

THE DETECTION OF FOREIGN BRIBERY



The Detection of Foreign Bribery



Please cite this publication as:

OECD (2017), *The Detection of Foreign Bribery*,
www.oecd.org/corruption/the-detection-of-foreign-bribery.htm

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Foreword

The Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-Bribery Convention) states that “bribery raises serious moral and political concerns, undermines good governance and economic development, and distorts international competitive conditions.” Twenty years later, these words still hold true. While investigations and prosecutions are on the rise year after year, half of the countries of the 43 Parties to the OECD Anti-Bribery Convention have yet to conclude a foreign bribery enforcement action. To improve enforcement of the foreign bribery offence, the first step – and challenge – is the detection of the offence.

This study looks at “primary” detection sources which have been, or could be expected to be, at the origin of foreign bribery investigations. These sources range from government agencies to private sector actors and individuals, at both domestic and international levels. These bodies are sometimes specifically identified in OECD anti-bribery instruments as entrusted with a particular role in preventing and detecting foreign bribery. In other instances, the role played by these actors in the detection of foreign bribery has emerged over the past twenty years of enforcement.

This study was undertaken by the OECD Working Group on Bribery in International Business Transactions (WGB) in order to share experiences and good practices and to generally support efforts to better detect bribery of foreign public officials. It builds on the information collected through the WGB’s country reviews on enforcement of the Convention. The study has also benefited from input of experts in the specific areas under review.

This study provides practitioners, legislators, policy makers, the private sector and civil society, with practical information on methods which have proven effective in practice in detecting foreign bribery and ensuring it is reported to relevant authorities. It provides examples, through specific case studies, of how foreign bribery has been identified in practice by particular sources and suggests ways in which these methods might be replicated or inspire improvements to further enhance detection capacities.

Acknowledgements

This report was prepared by the Anti-Corruption Division of the OECD Directorate for Financial and Enterprise Affairs and developed within the OECD Working Group on Bribery in International Business Transactions. The co-ordination and drafting of this report was led by France Chain with chapters also drafted by Leah Ambler, Catherine Marty, Lise Nee and Simone Rivabella.

The authors acknowledge with gratitude the country mentors who contributed to the drafting of the different chapters, namely: Australia (Tom Sharp, Criminal Law Reform Section, Attorney-General's Department); Brazil (Vladimir Aras, Attorney General's Office and Georgia Diogo, International Cooperation Unit of the Brazilian Prosecution Service); France (Cyprien Scherrer, Head of the Strategic Analysis Unit, French Financial Intelligence Unit, TRACFIN); Germany (coordinated by Mr. Felix Burkhart, Federal Ministry for Economic Affairs and Energy, including input of the Federal Ministry of Finance and various agencies at Länder level); Israel (Yitzchak Yitzchak Blum, Deputy Director, Department of International Affairs Office of the State Attorney); Italy (Lorenzo Salazar, Substitute Prosecutor General, Naples); Netherlands (Albert Jan Kwakman and Peter Van Leusden, Dutch Fiscal Intelligence & Investigations Service); Sweden (Alf Johansson, Chief Public Prosecutor); Switzerland (Stiliano Ordolli, Head of the Money Laundering Reporting Office-Switzerland, MROS); the United Kingdom (Laura Conway, Serious Fraud Office); and the United States (Andrew Gentin, Department of Justice, and staff from the Securities and Exchange Commission).

The development of this report further benefited from the inputs of a number of consultation partners, namely: the Business and Industry Advisory Committee to the OECD (BIAC); the International Bar Association (IBA) (Jane Ellis); the Public Affairs and Media Division of the OECD Public Affairs and Communications Directorate (Spencer Wilson); the International Cooperation and Tax Administration Division of the OECD Centre for Tax Policy and Administration (Melissa Dejong); Transparency International UK; International Federation of Accountants (IFAC); the Secretariat of the Financial Action Task Force (FATF) (under the supervision of John Carlson); the Global Partnerships and Policies Division of the OECD Development Co-operation Directorate (Amanda Sporre); the Export Credits Division of the OECD Trade and Agriculture Directorate (Julian Paisey); the Competition Division of the OECD Directorate for Financial and Enterprise Affairs (Antonio Capobianco); the Integrity Vice Presidency Unit of the World Bank Group (Mamta Kaushal); and the International Centre for Settlement of Investment Disputes (ICSID).

The authors also wish to express their gratitude to the International Consortium of Investigative Journalists (ICIJ), the Organised Crime and Corruption Reporting Project (OCCRP), and the Global Investigative Journalism Network (GIJN) for disseminating the OECD Survey of Investigative Journalists to their membership. The Secretariat further conducted interviews with three journalists, which form the basis for some of the case studies in this chapter.

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Introduction

Detecting the crime is the first step, and a challenge, to any effective enforcement of the Convention on Bribery of Foreign Public Officials in International Business Transactions (the OECD Anti-Bribery Convention). When the crime in question is foreign bribery, the difficulty may be even greater as neither the bribe payer nor the bribe recipient has any interest in disclosing the offence. Contrary to many other offences, there is rarely an easily identifiable, direct victim who would be willing to come forward. And while there may be witnesses to the foreign bribery, these may not be sufficiently aware of or alert to the offence occurring before them, and may not be aware of the importance or existence of reporting channels. Law enforcement is therefore left with the significant challenge of uncovering, investigating and prosecuting an offence which no one, it seems, has any incentive to disclose.

Yet, over the past 18 years since the entry into force of the OECD Anti-Bribery Convention, enforcement of the foreign bribery offence has tremendously increased. 2016 foreign bribery enforcement data shows that 443 individuals and 158 entities have been sanctioned in criminal proceedings for foreign bribery in 19 Parties between the time the OECD Anti-Bribery Convention entered into force in February 1999 and the end of 2016. A perhaps an even more striking figure is the recent increase in the number of ongoing investigations into foreign bribery: over 500 ongoing foreign bribery investigations in 29 Parties are reported – an increase of around 100 investigations, relative to 2015 (OECD, 2017a). This means that detection of the foreign bribery offence can and does increasingly occur – at least in certain countries, or from certain sources.

Building on these positive experiences, but noting the constant challenge that detection of foreign bribery poses to law enforcement authorities, the OECD Working Group on Bribery (WGB), which brings together the 43 countries Party to the OECD Anti-Bribery Convention,¹ has undertaken to analyse how detection has or could better occur in the different sectors under review. In the context of its monitoring of countries implementation of the OECD Anti-Bribery Convention, the WGB has amassed a wealth of information on the institutional frameworks in place in the 43 Parties to the OECD Anti-Bribery Convention. Building on these, as well as individual case studies, this study reviews the good practices developed in different sectors and countries which have led to the successful detection of foreign bribery, with a view to sharing good practices, improving countries' capacity to detect, and ultimately stepping up efforts against transnational bribery.

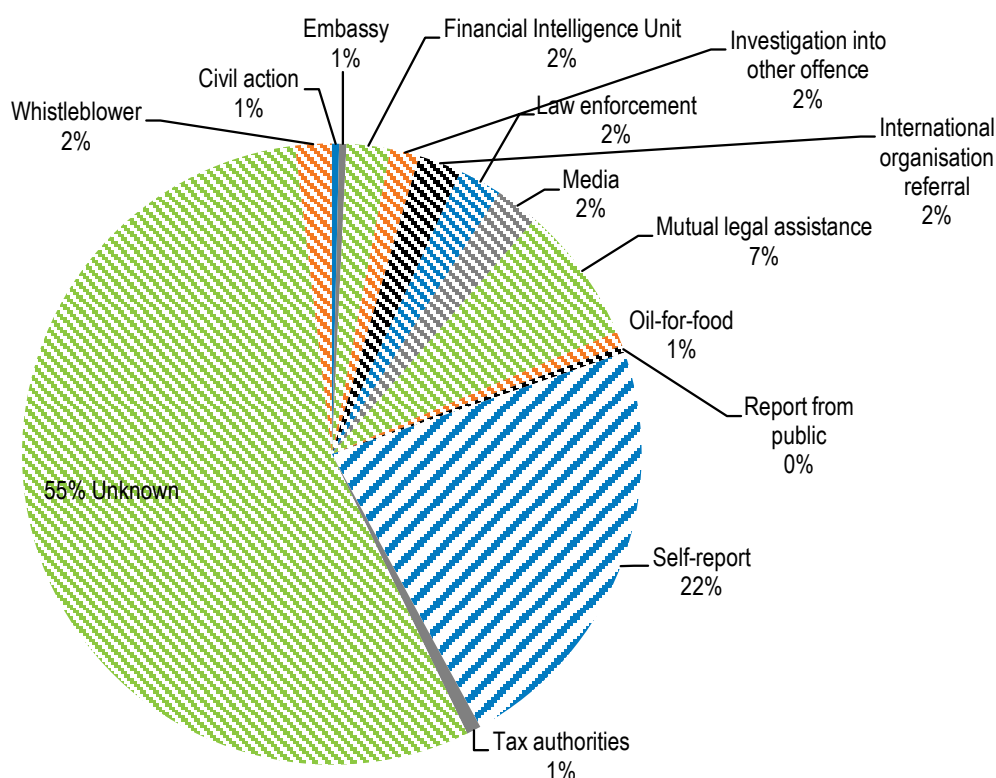
¹ The 43 Parties to the OECD Anti-Bribery Convention include the 35 OECD countries as well as Argentina, Brazil, Bulgaria, Colombia, Costa-Rica, Lithuania, Russia, and South-Africa.

Scope and methodology

The study looks at primary sources of detection for the foreign bribery offence, that is to say at the role that certain public agencies – other than law enforcement – or private sector actors can play in uncovering foreign bribery. The detection sources examined in the ten chapters of this study have been identified on the basis of (1) their recurrence as a source of detection in foreign bribery cases (e.g. self-reporting), (2) the standards in the OECD Anti-Bribery Convention and 2009 Recommendation on Further Combating Bribery of Foreign Public Officials in International Business Transactions (the 2009 Recommendation), which identify certain agencies or professionals as playing a particular role in the detection of foreign bribery (e.g. whistleblowers, foreign representations, tax authorities, external auditors), and (3) more recent trends which point to an evolving role in the foreign bribery context (e.g. the legal profession, or competition authorities).

Each of the ten chapters identifies the number of foreign bribery cases detected through each source (see Figure 1, and data collection methodology). Recalling the relevant standards under the OECD Anti-Bribery Convention and related OECD anti-bribery instruments where applicable, each chapter then reviews available country practices developed in respect of the public agency or private sector actor concerned, and includes case studies based on finalised (or sometimes ongoing) foreign bribery cases to illustrate how, in practice, foreign bribery can and has been detected by the source in question.

Figure 1. **How are foreign bribery schemes detected? 1999-2017**



Source: OECD database on foreign bribery case

Each chapter has been developed under the mentorship of one or two country experts from the WGB, who provided their invaluable knowledge and guidance on the detection source. It builds on the over 200 country evaluation reports covering the 43 Parties' foreign bribery laws and enforcement practices and activities published by the WGB.² Additional information provided by the countries, in the form of real-life case studies or description of practices, further illustrates what can be achieved to fully tap into the potential of certain sources. Finally, relevant experts have been consulted on specific sections of the report, including from the OECD as well as external stakeholders.

Data collection methodology

The study relies on data collected to identify detection sources for foreign bribery cases (or schemes) concluded between the entry into force of the OECD Anti-Bribery Convention in 1999 and 1 June 2017. A foreign bribery scheme encompasses one set of facts involving bribery of a foreign public official in an international business transaction, for which there may have been enforcement actions against several natural and/or legal persons. The data on detection sources extracted for the purpose of this study is the result of an analysis of 263 foreign bribery schemes which have been investigated, prosecuted and reached a final law enforcement outcome for the specific crime of bribery of foreign public officials in international business transactions, as set out in Article 1.1 of the OECD Anti-Bribery Convention and transposed into Parties' domestic legislation. Preparatory and participatory offences such as conspiracy, attempt, aiding and abetting foreign bribery are also included. The data collection does not, however, include foreign bribery-related offences (such as accounting and auditing, money laundering, trafficking in influence, fraud, commercial bribery, violation of duty of supervision, failure to prevent bribery) nor United Nations (UN) sanctions violations or other economic crimes.

The data collection is based on research into enforcement actions from countries Party to the OECD Anti-Bribery Convention, collected notably from court decisions and settlement agreements available on the websites of national law enforcement authorities; information provided by national authorities in the context of Phase 3 and 4 and follow-up evaluations by the WGB and following bilateral requests by the OECD Secretariat. The data was further verified by the countries Party to the OECD Anti-Bribery Convention. 0% values are when there are only 1 or 2 cases in the category. Furthermore, case information was not always complete, which explains the frequent "unknown" value on the sources of detection (see Figure 1). Due to the confidential nature of some of the information provided by national authorities, the study presents essentially aggregate figures, relying, where possible, on case studies for a more concrete illustration.

Key findings

In many respects, the study demonstrates that a number of potential detection sources under review are largely untapped, and that much could be done by Convention Parties to improve the use of these sources to improve detection of foreign bribery. The study and supporting data (see Figure 1) also show that detection of foreign bribery is a complex process, involving many potential sources, which can make it difficult to identify which source initiated the case. One case may have been detected by the media in one country, leading its law enforcement authorities to seek mutual legal assistance, thereby alerting

² See www.oecd.org/daf/anti-bribery/countryreportsonteimplementationoftheoecdanti-briberyconvention.htm.

authorities in a second country, and/or possibly triggering a report by a confidential witness or informant.

Naturally, adequate legal and institutional frameworks are the first step to promote detection by a given source. While each chapter goes into the specificities applicable to each sector under review, it is generally true that clear and adequate protection, incentives and support (depending on the detection source) need to be afforded to those who report. Establishing and publicising reporting channels is also essential if any alleged foreign bribery that has been detected is to be reported to law enforcement authorities. Generally speaking, a broad approach is also preferable to encourage people to come forward if they suspect any kind of economic or financial misconduct: initial suspicions by non-experts may be more akin to sensing that “something is wrong”, than to a specific determination that foreign bribery has occurred. Law enforcement may often be better placed to determine whether or not reports merit further investigation, and placing the onus to determine whether a set of facts is foreign bribery on persons whose profession is not to investigate and prosecute foreign bribery may be counterproductive.

In many instances, awareness and training are also key to detection. This goes well beyond alerting public officials or certain private sector actors of the existence of foreign bribery – foreign bribery is no longer a “new” offence in most Convention countries. When developing rigorous, profession-specific awareness-raising and training initiatives, authorities highlight the importance they give to fighting foreign bribery, and to the role that the targeted agency or profession can play in uncovering it. Training and guidance need to be tailored to the specific public agency or profession: each agency, each profession has a specific mission, and some of the red flags for detecting foreign bribery from their perspective will be unique to each. There can be no one-size-fits-all approach in this respect. Feedback from law enforcement following a report will also be important in developing the capacity to detect: it is a way of acknowledging the role played by the person or body in uncovering the foreign bribery. Where the detection source is a public agency or professional body, providing feedback also builds trust, increases expertise and mutual understanding, and more generally establishes a common goal of fighting bribery and corruption.

This Study reviews a wide range of potential sources for detecting foreign bribery, analysing and explaining how detection mechanisms operate across ten subject areas and how these can lead to identifying potential foreign bribery. Nevertheless, by its very broad nature, the Study just skims the surface on a number of issues. As Convention countries and the WGB further develop their expertise on the topic of detection, and as public agencies, private sector actors and non-governmental organisations increasingly turn their attention to the topic of transnational bribery, additional research may be warranted. The WGB may therefore engage in greater depth with certain agencies or professions, with a view to deepening its understanding of how they function and how they may assist in detecting foreign bribery through their particular lenses.

Chapter 1

Self-reporting

Introduction

Self-reports (or voluntary disclosure) by companies³ of possible instances of bribery of foreign public officials in their international business operations, can be an invaluable source of detection. Of the 263 foreign bribery schemes that have resulted in definitive sanctions since the entry into force of the OECD Anti-Bribery Convention, 23% (or 59) were detected via self-reporting. Generally, the notion of self-reporting applies to companies, whereas individuals reporting themselves would be considered as confidential informants or cooperating witnesses (addressed in Chapter 3). A company that self-reports will often also continue to provide ongoing cooperation with law enforcement authorities in the context of related investigation and related proceedings. There is currently no international anti-corruption standard relating specifically to self-reporting and practices vary across jurisdictions.

Frameworks for self-reporting can be subject-specific, such as reporting suspected money laundering offences to money laundering authorities, anti-competitive or cartel conduct to competition authorities, or tax crimes to tax agencies. This chapter refers only to frameworks that address or include the possibility of self-reporting of the foreign bribery offence to the relevant law enforcement authority.

1. Defining self-reporting

A true self-report involves a company informing authorities of something of which they were unaware, with the company either accepting wrongdoing or indicating that it may accept wrongdoing (if at an earlier stage in the investigation). It will clearly not be a ‘self-report’ if the company is simply reporting the wrongdoing of others with a denial of corporate guilt.

The “voluntary” nature of the report can be questioned, for example, when:

- A company or its advisers are obliged to report an issue e.g. under money laundering obligations and disclose the same facts to a relevant investigating/prosecuting body at the same time (see also chapter 6 on FIUs and chapter 10 on Professional advisers);
- A whistleblower raises an issue with both a company and authorities at the same time (see also Chapter 2);

³ The word “company” or “companies” is intended to cover all legal non-human entities.

- A company reports potential, non-bribery related, issues to another e.g. regulatory body first and is informed it would be reported to the relevant investigating/prosecuting body;
- A company self-reports in anticipation of imminent media coverage;
- Other allegations arise out of an existing matter which was not self-reported; or
- A company is requested to provide information or cooperate with authorities.

The United States Department of Justice (DOJ) Fraud Section made its position in this regard clear when it set out in its 2016 enforcement plan and guidance (US DOJ, 2016) that “a disclosure that a company is required to make, by law, agreement, or contract, does not constitute voluntary self-disclosure.” The United Kingdom Serious Fraud Office (UK SFO) is a bit more nuanced, providing on its website that “the SFO may have information about wrongdoing from sources other than the corporate body’s own self-report.” This could suggest that a company may still be considered to have self-reported even when the UK SFO was already aware of the issues involved.

2. Approaches to self-reporting for foreign bribery

Generally speaking, there are three approaches to the treatment of self-reporting of foreign bribery among Parties to the OECD Anti-Bribery Convention, which are often combined:

- Self-reporting as a factor to be taken into consideration by law enforcement authorities in deciding whether to enter into a settlement arrangement. For the purposes of this Study, the term settlement includes all forms of case resolution that do not involve a full trial (even if some forms of case resolution need to be judicially approved);
- Self-reporting as a mitigating factor in sentencing; and
- Self-reporting as a defence; or as the basis of a declination to prosecute.

2.1 *Self-reporting as a factor for deciding whether to enter into a settlement arrangement*

In practice, as of the time of this study, six jurisdictions have entered into settlement arrangements in foreign bribery cases based on self-reporting, namely Brazil (leniency agreement, under the Corporate Liability Law), the Netherlands (out-of-court settlements, Criminal Code), Norway (penalty notice), Switzerland (punishment orders and simplified procedure (art. 358ff CPC), United Kingdom (Deferred Prosecution Agreements (DPAs)) and the United States (Plea Agreements, DPAs, Non Prosecution Agreements (NPAs), declinations with disgorgement). Not all of these countries have specific legislative frameworks governing the process for self-reporting and its impact on criminal proceedings. France, Germany, Italy, the Netherlands and Spain have legislative frameworks for negotiating settlements in foreign bribery cases, but self-reporting is not envisaged in the legislation, nor is there a policy of rewarding it such context.⁴ At the

⁴ In France, under the new Law on Transparency, the Fight against Corruption and Modernization of Economic Life, a settlement or *convention judiciaire d'intérêt public* (CJIP), can be negotiated with prosecutors. In Germany, settlements can, inter alia, result in non-prosecution according to

time of this study, the Australian Federal Government had announced and invited submissions on a proposal for a DPA scheme to be introduced in Australia, with self-reporting envisaged under the proposed model.⁵⁶ Multilateral financial institutions also take into account self-reports in their sanctioning decisions. The World Bank reports that, with the introduction of Negotiated Resolution Agreements, an increasing number of companies self-report misconduct, “providing [the Bank] with direct evidence of a higher degree of reliability, which then leads to more impactful investigations”.⁷ Finally, private sector organisations, such as the OECD Business and Industry Advisory Committee (BIAC) and the World Economic Forum (WEF), have also addressed proposals to OECD and G20 countries to incentivise self-compliance, and developed guidance for companies in this respect.

