foreign bribery.</td>
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Organised Crime Unit within office of National Director of Public Prosecutions responsible for prosecution of money laundering offences

Penalties for money laundering are a fine not exceeding ZAR 100 million, or imprisonment for a period not exceeding 30 years. Criminal liability for money laundering extends to natural as well as legal persons.

- The FICA sets out money laundering reporting obligations.
- Failure to comply with any of these reporting obligations carries a fine not exceeding ZAR 10 million or imprisonment for a period not exceeding 15 years.

ARTICLE 8: Accounting

- Detailed accounting provisions aimed at transparency and accountability in both Companies Act and King IV Report on Corporate Governance apply.
- Regulatory burden on companies has been reduced but for SOCs and public companies there are stricter requirements regarding accountability and transparency.
- The Companies Act encourages higher standards of corporate governance in that minimum accounting standards having been set for company annual reports, there are stricter provisions governing directors’ conduct and liability, and their common law duties and liabilities have now been codified.
- The Companies Act indicates that all companies now require either an audit of financial statements or an ‘independent review’ except for those very small owner managed companies where all the shareholders are directors and all the directors are shareholders of the company.
• Section 43 of the Companies Act, 2008, provides for the establishment of **ethics committee** and section 94 provides for the establishment of the **Audit Committee in private companies**.

• Private companies now have to determine whether they require an audit or an independent review and need to make appropriate arrangements accordingly. A private company may stipulate in its Memorandum of Incorporation (MOI) that it must be audited, or it may voluntarily submit itself to audit.

• Any private profit or non-profit company must be audited if, in the ordinary course of its primary activities, it holds assets in a fiduciary capacity for persons who are not related to the company, and the aggregate value of such assets held at any time during the financial year exceeds R5 million.

• Companies that fall outside the above audit requirement nevertheless have to have an annual independent review by an independent accounting professional. "Independent reviews" are to be done in accordance with the International Standard on Review Engagements (ISRE) 2400.

• The Regulations specify who may be independent accounting professionals and that an independent review may not be performed by anyone who is responsible for preparing the annual financial statements.

• Section 214 of the Companies Act, 2008, deals with the criminalisation of false statements, reckless conduct and noncompliance. A person will be found guilty if he/she falsifies an accounting record of a company; provides false and misleading information where the Act requires; and knowingly becomes part of the act or omission to defraud creditors, employees of the company and holders of the securities. If the matter comes to the attention of the Companies and Intellectual Property Commission (CIPC) that the above unlawful activities are taking place in a company, the CIPC can report this.
matter to the South African Revenue Service, Financial Services Board, Independent Regulatory Board of Auditors, or National Prosecuting Authority for further investigation and prosecution.

- If the Companies and Intellectual Property Commission (CIPC) detects non-compliance with requirements under the Companies Act, it may make adverse findings against the company concerned or its directors. If the Commission picks up fraudulent conduct or reckless conduct of business, the matter is referred to the National Prosecuting Authority, for possible prosecution. The Commission has investigation powers only. The completion of its enforcement efforts depends on other agencies like the NPA and SAPS.

- In the public sector, the **Public Finance Management Act 1999** sets out requirements regarding accounting norms for national and provincial government institutions and the entities under their control, including a number of state-owned or state-controlled companies. An Accounting Standards Board has been established under Chapter XI of the Public Finance Management Act 1999, which sets accounting standards for the public sector, based on the International Public-Sector Accounting Standards issued by the International Federation of Accountants. These standards do not permit off the book transactions or keeping off the book accounts and prescribe requirements for disclosure of material contingent liabilities.

- In terms of the **Public Finance Management Act 1999**, entities in the public sector are required to set up internal audit, audit committees and other internal control measures. These entities are subject to an external audit by the Auditor-General of South Africa.

- National Treasury Regulations 16A9.1 (c) and Municipal Supply Chain Regulations section 38 (1) (c) make provision that the Accounting Officer check that a supplier is not listed as a person prohibited from conducting business with public sector
before awarding a contract.

- **Auditors are subject to certain reporting obligation** under the South African anti money laundering legislation. They must also report reportable irregularities to the Independent Regulatory Board for Auditors (IRBA), as provided under section 45 of the Auditing Profession Act 2005