Under the United Kingdom DPA model, as introduced by Schedule 17 of the Crime & Courts Act 2013, the UK SFO encourages corporate self-reporting, but offers no guarantee that a prosecution will not follow any such report. In the UK SFO’s Guidance on corporate self-reporting (UK SFO, 2012), it is referenced as part of an additional public interest factor against prosecution of a company if it forms part of a genuinely proactive approach by the corporate management team and is made within a reasonable time of the offending, as outlined in the DPA Code of Practice.⁸ Indeed, since the SFO may have information about wrongdoing from sources other than the company’s own self-report, the timing of any self-report is very important. A failure to report properly and fully the true extent of the wrongdoing may therefore amount to a public interest factor in favour of a prosecution.⁹ In addition, the DPA Code of Practice also sets out that the prosecutor “in giving weight to [the company]’s self-report will consider the totality of the information that [the company] provides to the prosecutor. However, the absence of an initial self-report will not preclude the option of a DPA as illustrated by *R v Rolls-Royce plc & Anor 2017*; in this case, the company subsequently provided an “exceptional” level of co-operation.¹⁰ Judicial approval of any DPA is required in the United Kingdom, with the Court determining whether the proposed DPA is “likely” to be in the interests of justice and if its proposed terms are fair, reasonable and proportionate. This provides oversight by an independent arbiter as to the weight of the self-reporting in the DPA decision and the financial penalties agreed.

section 153 and 153a of the Criminal Procedure Code. In Italy, settlements are negotiated under the procedure known as *patteggiamento* (articles Articles 444 to 448 of the CCP. In Spain, settlements are negotiated under the procedure known as *conformidad* (article 787 of the Code of Criminal Procedure (CCP)).

⁵ Proposed model for a deferred prosecution agreement scheme in Australia, Attorney-General’s Department, Australian Government, www.ag.gov.au/Consultations/Pages/Proposed-model-for-a-deferred-prosecution-agreement-scheme-in-australia.aspx.

⁶ Settlement arrangements in foreign bribery cases will be examined in greater detail in the 2018 study on the topic by the OECD Working Group on Bribery.

⁷ World Bank Group Integrity Vice Presidency, Annual Update 2015, <http://pubdocs.worldbank.org/en/136451449168835691/INT-FY15-Annual-Update.pdf>.

⁸ Issued by the DPP and the Director of the SFO on 14 February 2014, after public consultation, www.sfo.gov.uk/publications/guidance-policy-and-protocols/deferred-prosecution-agreements/.

⁹ Corporate Self-Reporting Policy Statement, UK SFO website, <https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/corporate-self-reporting/>.

¹⁰ *R v Rolls-Royce plc & Anor 2017*, www.judiciary.gov.uk/wp-content/uploads/2017/01/sfo-v-rolls-royce.pdf.

Box 1. United Kingdom Case Study: SFO v ICBC SB PLC (2015)

On 18 April 2013, Standard Bank's solicitors Jones Day reported the matter to the Serious and Organised Crime Agency (now the National Crime Agency or NCA) and subsequently on 24 April to the SFO. Standard Bank also instructed Jones Day to begin an investigation and to disclose its findings to the SFO. The resulting report was sent to the SFO on 21 July 2014. The SFO reviewed the material obtained and conducted its own interviews. Subsequently, the Director of the SFO considered that the public interest would likely be met by a DPA with Standard Bank and negotiations were commenced accordingly.

In November 2015, the SFO's first application for a DPA was approved by Lord Justice Leveson. The counterparty to the DPA, Standard Bank plc (now known as ICBC Standard Bank Plc), was the subject of an indictment alleging failure to prevent bribery contrary to section 7 of the Bribery Act 2010. The indictment, pursuant to DPA proceedings, was immediately suspended. As a result of the DPA, Standard Bank agreed to pay financial orders of USD 25.2 million and in addition, was required to pay the Government of Tanzania a further USD 7 million in compensation. The bank also agreed to pay the SFO's reasonable costs of GBP 330 000 in relation to the investigation and subsequent resolution of the DPA. In addition to the financial penalties, Standard Bank agreed to continue to cooperate fully with the SFO and to commit to enhancing its anti-bribery and corruption controls, under the supervision of an independent reviewer.

The suspended charge related to a USD 6 million payment by a former sister company of Standard Bank, Stanbic Bank Tanzania, in March 2013 to a local partner in Tanzania, Enterprise Growth Market Advisors (EGMA). The SFO alleged that the payment was intended to induce members of the Government of Tanzania, to show favour to Stanbic Tanzania and Standard Bank's proposal for a USD 600 million private placement to be carried out on behalf of the Government of Tanzania. The placement generated transaction fees of USD 8.4 million, shared by Stanbic Tanzania and Standard Bank. The SFO worked with the United States DOJ and SEC throughout the process. A penalty of USD 4.2 million was also agreed between Standard Bank and the SEC in respect of separate related conduct.

Source: UK SFO press release

Timely and voluntary self-reporting is also one of the nine Principles of Federal Prosecution of Business Organizations, set out in Chapter 9 of the **United States Attorneys' Manual** ("the USAM"), which United States prosecutors refer to when considering the appropriate disposition of a criminal investigation into a corporate entity. Potential resolutions available to United States prosecutors include prosecution, plea agreements, DPAs, NPAs or declinations.¹¹ Furthermore, in 2012, the DOJ and the Securities and Exchange Commission (SEC) jointly published their Resource Guide to the United States FCPA which emphasizes the "high premium on self-reporting."¹² **Brazil's** Corporate Liability Law (N.12.846 of August 1, 2013 (CLL)), also known as the Clean Companies Act, and its regulatory Decree No. 8 420 of 2014, in its article 16, provides that a leniency agreement may be entered into in respect of administrative proceedings where the company self-reports and willingly cooperates in the investigation. In **the Netherlands**, although no guidelines currently exist for Dutch law enforcement authorities on self-reporting procedures, the Dutch Public Prosecution Service has entered into several out-of-court settlements in foreign bribery cases, two of which were detected through self-reporting by the company involved.

¹¹ www.justice.gov/usam/united-states-attorneys-manual.

¹² www.justice.gov/criminal-fraud/fcpa-guidance.

Box 2. Netherlands Case Study: SBM Offshore (2014)

In the second quarter of 2012, SBM Offshore – a Dutch-based global group of companies selling systems and services to the offshore oil and gas industry – voluntarily informed the Dutch Public Prosecution Service (*Openbaar Ministerie*) and the United States DOJ of its self-initiated internal investigation into foreign bribery committed by the company in several countries. The self-reporting took the form of an initial oral report, followed by a draft declaration, which was later supplemented by a final and extensive declaration of the criminal offence. Following its self-report, SBM conducted its internal investigation from 2012 to 2014, focusing on the period from 2007 through 2011, in consultation with the *Openbaar Ministerie* and the Dutch Fiscal Intelligence and Investigation Service (FIOD).

In November 2014, the *Openbaar Ministerie* reached an out-of-court settlement with SBM Offshore, consisting of a payment of USD 240 million (a USD 40 million fine and a USD 200 million confiscation measure). The settlement – the second largest in the history of the Netherlands – relates to, among others, foreign bribery in Equatorial Guinea, Angola and Brazil from 2007 through 2011. The internal investigations were conducted with the help of an external forensic auditor and related only to the bribery in Equatorial Guinea and Angola. The FIOD further investigated the bribery in Brazil. In addition to the USD 240 million payment, the company also enhanced its anti-corruption compliance programme and related internal controls. In the press release announcing the settlement, the *Openbaar Ministerie* cites the fact that SBM Offshore itself brought the facts to the attention of the authorities as a reason for offering the out-of-court settlement.

Source: Netherlands Phase 3 Written Follow-Up Report (2015); Dutch Public Prosecution Service website; <https://www.om.nl/actueel/nieuwsberichten/@87201/sbm-offshore-settles/>; and www.sbmoffshore.com/?press-release=sbm-offshore-achieves-settlement-dutch-public-prosecutors-office-alleged-improper-payments-united-states-department-justice-closes-matter

2.2 Self-reporting as a mitigating factor

With respect to countries that allow for mitigated sanctions in the case of self-reporting, the Working Group has consistently stated that the relevant Parties must ensure that the resulting sanction is nevertheless “effective, proportionate and dissuasive”, in accordance with Article 3 of the OECD Anti-Bribery Convention.¹³ In the **United Kingdom**, self-reporting can be a factor leading to a reduction in the financial penalty applicable to the corporate offender under a DPA (see above), or indeed, if prosecuted. The UK Sentencing Guidelines include as a factor reducing the seriousness of the offence or reflecting mitigation, that a corporation co-operated with the investigation, made early admissions and/or voluntarily reported the offence.¹⁴ In the three DPAs agreed so far in the United Kingdom relating to bribery offences,¹⁵ two of which involved self-reports, the Courts have approved discounts of between 33.3% and 50% in the financial penalties imposed on companies with specific reference being made to the need to incentivise self-reporting.¹⁶ As an alternative to prosecution, civil recovery orders may be used where the

¹³ UK Phase 3 Report, Recommendation 5(a); Italy Phase 3 Report, Recommendation 3(b).

¹⁴ Fraud, Bribery and Money Laundering Offences, Definitive Guideline issued by the Sentencing Council, www.sentencingcouncil.org.uk/wp-content/uploads/Fraud-bribery-and-money-laundering-offences-Definitive-guideline2.pdf.

¹⁵ *R v Standard Bank 2016*; *R v XYZ Ltd 2016*; *R v Rolls-Royce plc & anor 2017*. It should be noted that whilst Rolls-Royce plc did not voluntarily initially self-report to the SFO, it fully investigated the facts and reported greater wrongdoing than would otherwise have potentially been uncovered had it not co-operated.

¹⁶ In comparison, a discount of 33.3% is ordinarily available for a guilty plea at the first opportunity.

defendant company self-reports. The availability and use of civil recovery orders can be considered by a prosecutor as part of the public interest test when deciding whether to prosecute a company.¹⁷

Box 3. Norway Case Study: The Shipping Company Case (2014)

In August 2010, a shipping company notified ØKOKRIM of suspected bribery of high-ranking decision makers in Bahrain between 2003 and 2004. The bribes were paid in connection with a freight agreement the shipping company had with Aluminium Bahrain B.S.C. (Alba) concerning transportation of alumina from Australia to Bahrain. At the time, Alba was 77% owned by the state of Bahrain.

The shipping company initiated an internal investigation following the self-report. The findings of the internal investigation were communicated to ØKOKRIM in April 2011. On the basis of this information, ØKOKRIM initiated an investigation. Persons within the shipping company were aware that suspicions against the intermediary surfaced in February 2008; however, internal investigations were not initiated until 2010, when Alba questioned the relationship between the shipping company and the intermediary. ØKOKRIM regarded as very positive that the company itself notified law enforcement. After notifying ØKOKRIM, the shipping company assisted in bringing clarity to the factual circumstances and co-operated well, i.e. by giving ØKOKRIM access to material from the internal investigation and waiving the client-lawyer privilege for in-house attorneys.

This self-reporting and co-operation contributed to a substantial reduction of the fine. In determining the fine, significant weight was placed on the fact the bribes were related to a person at ministerial level and that the payments were rooted in the then management of the shipping company. Emphasis was also placed on the amount of the bribes, in total approximately NOK 9 million according to ØKOKRIM's calculations. On 15 May 2014, ØKOKRIM, issued a Penalty Notice for a fine of NOK 20 million (approx. USD 3.3 million) to be paid by the Norwegian shipping company. The Penalty Notice also included a decision to confiscate proceeds of NOK 12 million (approx. USD 2 million). The Penalty Notice was directed at Cabu Chartering AS, which is a company indirectly owned by the shipping company "Rederiaksjeselskapet Torvald Klaveness".

Source: ØKOKRIM

As a result of the self-reporting in the context of leniency agreements in **Brazil**, any fine may be reduced by up to two thirds, and the company will be exempt from certain sanctions, namely the extraordinary publication of the decision provided under article 6.II and the exclusion from receiving financial support from the government provided under article 19.IV (art. 16, para. 2).¹⁸ In **Switzerland**, companies may benefit from a lenient sentence if they self-report and collaborate with the Federal Office of the Attorney-General (OAG) to establish all relevant facts as well as adopt a new set of efficient compliance procedures and accept restitution of illicit gains (confiscation). In a recent case, the OAG sentenced such a company to the minimum statutory CHF 1 fine, based on these criteria and the fact that the company disgorged its profits linked to the contracts obtained by bribery.¹⁹ **Norway** does not have sentencing guidelines specifically intended

¹⁷ The most recent example of this being used in the United Kingdom for a foreign bribery case is Oxford Publishing Ltd (for more information: www.sfo.gov.uk/2012/07/03/oxford-publishing-ltd-pay-almost-1-9-million-settlement-admitting-unlawful-conduct-east-african-operations).

¹⁸ Brazil's Phase 3 Report (2014), para. 60.

¹⁹ "The Swiss subsidiary responsible for security printing settled proceedings against it in Switzerland through agreement with the Swiss Office of the Attorney General in connection with shortcomings in corruption prevention. By self-reporting, the company had initiated the proceedings itself. A symbolic fine of CHF 1 will be imposed on the Swiss company. In addition, the company accepted

for companies that self-report in foreign bribery cases. Nevertheless, the penalty notices issued by ØKOKRIM (the Norwegian National Authority for Investigation and Prosecution of Economic and Environmental Crime) in two 2014 foreign bribery cases mention self-reporting of the company and the cooperation with ØKOKRIM during the investigation as mitigating factors (see, for instance, Box 3).²⁰ In November 2017, **Argentina** passed legislation on liability of legal persons which includes incentives for “spontaneous self-reporting” by companies in the form of mitigated sanctions.

In the **United States**, pursuant to the United States Sentencing Commission Guidelines, voluntary disclosure is considered in determining an appropriate penalty, as is the subsequent cooperation of the company with the investigation, and the fact that the company accepts responsibility for the criminal conduct.²¹ Under its Pilot Program announced on 5 April 2016, the DOJ further actively encouraged voluntary self-disclosure by companies by offering the full range of potential mitigation credit to a company that voluntarily self-disclosed FCPA misconduct, fully cooperated, and remediated in an appropriate and timely manner. This Pilot Program provided that, under certain circumstances, the Fraud Section may grant a declination or a reduction of up to 50% below the low end of the applicable United States Sentencing Guidelines fine range. In contrast, discounts of up to only 25% are available for those companies that did not voluntarily self-disclose. On 10 May, United States Attorney-General Jeff Sessions issued a Memorandum for all Federal Prosecutors on the DOJ’s charging and sentencing policy. The Memorandum instructs prosecutors to “charge and pursue the most serious, readily provable offense.” Any decision to vary from the policy must be approved by a United States Attorney or Assistant Attorney-General, or a designated supervisor.²² Subsequently, a media article quoted a DOJ spokesperson as clarifying that the new charging and sentencing guidelines will not apply to self-reporting and DPAs under the FCPA Pilot Program.²³ On 29 November 2017, the US DOJ announced its new FCPA Corporate Enforcement Policy, to be incorporated into the US Attorneys’ Manual. The FCPA Corporate Enforcement Policy not only makes permanent the incentives of the FCPA Pilot Program, but also indicates that there is a presumption of a declination for companies that voluntarily self-report, fully cooperate, and remediate in a timely and appropriate manner, absent aggravating circumstances. The DOJ has reported that “In the first year of the Pilot Program, the FCPA Unit received 22 voluntary disclosures, compared to 13 during the previous year. In total, during the year and a half that the Pilot Program was in effect, the FCPA Unit received 30 voluntary disclosures, compared to 18 during the previous 18-month period.”²⁴ The US SEC programme for evaluating

the skimming of profits of EUR 27.8m from projects between 2005 and 2012 in four countries.” Koenig & Bauer Website, www.kba.com/en/investor-relations/ad-hoc-releases/.

²⁰ Norway’s Phase 3 Report (2011), www.oecd.org/daf/anti-bribery/norway-oecdanti-briberyconvention.htm.

²¹ www.ussc.gov/guidelines.

²² See US DOJ Press Release: www.justice.gov/opa/pr/attorney-general-sessions-issues-charging-and-sentencing-guidelines-federal-prosecutors.

²³ New sentencing policy won’t affect FCPA pilot programme, *Global Investigations Review*, 12 May 2017.

²⁴ Remarks by Deputy Attorney General Rosenstein at the 34th International Conference on the FCPA, 29 November 2017, www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-34th-international-conference-foreign.

cooperation of companies was set out in 2001,²⁵ and identifies self-reporting as a factor in determining whether to provide credit to a corporate offender. Such credit may range from taking no enforcement action to pursuing reduced sanctions. In late 2015, a speech by its then Director of the Division of Enforcement, Andrew Ceresney, emphasised that a DPA or NPA will not be recommended without self-reporting and significant co-operation.²⁶ The SEC has entered into three NPAs since 2010 in cases which were self-reported by co-operating companies.

**Box 4. United States Case Study:
United States v. Bizjet International Sales and Support, Inc. (2012)**

Bizjet, a United States-based wholly owned subsidiary of Lufthansa Technik AG that provided aircraft maintenance, repair, and overhaul services, paid bribes to secure business to employees of government customers in Mexico and Panama. Bizjet agreed to pay a USD 11.8 million criminal penalty and entered into a deferred prosecution agreement with the DOJ. In addition, three former Bizjet executives subsequently pleaded guilty in federal court relating to the same conduct. The case was brought to the DOJ's attention through a voluntary disclosure by Bizjet's outside counsel, WilmerHale LLP. Bizjet, through its outside counsel, cooperated substantially with the government's investigation. Red flags included that payments were made via an intermediary company owned and operated by a Bizjet regional sales manager, as well as admissions by employees and emails showing that payments were made directly to government officials. In addition to getting information from Bizjet's outside counsel, law enforcement authorities in Mexico and Panama also provided helpful assistance to the United States investigation, which was very important to resolving the case.

Source: US DOJ

2.3 *Self-reporting as a defence or basis for declination*

Under its Pilot Program, the US DOJ has issued a declination of prosecution for seven companies that had self-reported.²⁷ Nevertheless, all were required to disgorge their profits acquired as a result of the bribery (save for when they had already agreed to do so with the SEC). The FCPA Corporate Enforcement Policy, introduced on 29 November 2017, states that “when a company satisfies the standards of voluntary self-disclosure, full cooperation, and timely and appropriate remediation, there will be a presumption that the [US DOJ] will resolve the company’s case through a declination. That presumption may be overcome only if there are aggravating circumstances related to the nature and seriousness of the offense, or if the offender is a criminal recidivist.”²⁸

In the context of its evaluations of countries’ implementation of the Anti-Bribery Convention, the Working Group has considered self-reporting frameworks and expressed concern when self-reporting and subsequent cooperation can be considered a complete defence to the foreign bribery offence (often referred to as “effective regret”). The

²⁵ Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, which is commonly known as the Seaboard Report

²⁶ Full text of the speech: www.sec.gov/news/speech/ceresney-fcpa-keynote-11-17-15.html.

²⁷ The DOJ and SEC joint guidance indicates that the DOJ declined several dozen cases between 2013-15 but without revealing details.

²⁸ Remarks by Deputy Attorney General Rosenstein at the 34th International Conference on the FCPA, 29 November 2017: www.justice.gov/opa/speech/deputy-attorney-general-rosenstein-delivers-remarks-34th-international-conference-foreign.

Working Group has consistently recommended that countries with the defence of effective regret amend their laws to ensure the defence does not apply to the foreign bribery offence, or is discretionary and not linked to identifying and prosecuting the foreign public official who received the bribe, notably as, in the foreign bribery context, the foreign official is in a different country and the country with the defence is unlikely to pursue the foreign official.²⁹

3. Incentivising self-reporting

3.1 *Educate companies on detecting bribery*

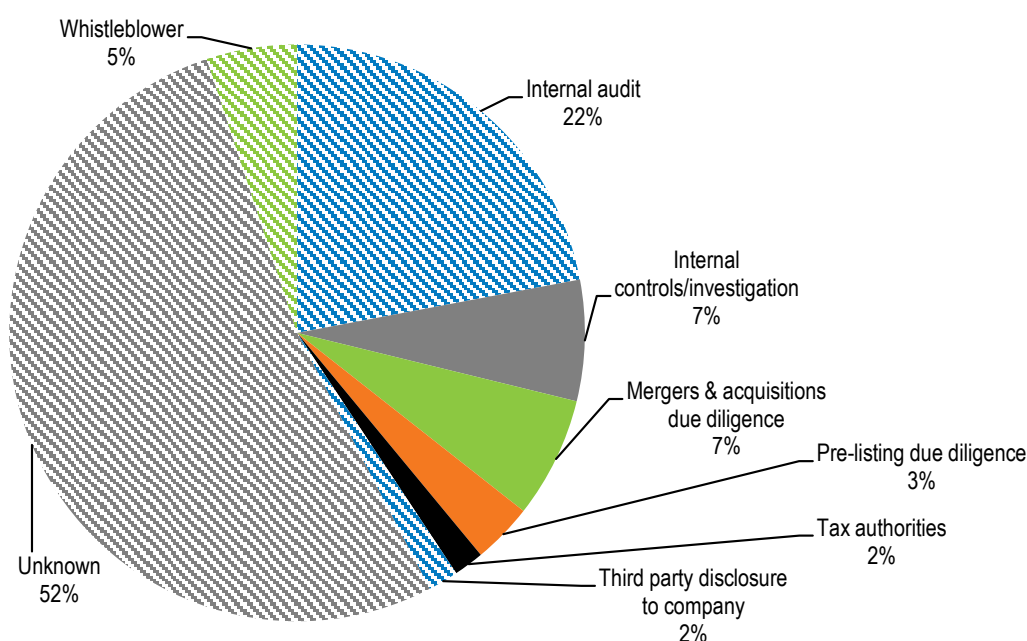
In relation to a true self-report, companies may often learn of the bribery through managing their own business in accordance with corporate policies and procedures, in particular by adopting a proactive risk-based approach to compliance. The importance of effective internal controls, ethics and compliance measures to detect foreign bribery is outlined in Recommendation X. of the 2009 Anti-Bribery Recommendation and its Annex II (OECD, 2009a). Complicating factors for the initial detection of bribery by a company may include whether it uses intermediaries and the effectiveness of its due diligence in that regard; the control it may have over subsidiaries and other group companies and whether it is operating in multiple jurisdictions. Strong and effective internal whistleblower protection and reporting mechanisms are also essential. The following chart sets out how, in the 22% of bribery schemes detected through self-reporting, the self-reporting company first became aware of the bribery in its international operations.

Companies, and their advisors, may be assisted by publication by the authorities of sufficient factual detail of the means by which the bribery was discovered by a company, wherever possible and with due respect to individuals' rights to privacy and privilege against self-incrimination. Closer coordination between public and private sector bodies to share information to identify, combat and prevent foreign bribery may also assist. The sharing or publication of information about the method of detection within the context of settlement arrangements or judgments enables companies to proactively update their policies and procedures. However, publication of information needs to be balanced against considerations of legal professional privilege, the privilege against self-incrimination, together with privacy issues, mainly in relation to individuals involved in these cases.³⁰ In certain jurisdictions, such as the **United Kingdom**, there can be a limited waiver of privilege over relevant material, which could conceivably include material relevant to the detection of the bribery.

²⁹ Czech Republic Phase 3 Report, Recommendation 1; Phase 4 Report (forthcoming); Greece Phase 3bis Report, Recommendation 2(d); Poland Phase 2 Report, Recommendation 3(e) and Phase 3 Report, Recommendation 1; Portugal Phase 3 Report, Recommendation 2; Slovak Republic Phase 3 Report, Recommendation 1(c); Slovenia Phase 3 Report, Recommendation 1(c); Spain Phase 3 Report, Recommendation 2(d). The Czech Republic and Portugal have since fully implemented the relevant recommendations (Source: Country Reports on the Implementation of the OECD Anti-Bribery Convention (www.oecd.org/daf/anti-bribery/countryreportsontheimplementationoftheoecdanti-briberyconvention.htm)).

³⁰ The Resource Guide to the Foreign Corrupt Practices Act (2012), notes that, in order to protect the privacy rights and other interests of the uncharged and other potentially interested parties, the US DOJ and US SEC do not provide non-public information on matters it has declined to prosecute.

Figure 2. Bribery schemes detected through self-reporting



3.2 Provide guidance on self-reporting

Self-reporting is often taken into account as part of the wider picture relating to the co-operation by the company in any subsequent investigation. Clear guidance as to the definition or criteria used to define a self-report together with any ongoing expectations relating to co-operation will be of assistance to any company in its decision whether or not to report. It can then assess whether it can meet these requirements in line with the other factors under consideration set out above. In addition to the UK SFO Guidance on Corporate Self-Reporting mentioned above, other countries have developed clear guidance for companies.

The **United States** DOJ FCPA Self-Reporting Pilot Program has the most structured guidance on self-reporting. Under the Pilot Program, a self-disclosure must:

- Occur before a government investigation or an imminent threat of disclosure;
- Take place within a reasonably prompt time after the legal person became aware of the offence;
- Include all relevant facts known to the company, including all relevant facts about any individuals involved in any FCPA violation.

The expectations of the DOJ in terms of what is required for a company to receive additional credit for full co-operation include:

- Disclosure on a timely basis of all facts relevant to the wrongdoing at issue, including all facts related to involvement in the criminal activity by the corporation's officers, employees, or agents;
- Preservation, collection and disclosure of relevant documents and information relating to their provenance;

- Provision of timely updates on a company's internal investigation...;
- Upon request, making available for Department interviews those company officers and employees who possess relevant information; this includes, where appropriate and possible, officers and employees located overseas as well as former officers and employees (subject to the individuals' Fifth Amendment rights);
- Disclosure of overseas documents... (except where such disclosure is impossible due to foreign law)...

Whilst this guidance clearly sets out the expectations of any co-operating company, the prosecutor retains a high-level degree of discretion in relation to the eventual disposal of the case. According to the DOJ, the Program has resulted in an increase in the number of voluntary self-reports.

Brazilian authorities have taken various steps to provide guidance to both enforcement authorities and companies in relation to self-reporting procedures. Ordinance No. 910 of 7 April 2015 defines the procedure for law enforcement authorities to investigate administrative liability of companies and negotiate leniency agreements. It requires companies to “expressly declare that [they were] guided about [their] rights, guarantees, legal duties and warning that if CGU’s requests and determinations are not met during the negotiation phase, it will result in proposal abandonment” (art. 28(1)). Furthermore, the agency negotiating the leniency agreement must evaluate whether the company was the first to manifest interest in cooperating with the investigations of wrongdoing (art. 30(II)(a)). In addition, the Brazilian Ministry of Transparency has issued a number of technical notes that set the rules for the commissions in charge of leniency agreements, including the parameters for calculating sanctions. These documents are not publicly available as they cover the strategies for negotiation. The Ministry of Transparency has however released a step-by-step guide for companies on self-reporting and leniency agreements³¹ and dedicated web portal for reporting information and answering questions.³² Awareness-raising is also necessary to ensure companies have knowledge of self-reporting guidance: a recent media article quoted a Brazilian prosecutor’s statements that companies were incorrectly deciding not to self-report possible bribery which predated the 2014 anti-corruption legislation.³³

In **Canada**, the Royal Canadian Mounted Police’s (RCMP’s) International Anti-Corruption Unit has developed several initiatives to reach out to the public (including industry representatives, companies, and law firms), including to encourage the proactive self-reporting of incidents of bribery discovered through internal controls and compliance mechanisms. This goes hand-in-hand with emphasis on the importance of establishing and implementing such mechanisms. Investigative leads relating to foreign bribery have been provided to the RCMP International Anti-Corruption Unit as a result of self-disclosure by companies, including in the concluded case of Griffiths Energy International Inc..³⁴

³¹ See www.cgu.gov.br/noticias/2017/03/ministerio-da-transparencia-esclarece-procedimentos-do-acordo-de-leniencia (in Portuguese).

³² See: www.cgu.gov.br/noticias/nota-de-esclarecimento-leniencia-passo-a-passo-parte-2.

³³ Multinationals failing to report misconduct to us, warns Brazilian prosecutor, *Global Investigations Review*, 23 May 2017.

³⁴ By virtue of 2013 amendments to the *Corruption of Foreign Public Officials Act*, the RCMP has the exclusive ability to lay charges for offences under the CFPOA as well as for offences of

Box 5. Canada Case Study: Griffiths Energy International Inc. (2013)

Griffiths Energy International Inc. (“Griffiths”), a company based in Calgary, Alberta, pleaded guilty on 22 January 2013 to a charge of foreign bribery under the CFPOA to secure an oil and gas contract in Chad. Griffiths acknowledged committing to provide CDN 2 million in cash and shares in exchange for exclusive resources in two regions. After providing the Government of Chad with a CDN 40 million signing bonus, Griffiths was awarded the resource rights. After a voluntary disclosure by the company, full cooperation with the RCMP International Anti-Corruption Unit’s investigation, and a guilty plea, Griffiths was sentenced by the Alberta Court of Queen’s Bench to a fine of CDN 10.35 million. In addition, the PPSC prosecutor initiated forfeiture proceedings in relation to the shares purchased by three of the bribe recipients.

Source: Canada, Phase 3 Written Follow-Up Report (2013)

While there is no legislative basis for self-reporting in **Switzerland**, the OAG, in a public statement made at a conference on 21 October 2015 in Zurich, confirmed that it welcomes self-reporting by companies of suspected corruption.³⁵ Such cases are managed within the scope of punishment orders and simplified procedures. The OAG has not produced any internal guidelines for its prosecutors. Within the OAG, all such cases have to be discussed and approved by the chief of the relevant division, guaranteeing that there is equal treatment and an appropriate application of the public interest criterion. Furthermore, there are no publicly available guidelines, which is why the OAG recommends that companies seek advice on a no-name basis directly with the OAG.

3.3 *Establish clear self-reporting procedures*

To encourage, and facilitate, greater self-reporting by companies, it is important to establish and communicate clear channels for making the self-report. In the **United States**, self-reports are typically made by company counsel, who contacts the heads of the SEC and/or DOJ FCPA Units. The DOJ Fraud Section has a dedicated email address for receiving reports of FCPA violations.

The **UK SFO** has set out its procedure for any self-reporting company on its website. It outlines the process to be adopted by companies and/or their advisers when self-reporting to the SFO as follows:

- Initial contact, and all subsequent communication, must be made through the SFO’s Intelligence Unit, through the secure reporting form. The Intelligence Unit is the only business area within the SFO authorised to handle self-reports.
- Hard copy reports setting out the nature and scope of any internal investigation must be provided to the SFO’s Intelligence Unit as part of the self-reporting process.

attempt, being an accessory after the fact, counselling or conspiracy in relation to CFPOA offences. Therefore, in practice, self-disclosures in relation to such offences are channelled to the RCMP.

³⁵ Anti-Corruption Regulation (Switzerland), Law Business Research (2016), Bühr and Henzelin, [www.lalive.ch/data/publications/Anti_Corruption_Regulation_\(Switzerland\).pdf](http://www.lalive.ch/data/publications/Anti_Corruption_Regulation_(Switzerland).pdf).

- All supporting evidence including, but not limited to emails, banking evidence and witness accounts, must be provided to the SFO's Intelligence Unit as part of the self-reporting process.
- Further supporting evidence may be provided during the course of any ongoing internal investigation.

Apart from the information provided above, the SFO will not advise companies or their advisers on the format required for self-reports. Nor will the SFO give any advice on the likely outcome of a self-report until the completion of that process and any subsequent investigation.

3.4. *Proportionate incentives for self-reporting*

Providing proportionate incentives through any of the approaches set out above can effectively incentivise companies to self-report. It is clear that the Pilot Program put in place by the DOJ in April 2016 increased the numbers of voluntary disclosures that it received. Whilst in several jurisdictions there is no guarantee that a more favourable outcome can definitely be obtained by a company that has self-reported, reducing the sanction for companies that have self-reported compared to those that don't, can provide clear and obvious motivation to self-disclose potential violations of the law. Further to this, there is obvious benefit to authorities to motivate a self-disclosure to be made in a timely fashion in order to provide the relevant authority with the best opportunity to ensure that appropriate evidence can be secured and obtained. Early engagement can also mean that an authority can influence an internal investigation and access the material from that investigation if it chooses to do so.

3.5 *Ensure domestic capacity to effectively detect, enforce and sanction foreign bribery*

While the provision of encouragement and guidance to companies is key, the risk of detection of foreign bribery by law enforcement authorities must be real and present for self-reporting to be effectively incentivised. While certain companies may decide to self-report for ethical reasons or to accept responsibility for prior criminal acts, others may only see an interest in self-reporting if they are convinced that law enforcement agencies have the capacity to effectively detect and investigate foreign bribery. Thus, ensuring that law enforcement has adequate resources and expertise, as well as the necessary investigative powers for foreign bribery enforcement is an essential element in incentivising self-reporting. To make sure it is able to proactively detect foreign bribery, the UK SFO, for instance, has ramped up its intelligence capability.

The risk of authorities being alerted to the issues from another source may further encourage companies to report earlier and more often. This can be the case in systems that only provide credit for self-reporting if the authority is unaware of the issues. Further, concealment may be an aggravating factor in the relevant jurisdictions.

Finally, effective, proportionate and dissuasive sanctions for foreign bribery, both in law and in practice, are also an essential component to incentivise self-reporting. In the absence of consistent and dissuasive punishment for bribery-related offences in a given country, the incentive to self-report, and more generally cooperate, may diminish. But such a regime of effective, proportionate and dissuasive sanctions also needs to envisage reduction or mitigation of punishment for companies that self-report, as a way of encouraging them to come forward. In addition, in some jurisdictions, settlement

agreements allow the company to avoid debarment from public procurement: this may be a significant incentive to self-report for companies that conduct a large part of their business through public contracting.

4. Other factors which companies may consider in deciding whether to self-report

Discussions above focus on issues which the legislator and/or law enforcement may need to consider in developing approaches to self-reporting. However, it is worth setting out, that any company weighing up the decision to self-report may need to consider what might be a complex series of facts taking into account matters of criminal, regulatory and employment law. These include issues such as:

- **Jurisdiction:** A company will need to consider both which countries and subsequently which authorities may have an interest in the issues raised. The SBM Offshore case is an example of a company self-reporting in multiple jurisdictions. When considering whether to self-report in a particular jurisdiction, companies also need to be alert that in countries with the legality principle, prosecutors are required to open an investigation once they become aware of the possible commission of a criminal offence.³⁶ Furthermore, due to cross-jurisdictional police information sharing agreements, police may be required to share their admissions with authorities in other jurisdictions. Other authorities may also choose to share information between jurisdictions if permitted to do so. The consideration given to the principle of *ne bis in idem* (or double jeopardy) may also differ depending on the jurisdictions. As a separate note, authorities need to be aware of the potential problem of ‘forum shopping’ to ensure that companies do not seek to obtain a better resolution in an alternative jurisdiction to that which may have a better claim to address the issues. Companies, for their part, would prefer greater cross-jurisdictional guidance and harmonisation. These issues are too broad to be adequately addressed in this study which focuses on detection methods.
- **When and what to report:** A company will need to consider to what extent the issues should be investigated internally such that any report contains sufficient key information whilst also demonstrating that the report has been made in a timely fashion and voluntarily. In certain jurisdictions, internal investigations may not be possible due to the operation of data protection or labour laws. Information obtained in the course of internal investigations could be compelled by law enforcement authorities and may not be subject to legal professional privilege.
- **Reputation management:** There may be reputational damage inflicted on an organisation through media reporting on the self-report. This could lead to a negative effect on its share price and its ability to win new business. On the other hand, where self-reporting contributes to expedite case resolution, there could be shorter-term impact on reputation.

³⁶ For example, the principle of legality is expressed in § 152 para. 2 of the German Code of Criminal Procedure (*Strafprozessordnung* or *StPO*). It obliges prosecutors and police to take action against any person reasonably suspicious of criminal activities. German prosecutors therefore have no discretion as to whether to initiate investigations.

- **Legal professional privilege:** In providing information to authorities, a company will need to consider the risk of that information being shared between jurisdictions. This can lead to issues regarding loss of control and privilege over the material for use in other criminal proceedings, or in civil litigation. As mentioned above and further to the judgment in *Director of the SFO v Eurasian Natural Resources Corporation Ltd* (2017), information obtained in the context of internal investigations is not necessarily protected by legal professional privilege in the United Kingdom.³⁷
- **Implications for individuals/employees:** A company may have concerns about individual liability and the possibility of their subsequent criminal prosecution. This is particularly so where senior managers and/or directors are possibly implicated and still employed by the company. In certain countries, self-reporting and subsequent cooperation can extend to cooperation in proceedings against individuals. The company will also need to manage any local employment law and data protection issues. Further issues may arise, including of privilege, if the company wishes to interview or otherwise obtain the accounts of those individuals.
- **Costs:** because self-reporting generally goes hand-in-hand with continued cooperation in the investigation with law enforcement, any self-report is likely to lead to further employee time and effort spent, together with the costs of internal and external advisers. On the other hand, expedited settlement procedures resulting from self-reporting can save financial and reputational costs involved in protracted criminal proceedings.

Conclusion

It is evident that the above list of considerations will lead to differences in recommendations from advisers and decision-making by companies. In some cases, it will be an obvious decision to self-report, such as when a whistleblower or an internal audit has raised serious concerns. In other cases, a company may be wary of bringing matters to the attention of authorities where the competing factors are weighty. It is in those cases where clear incentives to self-report with respect to the potential outcomes open to a company may be required to tip the balance in favour of reporting. The potential benefits in having self-reported, or the potential increased sanctions of not having reported, need to be such that the other multiple issues under consideration become of secondary concern. Incentives can either be related to the self-reporting model or affecting the level of the sanction that will be applied or both. Similar approaches across jurisdictions as to the type and level of incentives available together with further examples of co-operation between authorities in multi-jurisdictional cases could also increase companies' confidence as to the consequences of self-reporting.

³⁷ As of the time of publication, ENRC has been granted permission to appeal.

Chapter 2

Whistleblowers and whistleblower protection

Introduction

Whistleblowers are an important source of foreign bribery cases and they often provide pivotal evidence for a successful prosecution. However, only 2% (5 cases) of foreign bribery schemes resulting in sanctions was detected by whistleblowers, most of who did not report directly to law enforcement authorities but instead raised the alarm internally within their organisation.³⁸ Detection through whistleblower reporting to law enforcement authorities is rarely discussed in public by such authorities because of the need to protect the whistleblowers involved. The Luxleaks case has put the spotlight again on the role of whistleblowers in promoting the public interest. The following case is an example of whistleblower reporting leading to a successful law enforcement outcome.

Box 6. United States Case Study: Mikerin Case (2015)

US-based Transport Logistics International (TLI), a company specialising in the transportation of nuclear fuel for civilian use between the Russian Federation and the United States, conspired with others, including its US-based executives, to pay approximately USD 2 million in bribes, between 2004 and 2013, to Vadim Mikerin, a foreign official with Techsnabexport (Tenex), a Russian state-owned corporation that sold and transported nuclear fuel on behalf of the Russian Federation and its nuclear agency, Rosatom. Thus far, three people have pleaded guilty to FCPA-related offences, including Vadim Mikerin who pleaded guilty to a conspiracy to commit money laundering and received a sentence of 48 months of imprisonment. The case was detected by a government informant who was asked by Mikerin to pay and launder bribes. That informant advised the FBI who opened an investigation and discovered additional bribe payments by TLI.

The reluctance of whistleblowers to report to law enforcement authorities is likely due to the lack of effective legal protections in many Parties to the OECD Anti-Bribery Convention. According to a 2016 OECD study, of the 43 Parties to the Anti-Bribery Convention, only 14 had adopted measures that satisfactorily meet the 2009 Anti-Bribery Recommendation's provisions on private sector whistleblower protection.³⁹ The WGB

³⁸ This figure is based on publicly-available court decisions, documents in finalised cases of bribery of foreign public officials, and other sources (such as media reports). This figure has not been validated by the States Parties to the OECD Anti-Bribery Convention, particularly those that have strict confidentiality rules that preclude associating whistleblowers with finalised cases.

³⁹ OECD (2016b), pge 105. At the time of and after publication of this study, several countries enacted whistleblower protection legislation that has not yet been evaluated by the WGB.

has stated that the implementation of effective whistleblower protection frameworks is a horizontal issue that confronts many Parties to the OECD Anti-Bribery Convention.

The 2009 Anti-Bribery Recommendation recommends that countries ensure that “appropriate measures are in place to protect from discriminatory or disciplinary action public and private sector employees, who report in good faith and on reasonable grounds to the competent authorities suspected acts of bribery” (OECD, 2009a, Recommendation IX iii). The OECD Recommendation on Public Integrity recommends “clear rules and procedures for reporting suspected violations of integrity standards, and [...] protection in law and practice against all types of unjustified treatment as a result of reporting in good faith and on reasonable grounds.” It further advises “providing alternative channels for reporting suspected violations of integrity standards, including when appropriate the possibility of confidentially reporting to a body with the mandate and capacity to conduct an independent investigation.” (OECD, 2016e, Recommendations 9b and 9c)

There is no internationally accepted definition of “whistleblower”. A whistleblower can be any person who reports suspicions of bribery of foreign public officials to law enforcement authorities, an employee who reports internally to the company, or third persons who report to law enforcement or the media. Whistleblowers who report are sometimes also involved in the offence. Protection should be afforded to whistleblowers regardless of their motives in making the disclosure and regardless of whether they report directly to law enforcement, or report internally - first within the company, or to the media, an elected government official or to civil society (for example, an advocacy group or a non-governmental organisation). The importance of whistleblower protection in facilitating detection through self-reporting, investigative journalism and reporting by the accounting and legal professions is addressed in other chapters of the report. This chapter will explore various approaches to encourage whistleblower reporting, including by providing effective legal protection from reprisals.

1. How can whistleblowers be encouraged to report foreign bribery allegations to law enforcement authorities?

1.1 Raise awareness

Raising awareness of protections afforded to whistleblowers and of the channels for reporting is essential to ensure the effectiveness of any whistleblower reporting framework. Whistleblowers must know where, how, and when to report; that their identity as a whistleblower will be kept confidential; and also that they will be protected with anti-retaliation remedies. Raising awareness of the importance of whistleblowers can promote a “speak up” culture and de-stigmatise the disclosure of wrongdoing. For example, the Office of the Whistleblower (OWB) of the US Securities and Exchange Commission (SEC) participates in public engagements aimed at promoting and educating the public concerning the US SEC’s whistleblower programme. Target audiences include potential whistleblowers, whistleblower counsel, and corporate compliance counsel and professionals. The OWB also aims to promote and educate the public about the whistleblower programme through its website (www.sec.gov/whistleblower). The website contains detailed information about the programme, copies of the forms required to submit a tip or claim an award, a listing of enforcement actions for which a claim for award may be made, links to helpful resources, and answers to frequently asked questions.