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<th>ARTICLE 9: Mutual Legal Assistance</th>
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<tr>
<td>Requests for MLA can be incoming or outgoing</td>
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<td><strong>Criminal matters:</strong></td>
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<tr>
<td><strong>International Cooperation in Criminal Matters Act 1996</strong> (ICCMA) provides for mutual legal assistance (MLA) in criminal matters on the basis of bilateral and multilateral treaties, and the principle of international comity.</td>
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<tr>
<td>South Africa is party to a number of bilateral and multilateral treaties. In addition, the ICCMA facilitates the execution of MLA requests, including with countries South Africa does not have a treaty with.</td>
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<tr>
<td>ICCM also facilitates provision of evidence and execution of sentences in criminal cases, as well as the confiscation and transfer of the proceeds of crime.</td>
</tr>
<tr>
<td>ICCM does not prescribe a list of specific offences and applies to any crime, including corruption or bribery of foreign public officials.</td>
</tr>
<tr>
<td>ICCM Act applicable to both natural and legal persons.</td>
</tr>
<tr>
<td>The Department of Justice acts as the central authority for both outgoing and incoming MLA requests. Chief Directorate: International Legal Relations, acting under auspices of Department, responsible for processing requests for MLA and extraditions.</td>
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</tbody>
</table>
- **All incoming MLA requests of an economic nature** be referred to the Anti-Corruption Task Team before deciding whether to approve such requests to ensure that any OECD offences disclosed in MLA requests would be detected and properly investigated. The requests are read by the dedicated prosecutor and captured on the ACTT data base. Liaison also takes place with the DPCI’s Commercial Crime Component and Cyber Crime Component to address MLA requests disclosing other serious economic crimes warranting local investigations. The database captures the country making the request.

- **Non-criminal matters:**
  - South Africa does not provide MLA in requests concerned with administrative and not criminal liability. South Africa can only provide assistance in terms of the ICCMA.

- **Dual criminality:**
  - Dual criminality is generally not a pre-requisite for the rendering of MLA by South Africa. There is no provision in the ICCMA dealing with the requirement of dual criminality, nor do its bilateral treaties usually include any such provision. However, under the Harare agreement, mutual legal assistance may be refused on the ground of lack of dual criminality.

- **Bank secrecy:**
  - Neither the ICCM Act, nor its bilateral treaties provide for the possibility of refusing MLA on the basis of bank secrecy. However, the ICCM does not detail which coercive measures may or may not be undertaken in the execution of an MLA request.

**ARTICLE 10: Extradition**

- To date, South Africa is party to a number of Extradition Treaties
- South African Extradition Act 1962: extradition to countries with which South Africa has extradition agreements will be subject to the conditions specified under such agreements;

- South Africa’s **Extradition Act** makes provision for extradition in respect of offences that occurred within the jurisdiction of the requesting state – ‘jurisdiction’ interpreted to mean ‘extraterritorial jurisdiction’;

- All extradition treaties concluded in terms of the provision of the Extradition Act make provision for **extraterritorial jurisdiction**.

- **Extradition for bribery of a foreign public official:**
  - Pursuant to the Extradition Act 1962, South Africa has the authority to extradite persons accused or convicted of an “extraditable offence” with or without an extradition agreement, subject to certain criteria.
  - Whether or not an extradition agreement is in place, there is always a **requirement** that the offence for which extradition is requested has been **committed within the jurisdiction** of the foreign State requesting extradition.

- **Extradition of nationals:**
  - South Africa does not impose a bar on the extradition of its nationals, whether in the Extradition Act or in extradition agreements with designated States.

- **Dual criminality:**
  - Section 1 of the Extradition Act reflects the principle of dual criminality in that it requires an offence in terms of South African law and the law of the foreign State, which is punishable with a sentence of imprisonment for a period of six months or more.
| ARTICLE 11:  
| Responsible Authorities | Director-General of the Department of Justice and Constitutional Development is the designated Responsible Authority in terms of Article 11 |
South Africa has a plethora of local and domestic legislation in place dealing with corruption and bribery and is party to a number of international treaties and conventions. In fact, the OECD Working Group on Bribery has stated that South Africa has a well-drafted foreign bribery offence and a broad and flexible corporate liability regime. Furthermore, the Prevention of Organised Crime Act allows for the broad use of freezing orders and confiscation measures and legislative steps have also been taken to encourage publicly-listed and state-owned enterprises to strengthen internal controls, ethics and compliance measures for the purpose of preventing and detecting corruption and bribery, including through the establishment of social and ethics committees. Therefore the legislative and structural framework to effectively combat corruption and bribery does exist in South Africa. However, it does not operate nearly as effectively as it should. This is in part due to the enforcement difficulties that arise as a result of the highly decentralised structure of the anti-corruption framework. This report has, moreover, raised a number of issues which contribute to the efficacy problem including a multitude of complex statutes and directives which require consolidation and a more streamlined and coordinated operational approach, lack of transparency in corporate reporting, the phenomenon of state capture, a lack of visible enforcement and the fact that prosecutions may be hampered by political and economic considerations. South Africa must therefore take urgent proactive steps to ensure that cases of corruption and bribery (both domestic and foreign as well as in the public and private sector) are investigated and successfully prosecuted. Finally, it is worth noting that in a recent report the OECD Working Group on Bribery recommended that, in order to improve its fight against foreign bribery, South Africa should:

- significantly increase its efforts to proactively detect, investigate and prosecute foreign bribery;
• ensure that national economic interests and the identities of the natural or legal persons involved do not influence the investigation or prosecution of foreign bribery cases;
• increase the financial resources available to law enforcement authorities and ensuring enhanced cooperation and coordination between the police and prosecutors; and
• urgently ensure and raise awareness that people who report suspected acts of foreign bribery are in practice afforded the protections guaranteed by the law, including those in the auditing profession.