Country practices: Raising awareness of whistleblowing frameworks	
Korea: Anti-Corruption and Civil Rights Commission (ACRC)	<p>Since the entry into force of Korea's Public Interest Whistleblower Act, the Anti-Corruption and Civil Rights Commission (ACRC), the body responsible for its implementation, has undertaken several awareness-raising initiatives, including both in the general anti-corruption context, such as through the annual ACRC Policy Roundtable for Foreign Businesses in Korea, where the ACRC Chairperson invites leaders of foreign businesses operating in Korea to discuss Korea's anti-corruption policy; and in whistleblower protection-focused contexts, including</p> <ul style="list-style-type: none"> • workshops on dealing with whistleblower reporting and protection in the public and private sectors (2012, 2014), • lectures tailored to different groups in society to raise awareness of public interest whistleblowing and protection: public organisations, businesses, and the general public (about 3,500 participants in 2011, 2012), • yearly distribution of promotional materials since 2013, including TV commercial, posters, leaflets, banners on internet portals, on-board video materials for train cabins, • update and distribution of PPT materials on whistleblower reporting and protection for training of employees of public organisations (2012, 2013, 2014, 2016), • distribution and operation of online training on public interest whistleblowing (2014, 2016), • distribution of the whistleblower protection guide for companies (2015), • and newspaper commercials (2014), e-book on public interest reporting best practices (2015), radio commercials (2016). <p>The ACRC also made efforts to raise awareness on public interest whistleblowing among the youth by publishing webtoons and mobile messenger emoticons (2012). About 16% of the public were aware of the whistleblower protection system in 2011, and the figure jumped to 23.6% in 2012 and 28.4 in 2016.</p> <p><i>Source: Korea Phase 3 Written Follow-Up Report (OECD, 2014); Korea ACRC</i></p>
Ireland: Integrity at Work Initiative	<p>Partnerships between government and civil society can also promote whistleblower reporting and protection. A recent example of such collaboration is Ireland's Integrity at Work (IAW) Initiative, which aims to assist employers to comply with the Protected Disclosures Act (2014) and foster workplaces where people feel safe to speak up about wrongdoing. The IAW along with Ireland's Transparency Legal Advice Centre (TLAC) – an independent law centre established by TI Ireland that provides free specialist legal advice on protected disclosures – are run by TI Ireland with funding from the Irish Department of Public Expenditure and Reform and Department of Justice and Equality.* Members of the IAW programme come from all sectors: public, private and not-for-profit. To date, 24 organisations have joined or signalled their intention to join IAW. Two IAW Forums (seminars and workshops) have been delivered to over 100 participants between December 2016 and June 2017, focusing on providing expert guidance to employers on important issues such as assessments and investigations, complying with the Protected Disclosures Act, and related topics. As a result, there has been an increase of over 200% in the proportion of whistleblowers calling the Speak Up helpline since it was established in 2011. TLAC has also been providing free legal advice to clients since March 2016. TLAC's clients are (or were) employed in a variety of sectors including health, social care and government.</p> <p><i>* For more information, see: http://transparency.ie/integrity-work.</i></p>

1.2 Provide clear reporting channels

The 2009 Anti-Bribery Recommendation urges countries to ensure that easily accessible channels are in place to report suspected acts of foreign bribery to law enforcement authorities, in accordance with member countries' legal principles (OECD, 2009, Recommendation IX i). It is important to ensure that reports can be made by various means (e.g., phone, online, mail, and fax) to allow whistleblowers to choose the channel most adapted to their circumstances. For example, whistleblowers in open-space offices might be reluctant to use online or phone hotlines during work hours and may prefer to report outside of work hours by other means. Clear reporting channels should not only be put in place, but also publicised. The WGB has recommended that 17 countries raise awareness in the public and private sectors about the available channels for making reports.⁴⁰

The US SEC's OWB was established under the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 and began operating in 2011. In 2017, the OWB received over 4 400 tips, an increase of almost 50% since 2012 (its first full year of operation). Beginning in August 2011, individuals wishing to participate in the US SEC's whistleblower programme have been required to submit their tip through a "Submit a Tip" button on the SEC's online portal or in hard copy on a specific form ("Form TCR"). OWB raised awareness of the online portal by (1) publicising it actively through participation in webinars, presentations, speeches, press releases, and other public communications; (2) establishing a publicly-available whistleblower hotline and directing callers to the online portal; and (3) in meetings with whistleblowers, potential whistleblowers and their counsel and corporate compliance counsel and professionals to promote the online portal.

Country practice: Complaint or Referral Portal	
United States: "Submit a Tip", US SEC, Office of the Whistleblower's Online Tip	<p>US Exchange Act Rule 21F-9 provides whistleblowers the option to submit tips either electronically through an online portal that feeds directly into the Tips, Complaints or Referrals (TCR) System or by mailing or faxing a hard-copy Form TCR directed to OWB. This flexibility supports whistleblowers who may not have access to a computer or who may prefer to submit their information in hard copy. In cases where whistleblowers elect to submit a hard-copy Form TCR, OWB manually enters the tip into the TCR System so that it can be appropriately reviewed, assigned, and tracked in the same manner as tips received through the online portal.</p> <p>OWB's website (www.sec.gov/whistleblower) contains detailed information about the programme, copies of the forms required to submit a tip or claim an award, a listing of enforcement actions for which a claim for award may be made, links to helpful resources, and answers to frequently asked questions.</p> <p><i>Source: US SEC, OWB Annual Report, 2016</i></p>

⁴⁰ Bulgaria, Estonia, Finland, Germany, Hungary, Iceland, Ireland, Israel, Italy, Korea, Luxembourg, Mexico, New Zealand, Slovak Republic, Slovenia, South Africa and Turkey. This list refers to the countries that received such recommendation in the context of their Phase 3 evaluation by the WGB. In the case of Bulgaria, Estonia, Finland, Germany, Iceland, Italy, Mexico, Slovak Republic, recommendations were made to both ensure that appropriate measures are in place to protect whistleblowers and take steps to raise awareness of these mechanisms.

The **Dutch** Whistleblowers Authority Act (*Wet Huis voor Klokkeluiders*) entered into force on 1 July 2016. The purpose of the Act is to improve ways to report a concern about wrongdoing within organisations and to offer better protection to those who do so. The Act also provides for the establishment of a Whistleblowers Authority which is mandated to receive, investigate and refer protected disclosures or alleged retaliation or a combination of both. Pursuant to the Act, Dutch companies with 50 or more employees must establish internal reporting and protection mechanisms. The Act then provides for a tiered approach to reporting: first internally within the company, then to the relevant authority and finally to the Whistleblowers Authority as a last resort. There are exceptions to this tiered approach in cases of emergency; where the company or authority has not put in place the required reporting mechanism; or when highest level management is involved in the wrongdoing. The Whistleblowers Authority Act also gives the employee the right to obtain confidential advice about the best course of action before making a report, either from the company's confidential counsellor, a Whistleblowers Authority advisor or a private lawyer or other advisor. In its first 6 months of operation, 532 people contacted the Whistleblowers Authority's Advice Department; 70 of these requests for advice were considered as whistleblower cases; 183 were still under evaluation as of December 2016. In terms of subject-matter, 33% of requests involved an issue in the public sector; 32% involved an issue in the private sector; and 23% an issue in the semi-private sector (Whistleblowers Authority, 2016).

The **UK** Serious Fraud Office (SFO) recently updated its whistleblowing procedures to encourage greater reporting. In January 2016, the SFO launched a new website, introducing a "decision tree" reporting form that asks reporting persons a series of questions to try and establish at the outset whether their information should be supplied to the SFO (through the online secure reporting form) or to other UK agencies. To inform the public of this new reporting system, the SFO issued a statement referring to the new decision tree reporting form, although it did not actively seek to promote its use (UK SFO, 2012). The SFO press office also solicited feedback from stakeholders and journalists on the decision tree approach. The decision tree enables the SFO to redirect reporting persons to the appropriate government agency but the SFO considered that active promotion may have undermined that objective. The UK's Phase 4 evaluation notes that although the SFO received fewer tips following the introduction of the new system, the SFO received a greater number of relevant whistleblower tips.⁴¹

Country practice: Reporting serious fraud, bribery and corruption	
United Kingdom Serious Fraud Office	<p>"Whistleblowing is when an employee reports suspected wrongdoing at work. Officially this is called "making a disclosure in the public interest". If you suspect wrongdoing in your workplace, you should follow the whistleblowing procedures in your own organisation. If there aren't any or you are not comfortable reporting the matter internally there are a number of prescribed bodies to whom you can report in confidence. You can find useful advice on the Gov.uk website. The Serious Fraud Office is one of those prescribed bodies and we would like to hear from you if the wrongdoing concerns serious or complex fraud, bribery or corruption in a UK company. In such circumstances we would urge you to contact us using our secure reporting form."</p> <p>Source: UK SFO website: www.sfo.gov.uk</p>

⁴¹ UK Phase 4 Report (2017), paragraph 24, www.oecd.org/daf/anti-bribery/unitedkingdom-oecdanti-briberyconvention.htm.

In **France**, in accordance with article 8 of the Loi Sapin II, reports must be made first internally “to the direct or indirect hierarchical superior, the employer or a person designated by the employer.” Where this internal process is unsuccessful, the report can be addressed to a law enforcement authority, administrative authority or professional association. In cases of grave and imminent danger or where there is a risk of irreversible damage, the disclosure can be made directly to these organisations. As a last resort, and failing a response by the abovementioned organisations within three months, the report may be made public. The Loi Sapin II further requires public and private sector bodies with at least 50 employees to “establish appropriate procedures for receiving reports from members of their personnel or external and occasional collaborators.” Finally, “any person can make his/her report to the Defender (*Défenseur des droits*)⁴² to be directed towards the appropriate organisation to receive the report”. Attempts to obstruct reporting or retaliate against those who report under the Loi Sapin II are punishable by one year’s imprisonment and a EUR 15 000 fine.

Country practice: Whistleblower Hotline	
United States: Whistleblower Hotline, US SEC, Office of the Whistleblower	<p>The OWB created a whistleblower hotline, in operation since May 2011, to respond to questions from the public about the SEC’s whistleblower programme. Individuals leave messages on the hotline, which are returned by OWB attorneys within 24 business hours. To protect the identity of whistleblowers, OWB will not leave return messages unless the caller’s name is clearly and fully identified on the caller’s voicemail message. If OWB is unable to leave a message because the individual’s name is not identified or if it appears to be a shared voicemail system, OWB attorneys make two additional attempts to contact the individual. During 2017, the Office returned nearly 3 200 phone calls from members of the public and has returned over 18 600 calls since the hotline was established. Many of the calls OWB receives relate to how the caller should submit a tip to be eligible for an award, how the Commission will maintain the confidentiality of a whistleblower’s identity, requests for information on the investigative process or tracking an individual’s complaint status, and whether the SEC is the appropriate agency to handle the caller’s tip.</p> <p><i>Source: US SEC, OWB Annual Report, 2017</i></p>

1.3 Provide guidance and follow-up

Whistleblowers take significant personal risks in reporting bribery and other crimes and misconduct to law enforcement authorities. Supporting and advising whistleblowers during the time they are deciding whether to make a report should help to instil confidence in the system and encourage reporting. For example, the US SEC’s Whistleblower Hotline provides guidance to prospective whistleblowers about the SEC’s whistleblowing programme. It can also be helpful for the support and advice to be provided by an independent third party. In this context, NGOs such as the Government Accountability Project (GAP), Public Concern at Work (PCaW), and Transparency International support, advise and accompany whistleblowers as they raise their concerns

⁴² The Defender (*Défenseur des droits*) is an independent constitutional authority. Nominated by the President for a six year mandate, the Defender is mandated to defend citizens’ rights against the administration (ombudsman) but also has special prerogatives in the area of promoting the rights of children, the fight against discrimination and the respect of ethics and safety.

internally within their organisation or externally to law enforcement, the media, or other parties.⁴³

Countries should consider whether it would be practical and helpful to encourage whistleblowing by instituting formal policies in their whistleblowing programmes that require periodic communication with whistleblowers about the status of their tip after it has been filed. A communication strategy could help to assure whistleblowers that their concerns are being heard and allow law enforcement authorities to ask follow-up questions to clarify or obtain further information. Such a strategy should also balance the need to keep information on ongoing investigations and proceedings confidential. **Austria's** Ministry of Justice has established an innovative way of ensuring anonymity to whistleblowers, whilst enabling law enforcement authorities to obtain additional information to progress the case. In **Canada**, the Values and Ethics Code for the Public Sector sets out duties and obligations of senior officers for disclosure of wrongdoing, including to “[n]otify the person(s) who made a disclosure in writing of the outcome of any review and/or investigation into the disclosure and on the status of actions taken on the disclosure, as appropriate.”⁴⁴

Country practice: Whistleblower Portal	
Austrian Federal Ministry of Justice	<p>In 2013, the Federal Ministry of Justice in Austria launched a portal (www.bkms-system.net/wksta) to enable individuals to report wrongdoing. The portal can be also be accessed via a link on the Federal Ministry of Justice homepage (www.justiz.gv.at/web2013/html/default/2c9484853d643b33013d8860aa5a2e59.de.html), where individuals can find and download further information on the portal.</p> <p>The portal is operated by the Central Public Prosecutor's Office for Combating Economic Crimes and Corruption (CPPOCECC). The whistleblowing system is an online anonymous reporting system, which is especially suited for investigations in the area of economic crimes and corruption. The whistleblower (or “discloser”) may report anonymously any suspicion that a crime in the general remit of the CPPOCECC pursuant to section 20a of the Code for Criminal Procedure (CCP) was committed; the investigation authority in turn may make inquiries with the whistleblower, while maintaining his or her anonymity in order to verify the value of the information. Any reports within the focus set forth by section 20a CCP, but outside the CPPOCECC remit, are forwarded to the competent authority (mostly financial authorities).</p> <p>To ensure that anonymity is guaranteed, when setting up a secured mailbox, the whistleblower is required to choose a pseudonym/user name and password. The anonymity of the information disclosed is maintained using encryption and other security procedures. Furthermore, whistleblowers are asked not to enter any data that gives any clues as to their identity and to refrain from submitting a report through the</p>

⁴³ The Government Accountability Project (GAP) is a US whistleblower protection and advocacy organisation. A non-partisan public interest group, it litigates whistleblower cases, helps expose wrongdoing to the public, and actively promotes government and public accountability. Since 1977, GAP has helped over 6, 000 whistleblowers (www.whistleblower.org/); Public Concern at Work is a UK-based whistleblowing charity that advises individuals considering whistleblowing at work, supports organisations with their whistleblowing arrangements, informs public policy and seeks legislative change (www.pcaw.co.uk/); Transparency International has established Advocacy and Legal Advice Centres in more than 60 countries, which advise whistleblowers in making their disclosures and work to make sure that their disclosures are duly addressed by appropriate authorities (www.transparency.org/getinvolved/report).

⁴⁴ See: www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=25049.

use of a device that was provided by their employer. Following submission, the CPPOCECC provides the whistleblower with feedback and the status of the disclosure through a secure mailbox. If there are issues that need to be clarified regarding the case, the questions are directed to the whistleblower through an anonymous dialogue.

Such verified reports can lead to the opening of investigations or raise concrete suspicions requiring the initiation of preliminary investigations. As of 31 May 2017, the introductory page of the electronic whistleblowing system was accessed 343 0296 times. A total of 5 612 (possible) criminal offences were reported, less than 6% of which were found to be completely without justification. A total of 3 895 of the reports included the installation of a secured mailbox. About 32% of the reports fell into the scope of other (especially financial) authorities and were forwarded accordingly. The following description is available on the website in English and German:

“ ... [P]rosecution offices and police usually also depend on the information of responsible citizens. Often individual persons shy away from divulging information due to their fear of personal disadvantages. The reasons for this can for example be the involvement of colleagues or superiors. Also the uncertainty of whether their information is taken seriously and investigated can be a problem.

This protected communication platform serves to allay these doubts. Reports can be submitted anonymously and without being traceable. Please set up a secured postbox after reporting. This way, the prosecution office, unlike in the case of other anonymous reports, has the possibility to further establish the circumstances by directly asking you questions, in order to take appropriate and successful investigative measures.

By using the provided communication platform you have the possibility to protect yourself by remaining anonymous and at the same time actively help in the clarification of economic crime and corruption ...”

Source: OECD, 2016a; Austrian Federal Ministry of Justice

1.4 Consider financial rewards

There are currently two Parties to the OECD Anti-Bribery Convention that provide financial rewards to whistleblowers: **Korea** and the **United States**. Not only might financial payments incentivise whistleblowers to report information about misconduct, they can also provide financial support, such as living and legal expenses, following retaliation. Korea’s Anti-Corruption and Civil Rights Commission (ACRC) is mandated under the Anti-Corruption Act and the Act on the Protection of Public Interest Whistleblowers (2011) to provide financial rewards to public and private sector whistleblowers who report internally within their organisation or directly to the ACRC. In addition, the Act permits whistleblowers to request compensation for their expenses, such as medical or psychological treatment, removal costs due to job transfer, and legal fees. In 2016, the Korean government amended the Act on the Protection of Public Interest Whistleblowers by, among other things, extending the scope of protected reporting and harmonising the financial rewards systems between the two laws. The ACRC paid KRW 10.5 billion (USD 9.38 million) for corruption reporting between 2012 and 2016, and KRW 2.64 billion (USD 2.35 million) for public interest reporting between 2011 and 2016.

To help expand the federal government’s resources to detect misconduct in the securities industry, the Dodd-Frank Act authorises the US SEC to provide monetary awards to incentivise, compensate, and reward eligible individuals who voluntarily provide the SEC with original information that leads to a successful enforcement action that results in more than USD 1 million in sanctions. The range for awards is between 10% and 30% of the money collected. Factors that may increase an award percentage

include the significance of the information provided by the whistleblower, the level of assistance provided by the whistleblower, the law enforcement interests at stake, and whether the whistleblower first reported the violation internally through the company's internal reporting channels. Since inception of the programme in 2011, the SEC has awarded more than USD 160 million to 46 whistleblowers and the SEC's enforcement actions from whistleblower tips have resulted in more than USD 975 million in total monetary sanctions, including more than \$671 million in disgorgement of ill-gotten gains and interest, the majority of which has been, or is scheduled to be, returned to harmed investors (US SEC, 2017).

1.5 Ensure that criminal sanctions and civil defamation suits do not deter reporting

Criminal offences such as slander, violation of bank, commercial or professional secrecy, and corporate espionage can all be used to silence whistleblowers. In addition, civil defamation suits can have a chilling effect on whistleblowers seeking to speak up about wrongdoing in large, well-resourced organisations. Cases in **Russia and Switzerland**, where whistleblowers have been detained or held criminally liable for revealing wrongdoing detected in the course of their employment, highlight the need to strike a balance between punishing the malicious disclosure of sensitive corporate information and punishing those who speak out about possible misconduct that affects the public interest.⁴⁵

1.6 Ensure data protection legislation does not impede reporting

As noted in the OECD/G20 Study on G20 Whistleblower Protection Frameworks, data protection laws in some countries may impose legal restrictions on internal private sector whistleblowing procedures (OECD, 2012). The EU's General Data Protection Regulation (GDPR) and the EU Data Protection Directive (2016/680) will apply across all EU member countries from 25 May 2018. As company whistleblower reporting mechanisms rely on the processing of personal data (both of the reporting person and the subject of the report), the establishment of such reporting mechanisms will be subject to this strengthened data protection framework. This would mean that companies that have implemented, or intend to implement internal reporting mechanisms may need to obtain prior approval from national data protection authorities. Furthermore, companies could be liable to pay administrative fines amounting to the greater of EUR 20 million or 4% of total worldwide annual turnover should data protection authorities consider that companies' internal reporting mechanisms and subsequent internal investigation procedures violate GDPR provisions on data processing, data subjects' rights (i.e. the subject of the whistleblower report), or transfer of personal data to third countries or international organisations.⁴⁶ The requirement for prior approval of reporting mechanisms coupled with the risk of significant financial penalties could be major deterrents for companies considering whether to implement protected internal reporting channels.

Even before the entry into force of the GDPR, data protection laws have presented an obstacle to promoting whistleblower reporting mechanisms within companies. In **France**, courts have invalidated companies' internal whistleblowing procedures where the

⁴⁵ See, for example, Russia's Phase 2 Report, para. 42.

⁴⁶ GDPR, Article 83(5).

whistleblowing provisions were too broad in scope and could apply to actions which could harm the vital interests of the company, or physical or moral integrity of an individual employee; where the provisions did not sufficiently detail the rights of the individual subject of a whistleblowing complaint; or where there was a risk of slanderous reporting in the workplace.⁴⁷ In **Greece**, the Hellenic Data Protection Authority, in decision No. 14/2008,⁴⁸ declared a Greek company's internal whistleblower system illegal and sanctioned it for failing to abide by the regulations and procedures envisaged in Greek and EU data protection laws. As a result, those who reported under this system failed to qualify for protection and the monetary sanctions imposed on the company may have deterred other companies from setting up whistleblower systems. It is important for data protection regulators to be aware of the importance of promoting protected reporting within companies, whilst ensuring respect for data protection provisions. On the other hand, the GDPR's strengthened data protection provisions will ensure greater respect for the confidentiality of whistleblowers.

Country practices: Data protection legislation and private sector reporting mechanisms	
Denmark	<p>In its Phase 3 evaluation of Denmark, the WGB noted that despite the absence of private sector whistleblower protection legislation, Danish companies were increasingly adopting internal reporting mechanisms that had to be approved by the Danish Data Protection Agency (DDPA) to ensure compatibility with data protection laws. At the time of the evaluation in 2013, the DDPA had approved systems in over 100 companies. To further facilitate reporting, some companies provided measures to protect whistleblowers; however, in the absence of legal protection to whistleblowers against employment retaliation, these whistleblower mechanisms were judged to have limited effectiveness. The WGB recommended that Denmark promptly put in place public and private sector whistleblower protection measures.</p> <p><i>Source: Denmark's Phase 3 Report (2013); OECD, 2016a.</i></p>
France	<p>In France, courts have invalidated companies' internal whistleblowing procedures on the basis of data protection laws, including where the whistleblowing provisions were too broad in scope and could apply to actions that could harm the vital interests of the company or the physical or moral integrity of an individual employee. The Commission on Information Technology and Liberties (CNIL) has developed an expedited approval procedure whereby companies file a statement of compliance with the French data protection law (No. 78-17 of 6 January 1978). At the time of France's Phase 3 Written Follow-Up Report to the WGB in 2014, the CNIL estimated that 3 000 companies had a "professional whistleblower system".</p>

2. How can whistleblowers be better protected against reprisals?

There is a significant legal disparity among Parties to the OECD Anti-Bribery Convention regarding the employment and post-employment protections available to whistleblowers. Several countries still provide only partial protection to whistleblowers

⁴⁷ See, for example, 8 December 2009 Decision of the French Cour de Cassation.

⁴⁸ 12-09-2008 – Απόφαση Αρ. 14/2008 - Επιβολή κυρώσεων στην εταιρεία ABBOTT LABORATORIES ΕΛΛΑΣ ABEE, www.dpa.gr/APDPXPortlets/htdocs/documentDisplay.jsp?docid=201,90,84,96,141,65,145,84.

through prohibitions against workplace harassment and unfair dismissal in labour laws. In some countries, protection of whistleblowers only applies in certain sectors (such as public officials, or in the financial sector). Only nine countries have enacted standalone, comprehensive whistleblower protection legislation that applies to employees in both the public and private sectors.⁴⁹ Member countries should consider whether harmonising their whistleblowing protections into a single, standalone legislative framework would improve the public's understanding of the of whistleblowing protections afforded to them and the mechanisms to enforce those protections. Elements to ensure the effectiveness of legislative frameworks for whistleblower protection are discussed below.

2.1 Protect whistleblowers who report internally as well as externally

The OECD 2010 Good Practice Guidance on Internal Controls, Ethics and Compliance recommends that companies ensure internal and, where possible, confidential reporting by and protection of whistleblowers who report breaches of the law or professional standards or ethics occurring within the company. Providing confidentiality and anti-retaliation protections to those who report internally within their organisation and those who report externally to law enforcement, the media or civil society is essential to a whistleblower protection framework.

The preponderance of evidence suggests that most whistleblowers report (or want to report) internally first. For example, of the private sector whistleblowers who have received financial rewards for reporting wrongdoing to the US SEC to date, approximately 83% first raised their concerns internally to their supervisors, compliance personnel, or through internal reporting mechanisms, or understood that their supervisor or relevant compliance personnel knew of the violations before reporting to the SEC (US SEC (2017). The US SEC has emphasised that “an individual who reports internally and suffers employment retaliation will be no less protected than an individual who comes immediately to the Commission.”⁵⁰ Whistleblowers that are provided protected internal reporting can help companies learn earlier of wrongdoing and avail themselves of the opportunity to make an early self-report (where such mechanisms exist under national law), which in turn can lead to more expedient and efficient enforcement outcomes. An analysis of foreign bribery schemes noted that, of companies that self-reported bribery in their international operations to law enforcement authorities, 5% found out from a whistleblower. Furthermore, if whistleblowers report internally and no action is taken, they may feel more comfortable alerting law enforcement to their concerns if they know they are protected regardless of whether they reported internally first. Some countries require whistleblowers to report internally first in order to be protected against retaliation. External reporting is permitted in urgent cases, where no action is taken following the

⁴⁹ Hungary (Act CLXV. of 2013 on Complaints and Public Interest Disclosures); Ireland (Protected Disclosures Act (No.14 of 2014); Japan (Whistleblower Protection Act of 2004); Korea (Act on the Protection of Public Interest Whistleblowers of 2011); New Zealand (Protected Disclosures Act of 2000); Norway (Working Environment Act); Slovak Republic (Act No. 307/2014 Coll. on Certain Aspects of Whistleblowing); South Africa (Protected Disclosures Act 2000); United Kingdom (Public Interest Disclosure Act of 1998).

⁵⁰ Interpretation of the SEC's Whistleblower Rules Under Section 21f of the Securities Exchange Act of 1934 [Release No. 34-75592], US SEC, www.sec.gov/rules/interp/2015/34-75592.pdf.

internal report or where there is “reasonable cause”. This is the case, for instance, in **France, the Netherlands and Sweden**.⁵¹

External reporting should also be protected. Current OECD standards provide that public and private sector whistleblowers who report to external law enforcement authorities in good faith and on reasonable grounds should be protected against retaliation or discrimination. Although outside the current OECD standards for whistleblower protection, countries should consider providing protection to whistleblowers who report externally to the media or civil society organisations. As highlighted in Chapter 4 of this Study, responses to the OECD Survey on Investigative Journalism indicate that whistleblowers are the greatest source of information for journalists reporting on corruption cases. The need for greater protection of sources was raised in almost every response to the survey and whistleblower protection frameworks were the second-most valuable resource for journalists behind strong editorial support. It is important that potential whistleblowers are aware that in some countries only external reporting to relevant law enforcement authorities is protected, and reports made to the media or civil society will not necessarily receive follow up or be protected from reprisals. In **Canada**, the Journalistic Sources Protection Act, which was assented to on 18 October 2017, amends the Canada Evidence Act and the Criminal Code to confer further protections for the confidentiality of journalistic sources.

2.2 Define reporting persons and protected disclosures broadly

In any whistleblower protection framework, it is important to clearly identify the types of employment arrangements that benefit from protected reporting. With respect to categories of protected “reporting persons,” definitions must go beyond the traditional employment relationship to include consultants, contractors, trainees/interns, temporary employees, former employees, volunteers, and employees of state-owned or controlled enterprises and statutory agencies. In the context of foreign bribery reporting, it is also essential that protection extend to foreign or overseas-based employees. A broad range of disclosures should also be afforded whistleblower status and protections. Whistleblowers should not be required to categorise the nature of the wrongdoing they report, such as identifying the specific laws that might have been violated or whether the possible misconduct constitutes a crime. Thus, the protected reporting should not be restricted to the particular subject matter of the report. Recognising that segregating corruption from other kinds of public interest reporting deterred potential whistleblowers from reporting, Korea amended its Act on the Protection of Public Interest Whistleblowers to harmonise the protection frameworks and extend the number of laws covering public interest from 180 to 279. The Canadian Public Servants Disclosure Protection Act protects against a broad range of “wrongdoings” in, or relating to, the public sector (see s.8 PSDPA). Whistleblowers are only required to make a disclosure in good faith that they believe could show a wrongdoing. They are not required to categorise the nature of the wrongdoing.

As discussed above, criminal and civil sanctions for frivolous and defamatory reporting, or requirements that the report be made “in good faith”, can deter whistleblower reporting. Even disgruntled employees, or employees actually involved in

⁵¹ In Sweden it is only the case for employees in the private sector. Employees in the public sector are protected regardless of whether they report internally first. External reporting is permitted regardless the cause.

the wrongdoing, may become genuine whistleblowers and should also be entitled to protection. The UN Office on Drugs and Crime (UNODC) Technical Guide to the United Nations Convention against Corruption (UNCAC) states that “good faith should be presumed in favour of the person claiming protection, but where it is proved that the report was false and not in good faith, there should be appropriate remedies” (UNODC, 2009, p.107). The **UK** adopted this position in 2013 when it amended certain provisions in the Public Interest Disclosure Act (PIDA), notably to replace the good faith-requirement with a less onerous public interest test, thus shifting the focus of the legislation “from the messenger to the message”.⁵² In **New Zealand**, the motive of the person reporting wrongdoing is not relevant, but the Protected Disclosures Act 2000 (PDA) requires that the employee must believe on “reasonable grounds” that the information about suspected serious wrongdoing is true or likely to be true for the disclosure to come within the act and its protections (OECD, 2016a, p.51). **Ireland** omitted the public interest test from its Protected Disclosures Act 2014, deeming it a potential obstacle for individuals to come forward and acknowledging that in practice it may be difficult to distinguish what could qualify as a matter of public interest. As a result, the measures in place in Ireland reflect the notion that the public interest involved in attracting genuine whistleblowers far outweighs the public interest in seeking to punish persons who may report allegations in bad faith (OECD, 2016a, p.52).

2.3 *Ensure anonymity or confidentiality*

A fundamental method to protect and encourage whistleblowers is to ensure that they can make anonymous or confidential reports. However, anonymous reporting is not a substitute for robust anti-retaliation protections because the identity of the whistleblower could be deduced from the content or circumstances of the disclosure, such as reporting in small companies or small countries. From a practical perspective, it is also difficult to provide comprehensive protection to a person whose identity is unknown but that could be deduced by potential retaliators for the reasons described above. Anonymous reporting also makes it difficult to obtain additional information from the reporting person that might be essential to understand and remediate the wrongdoing and could have the unintended consequence of generating false or vindictive allegations if the reporting person cannot be identified and held accountable. The US SEC allows whistleblowers to make anonymous reports if they are represented by a lawyer but requires whistleblowers to disclose their identity before the SEC will pay them an award (Rule 21F-7). Since inception of the programme in 2011, 19% of the whistleblowers who received a financial reward from the SEC submitted their information anonymously through legal counsel (US SEC, 2017). As illustrated above, the Austrian Ministry of Justice uses an external service provider for its reporting platform, which enables encrypted anonymous reporting and follow-up and feedback through a case numbering system.

Whistleblowing laws should forbid the disclosure of the whistleblower’s identity (or any information that could reveal the whistleblower’s identity), and clearly state the exceptions to this principle that would require the whistleblower’s identity to be revealed. For example, in the US, one of the exceptions in SEC Rule 21F-7 permits the SEC to disclose a whistleblower’s identity, when the SEC brings litigation against an alleged

⁵² United Kingdom’s Phase 4 Report (OECD, 2017), para. 29, www.oecd.org/daf/anti-bribery/unitedkingdom-oecdanti-briberyconvention.htm. It should be noted, nevertheless, that bad faith reporting may lower compensation by 25%.

wrongdoer in federal court or in an administrative proceeding, and the whistleblower is called as a witness in the proceeding. In this circumstance, the defendant may have the right to know that the witness is a whistleblower and therefore has a potential financial interest in the outcome of the matter. On the other hand, to the extent that a whistleblower becomes a witness in a criminal trial, they may benefit from additional protection under witness protection provisions available in most countries.

Member countries should also consider ways to ensure the confidential handling of whistleblower reports and the whistleblower's identity. For example, confidentiality can be enhanced by exempting whistleblower reports from disclosure under freedom of information legislation (e.g. **Italy's** access to information law has an exception for public employees reporting offences, as does its new whistleblower protection law).⁵³ In addition, disciplinary provisions for breach of confidentiality requirements (and enforcement thereof) can boost whistleblower confidence in reporting mechanisms. In Korea, disclosure of a whistleblower's identity, or facts that may infer it, is punishable by 3 years imprisonment or a fine of KRW 30 million.⁵⁴

In **France**, "procedures for receiving reports must guarantee strict confidentiality of the identity of the reporting persons, persons the object of the report and the information collected by all recipients of the report" (art.9 Loi Sapin II). Elements that could identify the whistleblower may not be disclosed except to law enforcement authorities and only with the consent of the whistleblower and once the report has been substantiated. The disclosure of confidential information is punishable by two years' imprisonment and a EUR 30 000 fine."

2.4 Financial compensation and other protections

As mentioned above, **Korea's** whistleblower protection framework provides for financial rewards: in cases of internal whistleblowing which has led to direct recovery or increase of revenue of central or local governments, awards can range from 4-20% of the assets recovered up to KRW 2 billion; or up to KRW 20 million in cases of whistleblowing which contributed to upholding the public interest or prevented losses to, or led to pecuniary advantages for, central or local governments. Korea also has a financial compensation system to cover whistleblowers' expenses, such as medical expenses, removal expenses due to job transfer, legal costs and loss of wages. The ACRC can also order emergency police protection in cases of threats to physical safety. It has negotiated MOUs with the Korean Neuro-Psychiatric Association to provide financial support for psychiatric treatment of whistleblowers and with the Korean Bar Association to provide legal aid to whistleblowers. The UK PIDA also provides for compensation for the full financial losses of those found to have been unfairly dismissed. The level of compensation for full financial losses is uncapped, although the circumstances under which they are paid will depend on the facts of each case. The UK (HM Courts and Tribunals Service) does not maintain publically available or centrally held data on individual rewards.

⁵³ Disposizioni per la tutela degli autori di segnalazioni di reati o irregolarità di cui siano venuti a conoscenza nell'ambito di un rapporto di lavoro pubblico o private, approved by the Italian parliament on 15 November 2017.

⁵⁴ Act on the Protection of Public Interest Whistleblowers, Chapter V Article 30 (1).

In **Canada**, an individual who is the subject of an act of reprisal (including demotion, termination of employment and any other action or threat that adversely affects employment or working conditions) can make a complaint to the Integrity Commission, which may lead to a financial settlement. Sections 738 to 741.2 of the Criminal Code govern restitution orders as part of the sentencing process (including for the offence of retaliating against an employee who has provided information to law enforcement authorities about an offence committed by their employer, or to prevent an employee from so doing). Section 738 authorises a stand-alone restitution order to cover costs including for loss, destruction or property damage as a result of the commission of an offence and all readily ascertainable pecuniary damages, including loss of income or support, to any person who has suffered bodily or psychological harm from the commission of an offence. Restitution may also be ordered as a condition of a probation order or of a conditional sentence.

2.5 *Sanctions for retaliation*

Whistleblower protection systems need to contain measures to protect against reprisals if confidentiality mechanisms fail and the employer deduces the whistleblower's identity, thereby creating a risk of retaliation by the employer or other employees. Sanctions for reprisals against whistleblowers must consider the full range of retaliatory and discriminatory conduct. Examples of retaliation include, but are not limited to dismissal, demotion, reassignment of roles or tasks, denial of education, training or self-promotion opportunities, bullying, violence or unfair audit of the person's work. Whistleblowers should also be protected against threats of reprisals. Most Parties to the OECD Anti-Bribery Convention with whistleblower protection legislation provide protection for a broad range of reprisals, with penalties ranging from disciplinary action to fines and imprisonment.

Box 7. United States Case Study: International Game Technology (IGT) (2016)

On 29 September 2016, the SEC brought its first stand-alone retaliation case under Section 21F(h)(1) of the Exchange Act. The whistleblower, a director of a division of casino gaming company International Game Technology (IGT), had received positive performance evaluations throughout his tenure with the company, including his mid-year review in 2014. Shortly after the whistleblower received a favourable 2014 mid-year review, the whistleblower raised concerns to senior managers, to the company's internal complaint hotline, and to the SEC that IGT's publicly reported financials may have been distorted. The whistleblower became concerned that the company's cost accounting model could result in inaccuracies in IGT's financial statements and reported these concerns to management and the SEC. Within weeks of raising the concerns, the whistleblower was slated for termination and removed from significant work assignments. The company conducted an internal investigation into the whistleblower's allegations and determined that its reported financial statements were not inaccurate. Shortly thereafter, IGT fired the whistleblower. The SEC found that IGT's conduct violated Section 21F(h), and IGT agreed to pay a USD 500 000 civil penalty to settle the charges.

Source: US SEC OWB Annual Report 2016; In the Matter of International Game Technology, Rel. No. 78991, File No. 3-17596 (Sept. 29, 2016)

Criminal sanctions are perhaps the most dissuasive form of penalty for reprisals. The US Federal Criminal Code 18 USC. §1513 (e) states that “whoever knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any

Federal offense, shall be fined under this title or imprisoned not more than 10 years, or both.” In 2004, the Criminal Code of **Canada** was amended to introduce a crime of retaliation applicable to all employers and employees in Canada and punishable by a maximum of 5 years’ imprisonment. It provides that “no employer or person acting on behalf of an employer or in a position of authority in respect of an employee of the employer shall take a disciplinary measure against, demote, terminate or otherwise adversely affect the employment of such an employee, or threaten to do so, **(a)** with the intent to compel the employee to abstain from providing information to a person whose duties include the enforcement of federal or provincial law, respecting an offence that the employee believes has been or is being committed contrary to this or any other federal or provincial Act or regulation by the employer or an officer or employee of the employer or, if the employer is a corporation, by one or more of its directors; or **(b)** with the intent to retaliate against the employee because the employee has provided information referred to in paragraph (a) to a person whose duties include the enforcement of federal or provincial law.”

Civil and administrative penalties can also be effective to dissuade employers from retaliating against their current or former employees who blow the whistle or assist a government’s prosecution. For example, in the United States, Section 21F(h)(1)(A) of the Securities Exchange Act authorises the SEC to seek civil penalties against employers that engage in a wide-range of retaliatory actions against whistleblowers who report possible misconduct to the SEC or assist in an SEC investigation, judicial or administrative action; or in making disclosures required by other laws. Pursuant to whistleblower protection legislation that entered into force in Sweden in January 2017, employers who retaliate against whistleblowers are required to pay damages. The burden of proof rests on the employer to demonstrate that the retaliation did not occur.⁵⁵ **Korea**’s ACRC has a range of powers available to sanction companies for whistleblower reprisals, including ordering reinstatement of whistleblowers who have been transferred, demoted or fired. In a recent high-profile whistleblower case, Hyundai accepted ACRC recommendations to reinstate a former general manager who was fired after reporting information about vehicle defects to the Korean government, which resulted in product recalls. Hyundai filed an administrative lawsuit disputing the validity of the initial termination, but withdrew the lawsuit in May 2017.⁵⁶ Norway’s Phase 3 evaluation highlights the effectiveness of Norway’s whistleblower protection systems in the context of one company at the on-site visit, which explained that the employee who blew the whistle on the suspicions of foreign bribery that subsequently led to the company’s conviction for the offence was still employed with the company.⁵⁷

2.6 *Civil remedies for whistleblowers*

An additional form of protection is to provide private rights of action to aggrieved whistleblowers to sue the company or individual managers or directors for damages as a result of the discriminatory or retaliatory behaviour. Civil damages help compensate

⁵⁵ Act on special protection against victimisation of workers who sound the alarm about serious wrongdoings (2016:749).

⁵⁶ Hyundai Motor to reinstate whistleblower who leaked info about recall coverup, 30 April 2017, The Hankyoreh (see: http://english.hani.co.kr/arti/english_edition/e_business/792836.html).

⁵⁷ Norway’s Phase 3 Report (2011), para. 105, www.oecd.org/daf/anti-bribery/norway-oecdanti-briberyconvention.htm.

whistleblowers who have been fired and have difficulty finding future employment and could include lost income and litigation costs, such as attorney's fees. In the United States, the Sarbanes-Oxley and Dodd-Frank Acts provide such private rights of action. **Bulgaria's** Conflict of Interest Prevention and Ascertainment Act provides, in art. 32(4), that "a person, who has been discharged, persecuted or in respect of whom any actions leading to mental or physical harassment have been taken by reason of having submitted a request, shall have the right to compensation for the personal injury and damage to property according to a judicial procedure."

Box 8. United States Case Study: Wadler v. Bio-Rad Laboratories, Inc. (2017)

For 25 years, Sanford Wadler was general counsel at Bio-Rad Laboratories, Inc., a Fortune 1000 company that manufactures and sells products and equipment around the world. In 2009, Bio-Rad's management became aware that its employees may have violated FCPA provisions in Vietnam, Thailand, and Russia. The company hired a law firm to investigate whether employees were engaging in bribery in China. The firm concluded that there was no evidence of improper payments. However, in 2011, Wadler discovered no documentation supporting Bio-Rad's significant sales in China and was concerned that this constituted a violation of FCPA books and records requirements and possible concealment of bribes. In 2013, he learned that standard language on the need for FCPA compliance had been removed without his knowledge or approval, from documents translated into Chinese for use in Bio-Rad's operations in China. He brought these concerns to the attention of the Audit Committee and the company's external lawyers and accountants. On 7 June 2013, Sanford Wadler was fired.

Sanford Wadler filed a complaint of termination for engaging in protected activity with the Department of Labor, in accordance with the requirements of the Sarbanes-Oxley Act. He subsequently filed a suit against Bio-Rad and the individual members of its board of directors in the Northern District of California in May 2015. On 6 February 2017, a Federal Jury found that Bio-Rad Laboratories, Inc. would not have terminated Wadler had he not reported these allegations to the Audit Committee. The jury awarded Wadler nearly USD 11 million in damages; USD 2.96 million in back pay, doubled under the Dodd-Frank Act, in addition to USD 5 million in punitive damages. This award is one of the highest civil damages awards to a US whistleblower, to date. The jury found that Bio-Rad's wrongful conduct involved malice, oppression or fraud, entitling Wadler to punitive damages. This finding appears to be based on Bio-Rad's submission into evidence of a negative performance review for Wadler that, while dated April 2013 (prior to Wadler's termination), was shown in metadata to have been created in July 2013 (after his termination). In an earlier interlocutory judgment in the same case, the court confirmed the SEC's interpretation of the Dodd-Frank Act; that its anti-retaliation provisions extend to internal reports of wrongdoing. The court also importantly found that corporate directors of public companies can be held individually liable for retaliating against a whistleblower. Bio-Rad has appealed the verdict.

Source: Wadler v. Bio-Rad Laboratories Inc. et al., case number 3:15-cv-02356, in the US District Court for the Northern District of California

Conclusion

Whistleblowers must have effective legal protection in the form of guaranteed confidential reporting and anti-retaliation protections to freely and safely report suspected bribery of foreign public officials. The WGB continues its rigorous monitoring of countries' frameworks to protect private and public sector employees who report suspicions of foreign bribery. While several countries have recently enacted whistleblower protection legislation, two-thirds of Convention Parties still do not provide satisfactory protection. Given the importance of whistleblowers as a source of detection in foreign bribery cases, the WGB will monitor this issue as a priority in the Phase 4 country evaluations.

Chapter 3

Confidential informants and cooperating witnesses

Introduction

Because foreign bribery schemes are often devised behind closed doors and may only involve a small group of participants, confidential informants and cooperating witnesses can be an invaluable source of detection for law enforcement authorities. In jurisdictions that permit the use of informants and cooperating witnesses, such as Argentina, Brazil, Canada, France, Mexico, the United Kingdom and the United States, law enforcement authorities have successfully leveraged the knowledge of these human sources to successfully detect, investigate and prosecute foreign bribery cases. This chapter will explore the benefits and challenges associated with using informants and cooperating witnesses in foreign bribery investigations.

The UN Convention against Corruption (UNCAC) provides, in Article 37, for countries to enable defendants or co-offenders to cooperate with law enforcement authorities in criminal proceedings for corruption offences, in return for mitigated sanctions or immunity. It also notes that co-operators should be entitled to witness, expert and victim protection, as foreseen in UNCAC Article 32.

The Anti-Bribery Convention and related instruments do not contain express provisions on cooperation in foreign bribery cases. The issue has been examined to a limited extent by the WGB in the context of its country evaluations. One country, in particular, was recommended to allow immunity for co-operators as a measure to improve detection.⁵⁸ In most cases, the WGB has focused its attention on whether there exists a complete defence in foreign bribery cases for cooperating defendants – often termed as “effective regret”. Under this defence, a bribe giver can be completely exonerated from the bribery offence if certain conditions are met, including assistance from the individual in the detection and/or investigation of the crime.⁵⁹ The WGB has recognised that such a provision could play an important role in a domestic bribery context by facilitating the identification and prosecution of corrupt domestic public officials. However, the Working Group has also offered the view that such a rationale does not apply in the foreign bribery context, and that the application of the effective regret defence in foreign bribery cases may lead to a loophole in the implementation of the OECD Anti-Bribery Convention. In the course of Phase 2 and 3 evaluations, at least seven countries received WGB

⁵⁸ Japan’s Phase 2 Report (2005) and Phase 3 Report (2011), www.oecd.org/daf/anti-bribery/japan-oecdanti-briberyconvention.htm.

⁵⁹ Solicitation, or at least acceptance, of the bribe by the public official is another condition which is generally required for the defence to succeed.

recommendations with respect to ensuring that cooperation could not be a complete defence to foreign bribery – this with a view to ensure effective enforcement of the foreign bribery offence.⁶⁰

Box 9. United States Case Studies: Alstom (2014); Haiti Teleco (2011)

The Alstom case

In the investigation of Alstom S.A. and its subsidiaries, employees, and agents, U.S. law enforcement agents conducted an informal interview of a third-party intermediary used by Alstom's U.S. subsidiary at his home. After being visited by the agents, the intermediary agreed to cooperate with the investigation pursuant to an immunity agreement. The third-party intermediary provided inculpatory information regarding current and former Alstom employees with whom he engaged in the bribery scheme. Law enforcement agents then conducted recorded conversations between the third-party intermediary and several of the former Alstom employees. The recorded conversations resulted in additional inculpatory evidence against the former employees, and when confronted by law enforcement, those former employees agreed to plead guilty and cooperate with the investigation. The cooperation of these former employees led to the indictment of a current Alstom executive, who was arrested when he travelled to the United States. Upon being arrested and confronted by the evidence against him, the Alstom executive agreed to plead guilty and cooperate. The additional information provided by the Alstom executive led to additional charges against other individuals and a resolution with the company.

The Haiti Teleco case

In the investigation of U.S. telecommunications companies that paid bribes to Telecommunications d'Haiti S.A.M. ("Haiti Teleco"), U.S. law enforcement authorities developed evidence against a Haiti Teleco official who frequently visited the United States related to U.S. tax violations and money laundering. When law enforcement authorities charged this official, he agreed to plead guilty and cooperate with the investigation, and provided evidence against two U.S. telecommunications companies that paid him bribes as well as two intermediaries that were used in connection with the bribery scheme. This led to charges against the two intermediaries, who both pleaded guilty and agreed to cooperate, and executives from the two companies, one of which also agreed to plead guilty and cooperate. Based on the cooperation of the official, the intermediaries, and one of the telecom executives, authorities were also able to charge two additional Haiti Teleco officials for laundering bribe proceeds through U.S. financial institutions. With the testimony of the cooperating witnesses, U.S. authorities were not only able to identify the intermediaries and executives involved in the bribery, but further secured trial convictions of two telecom executives and one Haiti Teleco official.

1. Definitions and categories of confidential informants and cooperating witnesses

The 2004 United Nations Handbook on Practical Anticorruption Measures for Prosecutors and Investigators (UN Handbook) provides definitions for three categories of human information sources: confidential sources, confidential informants, and cooperating witnesses. They are defined in the UN Handbook as follows:

- “*Confidential sources* are those who provide information obtained by virtue of their lawful employment. For example, a hotel employee with access to registration records, or a travel agent with knowledge of travel plans, would usually be classified as confidential sources. The motivation for a confidential source’s cooperation with law enforcement may stem from a sense of public duty,

⁶⁰ See the Phase 2 reports for the Czech Republic, Greece, Latvia, Poland, Russia, the Slovak Republic and Slovenia.

a friendship with a law enforcement officer, or the sheer excitement derived from assisting the police clandestinely. Confidential sources are normally not paid for their assistance and they require a lower level of management by investigators. Special care must be taken where a country has privacy or data protection laws, and attention paid to the fact that the employment of the source will probably be at risk.”

- “*Confidential informants* are likely to be persons who are themselves engaged in criminal activities or associated with persons who are. Confidential informants are often paid by law enforcement agencies and their relationship with investigators is expected to be a continuing one. Their status as an informant, and the information they provide, are kept absolutely confidential and thus (unlike a cooperating witness) they are not expected to testify in court or otherwise participate publicly in any prosecution.”
- “*Cooperating witnesses* are sources that assist law enforcement officials in a confidential manner but who are expected eventually to be witnesses in public judicial proceedings. Cooperating witnesses may be involved in the corrupt dealings under investigation or be closely associated with the activities. A cooperating witness sometimes acts as an operative of the police in an undercover investigation and may need to know aspects of the investigative plan. The distinguishing characteristic of cooperating witnesses is the fact that their identity and cooperation with law enforcement will ultimately be publicly disclosed. Accordingly, these types of sources can require relocation or other special protection by law enforcement when their role becomes public.”
- A “*cooperation agreement*” generally refers to a written agreement between the prosecutor’s office and an individual defendant in which the defendant agrees to plead guilty and provide cooperation to the government, typically in exchange for a prosecutor’s recommendation to the sentencing judge of a reduced sentence and/or other benefits, such as a promise not to further prosecute the defendant. The cooperation agreement typically requires the defendant to render substantial assistance to the government. The agreement will define what is expected of the defendant, such as complete honesty, full financial disclosure, availability on short notice to meet with the prosecuting office and any other agencies, an agreement to testify as needed, and sometimes an agreement to serve in an undercover role.

This chapter refers primarily to “cooperating witnesses” and “informants”, noting the distinction in the definitions above between “confidential informants” – who provide helpful information to law enforcement authorities but typically are not expected to testify at trial – and “cooperating witnesses” – who are eventually expected to testify in public judicial proceedings.

2. Benefits to foreign bribery enforcement agencies of informants and cooperating witnesses

2.1. *Providing first-hand accounts of bribery schemes and testifying at trial*

Because informants and cooperating witnesses typically participated in the misconduct, they are uniquely situated to provide first-hand accounts of the crime or crimes at issue. Informants or cooperating witnesses can add value by providing such

information both to law enforcement to assist in their development of the investigation, and also to jurors at trial. It can be difficult to bring criminal charges against an individual without an informant or cooperating witness. In fact, the United States reports that its increased use of informants and cooperating witnesses has been one of the main forces behind the growing number of criminal prosecutions of individuals for foreign bribery offences.

Cooperating witnesses and informants are especially important in foreign bribery cases, particularly where such trials take place before juries made of laypersons. Foreign bribery prosecutions typically turn on the ability of the prosecution to explain complex issues in an understandable way to a jury comprised of individuals with little to no background in the subject. Cooperating witnesses or informants can greatly facilitate the jury's understanding of such issues by walking the jury through a complex bribery scheme in terms a layperson can understand, and can breathe life into otherwise ambiguous documents. However, prosecutors should be aware that the defence will try to undermine the credibility of cooperating witnesses and informants where they themselves have been involved in criminal conduct, and take necessary steps pre-trial such as preparing the cooperating witness or informant, mentioning any derogatory information up-front, and corroborating their testimony with objective sources of proof.

2.2. Explaining information already obtained

Documentary evidence is usually a critical component of many foreign bribery cases. Such cases often rely on bank records and internal e-mail communications that may not be obvious on their face. Cooperating witnesses and informants who had involvement with documents in the scheme can help prosecutors confirm their understanding of the significance and meaning of such documents. They can also explain ambiguous, cryptic, or incomplete documentary evidence. Such assistance is especially valuable given the recent trend toward fictitious or unknown beneficial owners and the use of end-to-end encrypted services.

Often, cooperating witnesses or informants can identify whether key documents are missing from the evidence collected by law enforcement, and provide the location of missing documents, such as off-site storage facilities or at targets' homes, safe deposit boxes, or other previously unknown locations. A cooperating witness or informant who is familiar with a target's handwriting can confirm that a key document appears to be in the handwriting of the target. If the cooperating witness or informant was present when it was written, he or she can provide context and further explanation.

In a related vein, cooperating witnesses and informants can help the prosecution corroborate and test information learned from other witnesses. This can be helpful to the prosecution insofar as testing the credibility of both the cooperating witnesses and informants, as well as other witnesses (including other cooperating witnesses and informants).

2.3. Obtaining evidence of foreign bribery schemes

Cooperating witnesses and informants are generally well-positioned to provide information to law enforcement that can assist prosecutors in gathering new evidence of the crime. For example, a cooperating witness or informant may be able to provide sufficient information to allow law enforcement to obtain a search warrant or telephone intercepts (or "wiretaps"). In the case of a search warrant, cooperating witnesses and informants are often well-positioned to provide credible information about the current

physical location of evidence, such as documents or cash, or the use of an e-mail account in connection with the bribery scheme. Similarly, a cooperating witness or informant can provide information needed to seek a wiretap, such as the current telephone numbers used by targets; this is especially useful when a target frequently changes telephone numbers, hoping to avoid detection.

Where permitted under national law, recorded telephone calls or in-person meetings between a cooperating witness or informant and a target can be an invaluable method of evidence gathering. When the conversation occurs over the telephone, such telephone calls are normally made under the supervision and contemporaneous, real-time monitoring by law enforcement. Such calls are sometimes referred to as “consensually monitored calls” or “controlled calls.” The agent may be in the same physical location as the cooperating witness or informant, allowing the agent to surreptitiously direct the questions or responses to the target, so as to steer the conversation into a fruitful area and elicit helpful information.

In certain jurisdictions, cooperating witnesses and informants can also audio and video record in-person meetings. This is usually accomplished by the wearing of a concealed transmitter or other portable recording device. Concealed transmitters typically allow the conversation to be monitored remotely by the agent. Ideally, the agent is located nearby, in a concealed location, to ensure the safety of the cooperating witness or informant.

The use of cooperating witnesses or informants in a “sting operation” may be another way to leverage their assistance to obtain evidence of bribery schemes. Generally speaking, a “sting operation” is an operation designed to catch a person committing a prospective crime. Cooperating witnesses or informants may temporarily assume a fictitious role or identity, and conceal their purpose and methods of detecting crime or obtaining evidence. Their use in such undercover law enforcement operations can range from simple one-time operations, to extremely complex operations unfolding over the course of a lengthy time period.

2.4. Providing details that fill in the blanks in the foreign bribery investigation

In addition to facilitating the gathering of evidence, cooperating witnesses and informants often are able to provide details that even the most thorough investigation would not reveal. Depending on how deeply imbedded any given cooperating witness or informant was in the foreign bribery scheme under investigation, they will have “lived” the factual scenario, and been privy to conversations and other activities of co-conspirators that likely are unknowable to law enforcement. In this way, cooperating witnesses or informants can help law enforcement better understand the scheme at issue, provide leads on other criminal activity, disclose the location of hidden assets, and make many other valuable contributions to an investigation/prosecution that would otherwise go unknown or not investigated.

2.5. Providing new information about other natural or legal persons involved in foreign bribery

Cooperating witnesses and informants are typically well-positioned to provide leads on other co-conspirators involved in the same foreign bribery scheme in which they participated. Cooperating witnesses and informants will be able to describe direct communications with co-conspirators about the scheme, even when no documentary

evidence exists relating to those co-conspirators. Sometimes, they may have audio recorded meetings or phone calls of such interactions. In addition, they may have retained text messages, emails or other written communications with other subjects.

Cooperating witnesses and informants may also have knowledge of individuals or companies engaged in other foreign bribery schemes. Care should be taken to distinguish between first-hand or personal knowledge of other foreign bribery schemes, and situations where the cooperating witness or informant has only heard rumours about such other schemes.

3. Challenges in using cooperating witnesses and informants

3.1. *Recruiting cooperating witnesses and informants*

Cooperating witnesses and informants are extremely valuable law enforcement tools and often their contributions cannot be replicated by other investigative techniques, such as the collection of documentary and physical evidence through subpoenas and search warrants, surveillance and other methods. However, as valuable as cooperating witnesses and informants may be, great care must be taken in their selection given their motivations. Such motivations may include money to be potentially earned from the law enforcement agency (for confidential informants), a desire to take revenge against others, fear of threats from criminal associates, a desire to obtain a sentencing reduction, and fear of deportation.⁶¹ These motivations can work at cross-purposes with the law enforcement agencies' goal of uncovering the truth insofar as cooperating witnesses and informants have an incentive to provide information that is perceived to be helpful. In an attempt to curry favour with the prosecution, cooperating witnesses and informants may exaggerate, lie or even manufacture false evidence. It is, therefore, advisable to tether the "credit" that cooperating witnesses and informants receive to their willingness to provide truthful information and testimony, rather than tying such credit to the outcome of the case.

3.2. *Establishing a working relationship*

Cooperating witnesses or informants who were involved in crime can be skilled criminals who are able to manipulate and lie effectively to those around them. Cooperating witnesses and informants may also have an incentive to guide the investigation in the direction they want, in order to advance their own agenda or to protect others, such as family members. These factors coupled with the incentives for cooperating witnesses and informants to provide the prosecution with "what they want to hear," mean that law enforcement must exercise caution when accepting information from them. "Trust but verify" is an approach often applied. Corroboration of as much evidence as possible obtained from a cooperating witness or informant is advisable.

3.3. *Maintaining a balance between cooperation and fundamental rights protection*

Domestic legal systems that allow for the use of cooperating witnesses and informants generally also provide checks and balances, to ensure that the rights of the

⁶¹ Dennis G. Fitzgerald, *Informants, Cooperating Witnesses, and Undercover Investigations*, 2nd Edition, 2015, at p.45. This chapter draws on the concepts set forth in this informative resource book throughout (hereinafter "Fitzgerald").

defence are respected, including as they relate to self-incrimination and the right to a fair trial. To maintain these safeguards, law enforcement agencies need to exercise their powers carefully and fairly. Allowing for oversight by an independent judge to determine the amount of cooperation credit that a cooperating witness or informant receives protects these fundamental rights; in addition, it can help mitigate the concern that the cooperating witness or informant is merely telling the law enforcement authorities what they want to hear (see section 3.1). For example, in the United States, the judge (not the prosecutor or agent) decides the cooperating witness or informant's ultimate sentence and sanction-reduction based on cooperation.

Country practice: Framework for cooperating defendants	
Argentina	<p>Law No. 27.304 of 2016 establishes the legal framework for cooperation with perpetrators of complex crimes such as corruption related offences. It provides for a reduction of between one-third and one-half of the sanction for a perpetrator who gives information and / or accurate and credible data that can contribute to avoiding a crime, or to clarifying the facts under investigation or other related facts. This information can also disclose the identity or location of other perpetrators, provide sufficient data to enable a significant advance in the investigation, disclose the destination of the instruments, assets, effects or proceeds of the offense, or indicate the sources of funding for the involved criminal organisations.</p> <p>To benefit from a reduction in sanctions, the information provided must refer only to the facts in which the co-operating defendant has participated and to subjects whose criminal responsibility is equal to or greater than that of the co-operator. This Law also establishes criminal sanctions against the unlawful provision of false information.</p> <p>On an operational basis, the cooperation agreement is arranged between the defendant and the prosecutor, but ultimately requires a formal confirmation by the judge of the case. The suitability of such an agreement is assessed notably based on the credibility of the defendant and verification of the veracity of the information provided. Before the judgment, the judge and the prosecutor must corroborate the truthfulness and usefulness of the information provided by the defendant.</p>

3.4 *Trial issues*

A testifying cooperating witness is someone who typically was involved in crime and who has already pleaded guilty. A cooperating witness frequently has an unsavoury past, often with additional prior criminal history or bad acts. This is often referred to as “baggage,” and can serve as a major distraction, and something that can make cooperating witnesses less credible than other more objective witnesses.

In addition, at trial, the defence will endeavour to establish that the cooperating witness somehow misled the government, or provided incomplete information during the course of his cooperation. The defence may also seek to establish that the cooperating witness's primary interest is to receive a lesser penalty, not necessarily to tell the truth. This type of cross-examination, if effective, can be very damaging to a cooperating witness's credibility. In some cases, at the beginning of the cooperation, the cooperating witness will have not fully embraced his/her wrongdoing and the law enforcement reports of interview will reflect this. If this is the case, the cooperating witness must “own” his early lack of candour and explain it at trial.

There are several ways in which the prosecution can address these attacks on the credibility of the witness. At trial, the prosecution should expect aggressive cross-

examination of its cooperating witnesses. If the defence cannot effectively attack the substance of the government's case, they will attempt to diminish the government's case by attacking the credibility of the cooperating witnesses. To reduce the effectiveness of such cross-examination, prosecutors should take various steps, pre-trial. One critical step is to fully debrief the cooperating witness about all possible prior offences. For example, the prosecution should know if the cooperating witness provided false information on his/her taxes or in a bankruptcy filing, even if it was done many years ago and unrelated to the bribery scheme. This prevents surprise at trial by a line of questions from the defence or a surprise defence witness. Such derogatory information should be mentioned upfront in the direct testimony of the cooperating witness. This takes the sting out of the defence eliciting such information first. A second step is to seek to corroborate as much of the cooperating witness's expected testimony as possible with other objective sources of proof. For example, if the cooperating witness is expected to testify that he/she made phone calls to the target in which bribes were discussed, the prosecution should obtain phone records that corroborate that such calls were made. Third, prosecutors and investigators must maintain a professional and arms-length relationship with the cooperating witness, and make clear to the judge and jury that the cooperating witness is only getting rewarded for telling the truth, and nothing more. Cooperation agreements should make this point very clear, and can be used during the cooperating witness's testimony. Lastly, it is important to help explain at trial (likely during closing arguments) why a cooperating witness provides important information despite the fact that he/she may be an unsavoury character, that only those individuals engaged in the crime are able to provide a first-hand account of what occurred, and that more wholesome witnesses would not have such knowledge because the co-conspirators would not confide in them in connection with the crime.

4. Developing incentives for cooperating witnesses and informants in foreign bribery cases

A key issue driving whether and to what extent law enforcement is able to attract and develop cooperating witnesses and informants is whether the domestic legal system provides appropriate incentives ("carrots") and disincentives ("sticks") to the relevant players. In the United States, a wide range of practices have arisen in different federal courts and U.S. Attorney's Offices around the country as to what reductions in sentences cooperating witnesses and informants may receive. Cooperation is greatly rewarded in most districts, and thus provides a powerful incentive for defendants to cooperate. Conversely, where individuals choose not to cooperate, they face substantially higher sentences. In systems that do not permit for reductions in sentences for cooperation, or provide marginal sentencing differences between cooperating defendants and non-cooperating defendants, individuals have more limited incentive to admit their own culpability and cooperate against others, and instead may choose to take the case to trial.

4.1. Investigative tools and techniques that allow cooperating witnesses and confidential informants to effectively demonstrate culpability

In rare circumstances, an individual who engaged in a bribery scheme seeks to make amends and chooses to cooperate in order to accept responsibility for prior actions. Most often, as noted above, an individual will only choose to cooperate when they think it is in their own self-interest. The first step in securing the cooperation of such an individual is therefore to develop evidence against that individual that is strong enough to convict them

at trial. Once confronted with that evidence, the individual will understand the need to consider cooperating with authorities. Thus, the availability of investigative tools that allow for the effective gathering of evidence is key.

4.2. *Effective, proportionate and dissuasive sanctions for foreign bribery*

As noted above, the motivations for an individual to cooperate with law enforcement include the fear of facing significant criminal punishment for the offence or offences at issue. However, if the domestic legal system fails to consistently and dissuasively punish individuals who commit bribery-related offences, this will decrease the incentive to cooperate. For example, if sentences of incarceration for any significant period of time are rare, and suspended sentences or sentences of probation or home confinement are more the norm, individuals may perceive the benefits of cooperation as less valuable than the unlikely outcome of being convicted and incarcerated.

4.3. *Reduction or mitigation of punishment based on cooperation*

Reduction in sanctions – Even if a legal system imposes effective, proportionate and dissuasive sanctions on individuals who engage in a bribery scheme, it also needs to provide for significant reductions for those individuals who cooperate with the government. Otherwise, there would be an insufficient incentive for individuals to cooperate, and they would instead choose to fight the charges and attempt to avoid conviction. Conversely, a legal system that appropriately rewards cooperating defendants with lighter sentences than those convicted of the same offences will naturally incentivise culpable individuals to cooperate.

Plea bargaining – Generally speaking, the term “plea bargaining” refers to the negotiation of an agreement between the prosecution and a defendant whereby the defendant is permitted to plead guilty under more favourable terms than if he simply pleaded guilty to all charges filed against him. During this process, and where allowed under the domestic legal system, the prosecuting office may offer one or more benefits or protections to encourage a defendant to not just plead guilty, but cooperate. Such benefits include: (1) an agreement that the prosecution will file a motion with the court at sentencing outlining the substantial assistance the defendant has provided in the investigation or prosecution of another person; (2) allowing the defendant to plead guilty to one charge, as opposed to all charges in a charging instrument, or all charges that could be brought against the defendant; (3) allowing the defendant to plead guilty to a lesser charge; and (4) an agreement not to prosecute the individual for other criminal activity. Hence, where this is envisaged in the domestic criminal procedure applicable in foreign bribery cases, the plea bargaining process may represent an opportunity to encourage cooperation.

Immunity – The highest level of legal protection that can be offered to cooperating witnesses and informants is immunity. In foreign bribery cases, countries should ensure that such immunity does not amount to an automatic defence of “effective regret”, thus impeding effective enforcement of the foreign bribery offence.

Country practice: Possibilities for immunity	
United States	<p>Typically, in the U.S. federal system, the prosecutor and the defence attorney will discuss the possibility of immunity in the context of a witness who refuses to be interviewed by law enforcement or who asserts his or her Fifth Amendment rights against self-incrimination if served with a grand jury subpoena to testify. Immunity from prosecution can be appropriate in cases where the prosecution values the cooperation of the individual but does not have sufficient evidence to charge and/or convict the individual, or believes it is appropriate to resolve the investigation against the individual without charges.</p> <p>Generally speaking, there are three types of immunity in the U.S. federal system. Such forms of immunity are: (1) transactional immunity (protects the witness from prosecution for the offence or offences involved; often contained in written plea agreements); (2) use immunity (only protects the witness against the government's use of his or her immunized testimony in a prosecution of the witness, except in a subsequent prosecution for perjury or giving a false statement); and (3) informal immunity (immunity conferred by written agreement between the prosecutor's office and the witness).</p> <p>See U.S. Attorneys' Manual, Section 9-23 (Witness Immunity) and U.S. Attorneys' Manual, Criminal Resource Manual, Sections 716-719 (immunity); Department of Justice, Executive Office for United States Attorneys, Federal Grand Jury Practice Manual, October 2008 ed., Section 8.23 (Transactional immunity).</p>

Conclusion

As detailed above, cooperating witnesses and informants can be an invaluable source in detecting foreign bribery, where accompanied by appropriate safeguards and guarantees. To the extent possible, WGB countries that do not permit the use of cooperating witnesses and informants would be well-served to consider taking legislative or other measures necessary to enable the use of this valuable law enforcement tool. WGB countries that already allow the use of cooperating witnesses and informants should fully utilise this tool in investigating and prosecuting foreign bribery cases, and, to this end, should work to enact implementing regulations or prosecutorial guidelines where appropriate to enhance their use.

Chapter 4

Media and investigative journalism

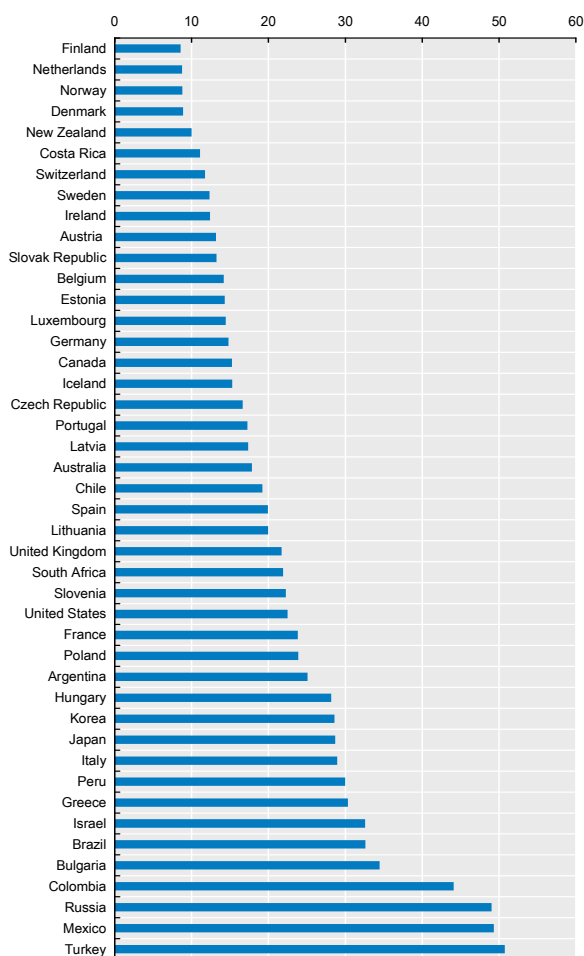
Introduction

Media reporting in general, and especially investigative journalism by affiliated or independent journalists, or indeed NGOs, are among the most important sources of public awareness-raising on corruption. Media reporting is an essential source of detection in foreign bribery cases, either for law enforcement authorities that investigate allegations contained in the press, or indeed for companies that decide to conduct internal investigations or self-report, or anti-money laundering reporting entities that make suspicious transaction reports, following queries from the media or published articles. To date 2% (6 schemes) of foreign bribery schemes resulting in sanctions were initiated following media reports on the alleged corruption. In addition to helping to initiate cases, media reporting may also assist with the evaluation of known matters for potential investigation. The fourth estate should be respected as a free eye investigating misconduct and a free voice reporting it to citizens. While recent technologies such as digital currencies and data mining are providing criminals with new means to commit crimes, encrypted communications provide sources with greater confidence to bring their concerns to the attention of the media, without fear of surveillance or reprisals. Open data is allowing investigative journalists access to an enormous amount of previously unattainable information and transnational networks and consortiums of news professionals facilitate investigations that were unimaginable ten years ago. The Panama Papers investigation, which was awarded the Pulitzer Prize for Explanatory Reporting in April 2017, grew out of five-year reporting push by the International Consortium of Investigative Journalists (ICIJ) that dug into financial secrecy havens and published figures for the top ten countries where intermediaries operate: Hong Kong, UK, Switzerland, US, Panama, Guatemala, Luxembourg, Brazil, Ecuador and Uruguay.⁶² Similarly, in April 2016, after a six-month investigation, two major media outlets reported on the Unaoil scandal, an alleged transnational bribery scheme involving bribes paid on behalf of companies in countries across the globe, including those from Parties to the OECD Anti-Bribery Convention. More recently, the ICIJ's Paradise Papers investigations have resulted in global reporting on the use of offshore financial centres by multinational companies to conceal certain transactions.⁶³

⁶² Explore the Panama Papers Key Figures, <https://panamapapers.icij.org/graphs/>.

⁶³ ICIJ, Paradise Papers: Secrets of the Global Elite, www.icij.org/investigations/paradise-papers/.

Figure 3. States party to the Anti-Bribery Convention in the 2017 World Press Freedom Index



Note: Countries have been given scores ranging from 0 to 100, with 0 being the best possible score and 100 the worst. Peru is included as a full member of the WGB.

Source: Reporters Without Borders, 2017 World Press Freedom Index, <https://rsf.org/en/ranking>

lawsuits. Investigative journalism would not exist without sources. Protection of sources, or whistleblowers (the terms will be used interchangeably in this chapter), is also fundamental to ensuring that corruption cases can be brought to light in the media.

Sixteen out of the 41 Parties to the Anti-Bribery Convention that have completed a Phase 3 evaluation confirmed detecting at least one case of foreign bribery through either national or international media reports.⁶⁴ Six countries received recommendations for law enforcement authorities to routinely assess credible foreign bribery allegations that are reported in the media; for overseas missions to monitor local media and report allegations to the appropriate authorities; or to raise awareness in national media about international corruption issues.⁶⁵ The OECD WGB maintains a “Matrix” of allegations of foreign bribery, which is prepared by the OECD Secretariat based on public sources and mainly on media reporting. The Matrix is used by the Working Group to track case progress, and is sometimes used as a source of detection by member countries.⁶⁶

The role of media in detecting bribery cases is enhanced by legal frameworks protecting freedom, plurality and independence of the press, laws allowing journalists to access information from public administrations and efficient judicial systems that keep journalists away from unfounded

⁶⁴ Argentina, Australia, Brazil, Czech Republic, Finland, Greece, Ireland, Israel, Latvia, Norway, Poland, Portugal, Slovak Republic, Slovenia, Spain and Turkey.

⁶⁵ Argentina, Australia, Greece, Israel, Portugal and Turkey.

⁶⁶ The WGB has noted in its evaluations that the Matrix should not be relied on as the sole or even primary detection source, as countries are expected to maintain their own proactive detection efforts.

1. Freedom of the press – a pre-condition to reporting on corruption

Freedom of the press is a fundamental human right and several international treaties recognise its importance in the protection of democratic principles.⁶⁷ The UNCAC (2003)⁶⁸ acknowledges the critical role of media in fighting corruption. Art. 13(d) asks States Parties to strengthen the participation of society in the fight against corruption by “respecting, promoting and protecting the freedom to seek, receive, publish and disseminate information concerning corruption” subject to certain restrictions as necessary and provided by law, to respect the rights and reputation of others and to protect national security, *ordre public*, or public health and morals. The Group of States against Corruption (GRECO)⁶⁹ considers the level of freedom of press as an indicator of compliance with the rules established by the Council of Europe (CoE) for fighting corruption. Point 16 of Resolution (97)24 of the CoE explicitly included the enhancement of freedom of media among the twenty “Guiding Principles for the Fight against Corruption”.

The OECD Survey on Investigative Journalists⁷⁰ (Survey) asked journalists to rate how safe they felt reporting on corruption cases, most respondents (35%) indicated that they felt moderately safe. Journalists were most concerned about threatened or actual legal action, in the form of civil suits for libel, or criminal prosecution for defamation or publishing classified information. Some referred to baseless legal actions being launched to intimidate journalists, which nevertheless took time to resolve and involved significant legal and psychological cost. One journalist stated that large companies had threatened to sue colleagues and as a result, decisions had to be made as to whether it was worth taking the risk to publish the story. Another journalist had been prosecuted, and acquitted, twice for reporting on corruption cases: “I can say how tediously [sic], costly and time consuming it is to be under pressure just for doing my job.” Other concerns included attacks on professional credibility and political retaliation. Some journalists had received death threats and mentioned colleagues who had been killed for their work investigating and reporting on corruption. Freelance or independent journalists were most exposed; those who worked in large media outlets or in large cities felt more protected. The 16 October 2017 murder of Maltese investigative journalist Daphne Caruana Galizia, known for her uncompromising

⁶⁷ Several international and regional instruments seek to guarantee freedom of the press. See e.g. Art. 19 of both the UN Universal Declaration of Human Rights (1948) and the International Covenant on Civil and Political Rights (1966), Art. 10 of the European Convention on Human Rights (1950), Art. 13-14 of the American Convention on Human Rights (1969), and the African (Banjul) Charter on Human and Peoples’ Rights (1981).

⁶⁸ All Parties to the Anti-Bribery Convention have ratified the UNCAC.

⁶⁹ Among Parties, Austria, Belgium, Bulgaria, Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, Luxembourg, Netherland, Norway, Poland, Portugal, Russia, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, United Kingdom and United States of America are members of GRECO.

⁷⁰ The OECD Survey on Investigative Journalists was conducted between 12 April and 26 May 2017 and received a total of 101 responses from journalists in 43 countries, including 28 out of the 43 Parties to the OECD Anti-Bribery Convention. The main objective of the Survey was to find out how investigative journalists uncover and investigate corruption stories and obtain their perspectives on interacting with law enforcement in foreign bribery cases. Some survey questions were optional and some allowed multiple responses, percentages have therefore been calculated for each question based on the percentage of respondents who answered that question. This explains the variations in the number of responses per question and why the percentages in some questions do not add up to 100%. Percentages have been rounded to the nearest whole number.

investigations into corruption and organised crime in her small European country, sent shockwaves through Europe and the world.⁷¹ Figure 1 sets out the ranking of Convention Parties on the 2017 World Press Freedom Index. While press freedom is not specifically within the scope of the OECD Anti-Bribery Convention and its related instruments, the WGB has considered constraints on freedom of the press and information in its evaluations.

2. Whistleblowers and protection of sources

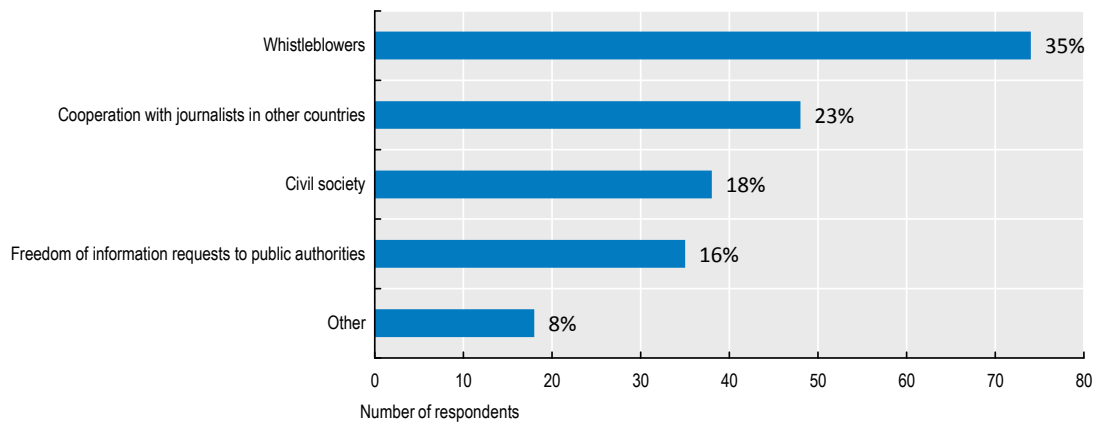
The Survey indicated that whistleblowers are often the first source of information for journalists reporting on corruption stories. Whistleblowers turn to journalists for various reasons including to protect their identity, to bring issues of concern to the attention of the public or government, or in the absence of effective responses by law enforcement or employers. One journalist noted that reporting to the media can be more effective for a whistleblower than reporting to law enforcement. While criminal proceedings can take years to reach a conclusion, a journalist can draft and publish a story within days that can reach a global readership through social media platforms. New technology means that journalists can communicate with their sources via encrypted communication platforms (e.g. Signal), which can protect the whistleblower's identity. However, journalists acknowledged the significant risks to sources as a result of non-existent or vastly inadequate whistleblower protection frameworks in many countries. Even in countries with whistleblower protection laws, protection rarely extends to whistleblowers who report directly to the media.⁷² 54% of respondents considered protection of sources a concern when interacting with law enforcement authorities in corruption cases. One journalist referred to an ongoing administrative case between the media outlet and tax authorities, where the tax authorities were compelling production of Panama Papers documents and editorial material which, if disclosed, would reveal sources. For this journalist, the case highlighted the lack of seriousness with which the authorities treated the protection of sources. Some journalists were concerned about government surveillance or other attempts to seek the identity of their sources; others approached law enforcement for assistance with source protection, presumably in criminal cases where sources were receiving physical threats from other perpetrators.

Whistleblower protections were considered the second most valuable support for journalists investigating corruption (63%), behind strong editorial board backing (77%). Journalists also noted that their sources can also work for law enforcement agencies, and considered that these sources should be protected as any other whistleblower. The media plays a potentially vital role in de-stigmatising whistleblower reporting. For example, referring to a "leak" when breaking a story based on information provided by a whistleblower (particularly an insider), can serve to reinforce perceptions that the whistleblower was acting unethically or illegally in providing such information. The role of whistleblowers and whistleblower protection in detecting foreign bribery cases is discussed in Chapter 2.

⁷¹ NY Times, "Investigative journalist in Malta is killed in car bombing" 16 October 2017, <https://www.nytimes.com/2017/10/16/world/europe/daphne-caruana-galizia-journalist-malta.html>.

⁷² For example, Sweden's new Act on special protection against victimisation of workers who are sounding the alarm about serious wrongdoings allows whistleblowers to report to the media or authorities if no action is taken following an initial internal report within their organisation or if there are justified reasons to disclose the information externally, for example if there is an emergency situation, if the wrongdoings are of particularly serious nature, if the employee has a specific reason to expect retaliation or if the employer is responsible for the wrongdoings.

Figure 4. First sources of information for journalists reporting on corruption



Source: OECD Survey of Investigative Journalists (88 responses)

Country practice: Constitutional rules on Freedom of the Press and Freedom of Expression in other media

Sweden

Sweden has specific rules on freedom of the press (Freedom of the Press Act 1949) and freedom of expression in other media (Fundamental Law on Freedom of Expression 1991). The Swedish constitutional rules have some distinctive features of historical origin, springing from the fundamental principle that freedom of expression is a guarantee for the free influence of public opinion. These constitutional rules apply to various means of expression such as through newspapers and magazines, television and other media including, to some extent, the Internet. The purpose of these constitutional rules is, inter alia, to secure the free exchange of opinion but it is also a way for the public to exercise control over the public administration. These characteristics have evolved over the centuries since the first Freedom of the Press Act in 1766 and provide particularly strong protection for freedom of expression in the media.

The provisions in the Constitution are based on some fundamental principles such as the right of free establishment of, for example, printing presses and newspaper and magazine undertakings and an absolute ban on censorship. The Constitution is furthermore based on the following principles.

The principle of sole responsibility means that only one person can be held responsible for the content in, for example, a newspaper. The usual penal rules on liability for complicity do not apply. The principle of sole responsibility guarantees that there is always a designated person who is responsible for the publication. This person cannot evade responsibility by alleging that he or she did not know about the content or did not consent to the publication. It is therefore not necessary to undertake any investigative measures to the question of establishing responsibility of that person.

The principle of freedom to communicate with the media entails a right, without penal consequences, to provide information, including confidential information, to newspapers and magazines, the radio and TV for publication. The provider of the information has the right to anonymity and journalists may not disclose the source of their information. Authorities and other public bodies may not investigate who has provided the information, if the provider has chosen to be anonymous, and may not undertake any negative measures, such as investigative measures against the provider.

However, the freedom of expression is not absolute. Responsibility for the content of a published statement may come into question for certain crimes listed in the Swedish Constitution. These include certain serious crimes against the safety of the realm, agitation against ethnic groups, unlawful threat and defamation. This list is exhaustive. If a crime is not included in the list, publication of a statement can consequently not lead to criminal or civil liability, and nor can it be subject to any investigative measures.

Finally, the constitutional provisions also provide procedural guarantees in the case of actions against abuse of the freedom of the press and the freedom of expression in other media. These rules differ to some extent from ordinary penal procedural rules. The Chancellor of Justice is the only public prosecutor in those cases.

Country practice: Framework for Press Freedom

Canada

The open court principle is connected to freedom of the press, as the media are an important means by which the public receives information about what transpires in court. In appropriate circumstances, s. 2(b) may provide a way to obtain access to court documents. However, s. 2(b) does not protect all techniques of “news gathering”. Freedom of expression and freedom of the press do not encompass a broad immunity for journalists from either the production of physical evidence relevant to a criminal offence or against disclosure of confidential sources. Therefore, a journalist may be compelled by a judge to disclose information regarding a secret source. A qualified journalist-source privilege exists in the common law and a test that is informed by Charter values is used to determine the existence of privilege on a case by case basis. The recently-enacted Journalistic Sources Protection Act amended the Canada Evidence Act and Criminal Code to confer further protections for the confidentiality of journalistic sources. Specifically, the amendments to the *Canada Evidence Act* enable a journalist to object to the compelled disclosure of information or documents on the grounds that it identifies or is likely to identify a confidential journalistic source. The objection can be raised with any court, person or body with the authority to compel the disclosure of information and the burden is on the person seeking disclosure to demonstrate that the test has been met (under the common law, the burden was on the journalist to demonstrate the existence of the privilege). As to the *Criminal Code* amendments, they provide a new process for the issuance of investigative tools (such as search warrants and production orders) when they relate to a journalist, including a triage procedure that requires the sealing of the evidence collected and a review by a court before the information is disclosed to police.

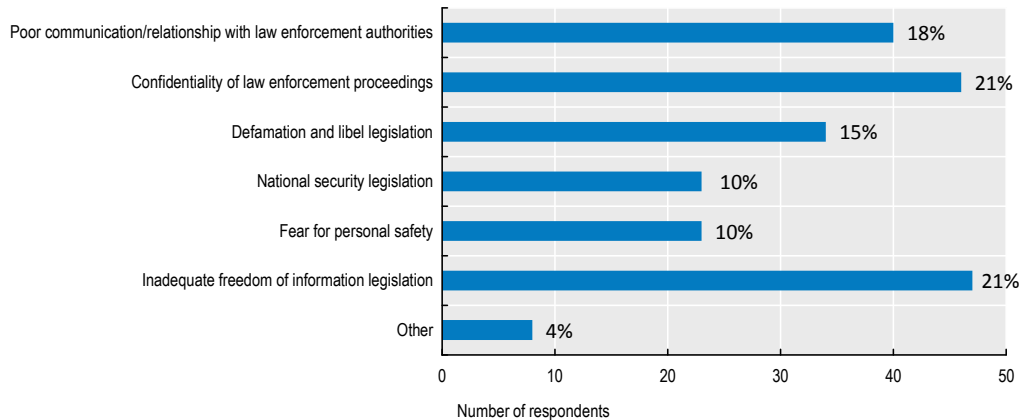
3. Freedom of information and open data

Freedom of information (FOI) laws govern the right of citizens to access information held by government agencies. These laws are designed to promote transparency in government by making government records available to the public to the greatest extent possible. Journalists considered inadequate FOI legislation to be one of the two main obstacles to investigating and reporting on corruption cases, the other one being confidentiality of law enforcement proceedings. One journalist noted that even in countries with effective FOI legislation, “most freedom of information laws exclude the

private sector from their jurisdiction and in many cases access to this kind of information held by the private sector is illegal. This limitation has serious implications because the private sector performs many functions which were previously the domain of the public sector.” The important role of state-owned enterprises (SOEs) on both the giving and receiving end of bribery in international business makes this observation all the more relevant to reporting on bribery in international business transactions.⁷³ Another limitation relates to the time taken to fulfil FOI requests. By the time a journalist receives the information, it is often too late and the window of opportunity to break the story may have passed.

Open data is digital data that is made available with the technical and legal characteristics necessary for it to be freely used, re-used, and redistributed by anyone, anytime, anywhere (G20, 2015). Open data is key to the fight against corruption; it enables transparency, accountability and access to information which can help detect and address this crime. The G20/OECD Compendium of Good Practices on the Use of Open Data for Anti-Corruption is a useful resource for countries to assess and improve their open data frameworks (OECD, 2017b). One journalist noted the importance of digital education for reporters: “Open data can be a boon to democracy – but only if there are professionals capable and motivated to transform that data into information for the public.” Transparency of beneficial ownership can be another important resource for journalists investigating corruption cases. The TeliaSonera/Vimpelcom case study illustrates the importance of transparency of beneficial ownership for investigative journalism in corruption cases.

Figure 5. **Main obstacles to investigating and reporting on corruption**



Source: OECD Survey of Investigative Journalists (84 responses)

In 2016 **Argentina** enacted the Public Information Access Act, No. 27 275, to grant access to public information and to foster citizenship participation and transparency in public management. The Act aims to enable people to search, access, request, receive, copy, analyse, reprocess, reuse and freely redistribute information. This law has a wide scope of application including the three branches of government, companies in which the

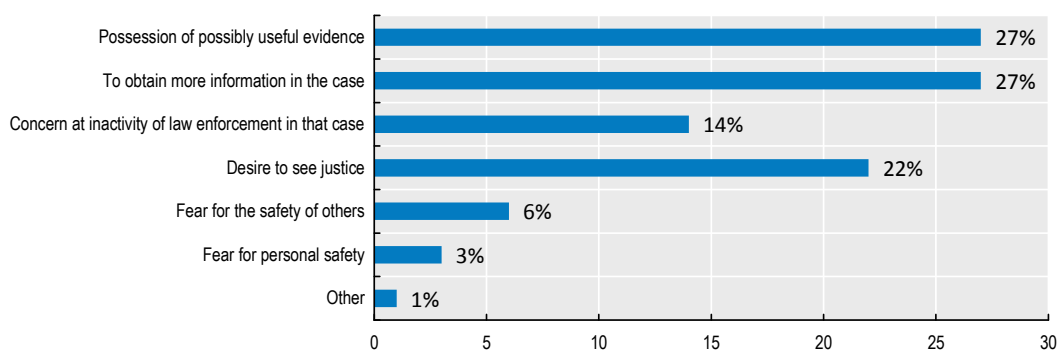
⁷³ The 2014 OECD Foreign Bribery Report noted that SOE officials received bribes in 27% of concluded cases.

national administration is a majority or minority shareholder, concessionaires and licensees of public services, business organisations, political parties, unions, universities and any other private entities to which public funds have been granted, trusts established with public funds and cooperating entities with which the National Administration has concluded agreements, among others. The Act requires officers to facilitate the search and access to public information through its official website in a clear, structured and understandable way for any interested party. In addition, an Executive Decree passed in January 2016 mandates central ministries to develop institutional open data plans. The Decree defines categories of public sector information to be prioritised by the central government for their publication as open data to fight corruption in the country, including structural information, asset disclosure, budgetary credits, procurement procedures, lobbying meetings, etc.

4. Interaction between journalists and law enforcement authorities in practice

In investigating corruption cases – whether in the context of criminal proceedings or investigative journalism – law enforcement and the media have a common mission: to expose and bring justice for abuses of power for private gain. Journalists considered a poor relationship or communication with law enforcement authorities the third greatest obstacle to investigating and reporting on corruption. 54% of respondents had contacted law enforcement authorities with information on corruption. Those who reported to law enforcement mainly did so in order to obtain more information in the case or because they knew that information they had could be useful. The next most common reason for reporting was because of a desire to see justice done, followed by concern at the inactivity of law enforcement in the case.

Figure 6. Factors that led journalists to report to law enforcement



Source: OECD Survey of Investigative Journalists (40 responses).

The kind of information journalists shared with law enforcement authorities ranged from “undecipherable financial documents” to documents and information on corruption that the journalist knew would be useful and that had not yet come to the attention of authorities. Survey responses indicate asymmetry in the interaction between journalists and law enforcement: while reporters often sought to obtain further details through authorities, 62% did not receive follow-up in response to their report. On the other hand, 58% of respondents had been contacted by law enforcement authorities in relation to a corruption investigation, and 45% indicated that they had declined to provide

information. One journalist noted that reporters can often acquire more information in a shorter period of time, through international associations of investigative journalists and because they are not constrained by protocols, mutual legal assistance requests and procedural requirements. However, information obtained by journalists through such networks may not be useful or admissible in subsequent criminal proceedings.

The vast majority of respondents considered a constructive relationship with law enforcement as essential or very important (78%). In reality, over a third of journalists categorised their interaction with law enforcement as either unsatisfactory or poor (38%), and roughly the same proportion as satisfactory (35%). Journalists emphasised, however, the need to draw a line between the respective missions of the media and law enforcement and to respect the integrity of each: “Reporters can’t become tools of the State. Law enforcement authorities ought to conduct fair investigations and trials.” One journalist described the ethical dilemma for journalists:

“We are not supposed to collaborate with authorities at all. It could affect our credibility if we did that. People should trust that if they are speaking with media, they are speaking with independent journalists, not with an institution working with government or police institutions. On the other hand, to get the information we need, we can talk to anyone. We have sources everywhere, including police or prosecutors ... which means that they know they are working on a story just by listening to questions. They need help from us but we need help from them ... to help analyse complicated documents. We need their knowledge to complete the story. On the other hand, we have to stay independent from them ... How far can we go? It is a crucial ethical question. We have to make sure that nobody can blame media for working in partnership with the police.”

Journalists emphasised the need for a constructive relationship of mutual respect, and for finalised cases to be made public. Some respondents noted that in jurisdictions where there may be undue political influence in corruption cases, media reporting can maintain public pressure to continue with the investigation and prosecution of these cases. Journalists want a reaction to their stories and an impact on society. They can make sure that prosecutors open up an investigation, for example by publishing a story with so much evidence that authorities have no excuse for not investigating it, and by seeking a reaction or comment on the story from the authorities. Journalists emphasised the importance of not contacting authorities before publication of the story, to avoid being accused of bias or lack of independence in reporting. While law enforcement and the media have shared goals of exposing corruption and ensuring that those responsible are brought to account, there can be challenges in the relationship. From a law enforcement perspective, these challenges can include managing journalists’ expectations and the limits on information that can be shared about investigations. Law enforcement authorities must operate in accordance with laws governing the admissibility of evidence, and collect sufficient evidence to support an effective prosecution of responsible individuals and/or legal persons. However, there are strong benefits in developing a productive relationship. For example, from a law enforcement perspective, contact from journalists before a story goes to print can be extremely valuable to ensure that the report will not adversely affect an investigation. In some cases, journalists will agree to delay publishing a story to allow law enforcement to undertake necessary investigative steps before the matter becomes public and the suspect (and other involved parties) are alerted. That being said, law enforcement authorities cannot make any undertakings to journalists in relation to how the information they provide will be used. They should, however, never ask journalists to reveal the nature of their sources. A constructive relationship with the media can also

have benefits for law enforcement: exchanges in advance of publication or requests for comment can enable law enforcement authorities to be prepared to respond to the story once it is made public.

Box 10. Interview: Paolo Biondani, L'Espresso (Italy)

The main factors which allow journalists to investigate foreign bribery are having easy and reliable access to documents in the possession of public administration and effective protection from baseless accusations of libel. Until 2016 Italy did not have an FOI law which consistently regulated access to documents kept by the administration. The only act regarding public transparency was a law from 1990 which was often misapplied and resulted in frequent claims to administrative courts, which were long and costly. The new legal framework follows the general principle of a free access to information and the possibility of appealing a negative response from the administration with a fast and free procedure. Nevertheless, concerns remain as exceptions to access to information foreseen by the law are very general and could be broadly interpreted. As a consequence, so far Italian journalists mainly rely on procedural acts from trials and investigations in reporting.

Baseless civil suits or charges for defamation can deeply affect a journalist's work, as they are costly and time consuming and can therefore prevent the follow-up to an investigation. The lack of any effective sanction for baseless allegations and the length of proceedings put journalists in an extremely vulnerable situation. It is important to avoid publishing misleading information, but at the same time it is necessary to find a new and fair balance between the protection of journalists' freedom and the proliferation of fake news through efficient proceedings and effective sanctions.

International professional cooperation and whistle-blowers are often essential tools for investigative journalists to detect a case or expand research. Whistle-blowers often contact media following inaction from law enforcement or because journalists can better protect their identity. In fact, according to Italian procedural law there is no possibility for witnesses to testify anonymously. Their protection is crucial to boost their will to inform media and authorities and to prevent them from being punished for speaking out.

Recent experience shows that investigating and reporting on international corruption is becoming easier, and sometimes more accessible than working on domestic bribery. This is thanks to the cooperation within networks such as ICIJ, which leads to results that were unthinkable until a short time ago. The Panama Papers case, for instance, required research into millions of documents that could not be carried out by one newspaper alone, while the international teamwork through ICIJ afforded a quicker and more comprehensive outcome which focused on many different countries.

5. How to detect foreign bribery reported in the media

One of the easiest ways to monitor media reporting on corruption is to use internet search engines and media alerts. It is important for law enforcement authorities to monitor media in their own country as well as media in principal export or investment destinations. The network of overseas embassies can be tasked with monitoring local media in their respective countries of accreditation (in local languages), and translating and reporting any credible foreign bribery allegations they come across. As mentioned above, the WGB has made several recommendations that law enforcement authorities routinely and systematically assess credible foreign bribery allegations that are reported in the media, and that Ministries of Foreign Affairs raise awareness among diplomats of the need to search local media and report allegations to national law enforcement authorities (discussed in Chapter 7).

The more challenging aspect of detection through media reporting is determining whether the story is credible. The issue of "fake news" and the serious impact it can have

has recently come to the fore and law enforcement authorities should be alert to the possibility of false or fabricated news stories. If a media report is corroborated across various news outlets, in various countries, this can suggest authenticity. The same applies to stories run by well-established news outlets and journalists with a strong reputation for reliable reporting. Media may also report on a domestic case involving the bribe recipient, which could, in turn, alert to the possibility that a bribe payer from one of the OECD Anti-Bribery Convention countries may be liable for a foreign bribery offence in his/her home jurisdiction.

Box 11. Canada Case Study: Niko Resources (2011)

Niko Resources, a Canadian publicly traded oil and gas company, in 2005 was engaged in explorations in Bangladesh. In June of that year the Bangladesh newspaper The Daily Star published a mail correspondence between the then Niko vice-president, Brian J Adolph, and the State Minister for Energy Mosharraf Hossain. The letters regarded the delivery of a luxury SUV and the text read “I take this opportunity on behalf of Niko management to thank you all for the support you have given us in the past and hope to receive the same in coming days”. The bribery was apparently linked to explosions that occurred the same year in one of the company’s natural gas fields and which sparked protests in a nearby village for complaints of environmental contamination.

The investigation was triggered in part by this media report and it was the first case to be investigated following the establishment of dedicated RCMP units to combat foreign bribery. In 2011 Niko Resources pleaded guilty to bribing the Bangladeshi minister with a luxury SUV and a trip to New York and Calgary, and was sentenced to pay a fine of CAD 9.5 million and to serve three years of probation. No individuals were charged.

Box 12. Netherlands, Sweden and United States Case Study: “Mission Investigate,” TeliaSonera and VimpelCom (2016)

In 2012, thanks to anonymous informants “Mission Investigate”, a Swedish TV programme edited by Mr Nils Hanson, started investigating a bribery case regarding a Swedish-Finnish partly state-owned telecommunication company, Telia Sonera, and its links with Gulnara Karimova, the daughter of the Uzbek president. The story had already attracted attention in Sweden, however Mission Investigate decided to investigate further.

Journalists identified payments in Telia Sonera’s annual report to a company called Takilant, based in Gibraltar. They went to Gibraltar and were able to obtain information on the company from the business registry authority, including limited financial information and the name of the director who turned out to be the acting personal assistant to Karimova. The journalists’ investigation was made possible by open data in Sweden and other countries, which allowed for either online or in-person consultation of companies’ registers and provided journalists with firms’ annual reports. In addition, the story was made possible through collaboration via the Organised Crime and Corruption Reporting Project (OCCRP), a network of investigative journalists, and in particular, its members in Uzbekistan.

Aiming at taking pressure off reporters, before publishing the documentary Mr Hanson himself informed Gulnara Karimova of the release, showing there was a whole institution backing them; an example of strong editorial board support. After the release of the TV documentary, Swedish prosecutors started an investigation and contacted, *inter alia*, US authorities. The Swedish investigation resulted in a prosecution in September 2017 against three persons belonging to TeliaSonera’s previous management for gross giving of bribes and a claim against the company for confiscation of USD 280 million. The Swedish investigation is still ongoing concerning confiscation of the bribes that Gulnara Karimova is suspected of having received.

**Box 12. Netherlands, Sweden and United States Case Study:
“Mission Investigate,” TeliaSonera and VimpelCom (2016) (cont.)**

The Swedish journalists from “Mission Investigate” also discovered the Amsterdam-based VimpelCom Ltd., the world’s sixth largest telecommunications company with shares publicly traded in the United States, was involved in a wide trans-national bribery case, hidden behind massive amounts of money paid to “consultants” and “local partners” operating in a high-risk country that performed no discernible service. VimpelCom conspired with others, including its Uzbek subsidiary Unitel LLC, to pay bribes of over USD114 million to Gulnara in order to enter and continue operating in the Uzbek telecom marketplace between 2006 and 2012, obtaining 3G and 4G licences that generated more than USD2.5 billion in revenue. The bribery scheme lasted six years and involved multiple shell companies that laundered the money through accounts in Latvia, UK, Hong Kong, Belgium, Ireland, Luxembourg and Switzerland. Unitel entered a guilty plea and VimpelCom entered into a three-year deferred prosecution agreement with the DOJ, as part of a global resolution with the US SEC and the Dutch Public Prosecutor and, to pay over USD 795 million in total fines and disgorgement, reform its compliance system, and adhere to a three-year corporate monitor. This case highlights how media reporting can be a vital source of detection in foreign bribery cases and how fostering mutually respectful relationships between the media and law enforcement can reinforce the fight against foreign bribery.

Conclusion

Media reporting and investigative journalism, including by NGOs, is a vastly useful, and possibly insufficiently tapped, source of information for foreign bribery allegations. Effective press freedom, open data, access to information and whistleblower protection frameworks are essential to enable free and credible reporting. While the OECD Secretariat regularly monitors global press for foreign bribery allegations and brings these to the attention of law officials in Parties to the OECD Anti-Bribery Convention, the WGB will, in turn, continue to ensure that countries allocate appropriate human resources, expertise, foreign-language skills, training and software, to monitor and act upon media reports of bribery in international business.

Chapter 5

Tax authorities

Introduction

Prior to the signature of the Anti-Bribery Convention in 1997, bribery was still considered as a regular business expense in several Parties and therefore eligible for tax deduction. Introducing the non-deductibility of bribes to foreign public officials into national tax legislations has been one of the major achievements of the WGB and the OECD Committee on Fiscal Affairs in combating bribery. In 1996, the OECD Council adopted the Recommendation on the Tax Deductibility of Bribes to Foreign Officials (1996 Recommendation), whereby Adherents which did not disallow the deductibility of bribes to foreign public officials “shall re-examine such treatment with the intention of denying this deductibility.” The 1996 Recommendation sent a clear message that bribery would no longer be treated as a business expense but as a criminal offence. Building on the 1996 Recommendation, the Recommendation on Tax Measures for Further Combating Bribery of Foreign Public Officials in International Business Transactions was adopted in May 2009 (the 2009 Tax Recommendation). All Parties to the OECD Anti-Bribery Convention are required to accept the 2009 Tax Recommendation,⁷⁴ and therefore to introduce an express prohibition on the non-tax deductibility of bribes in their tax legislation. At least 29 Parties have eliminated the tax deductibility of bribes to comply with their obligations under the OECD Anti-Bribery Convention and 2009 Tax Recommendation. As of 2017, all Parties have made the tax deductibility of bribe payments illegal.

To ensure that the non-tax deductibility is enforced, tax administrations must ensure that they can detect hidden bribes recorded in taxpayers’ accounts. While the primary function of tax administrations is to ensure compliance with domestic tax law and to determine taxpayers’ tax liabilities, tax administrations have access to information on taxpayers’ financial operations which may be also used by law enforcement authorities in investigating foreign bribery. A framework must therefore be in place so that tax authorities can share information with law enforcement authorities, and training and awareness-raising must be provided to tax examiners and auditors on detection of foreign bribery. In practice, only two foreign bribery schemes that have resulted in sanctions have been detected in the course of an investigation over alleged tax evasion and other tax frauds in two Parties to the OECD Anti-Bribery Convention. The positive experiences of those Parties may usefully inform the way foreign bribery cases are detected by tax authorities and how their experience can be replicated in other Parties.

⁷⁴ Commentary 37 to the Anti-Bribery Convention.

1 What role for the tax authorities?

As already noted, the primary role of tax administrations is to determine taxpayers' tax liabilities. Where suspicions of tax fraud arise, a criminal tax investigation may be initiated, but evidence of the commission of other criminal offences, including foreign bribery, may also be detected at this stage. The role that tax administrations play in criminal tax investigations varies. Four different organisational models have been identified based on the extent of these tax agencies' involvement in criminal tax investigations.

Box 13. Organisational Models of Tax Agencies for Countering Tax Crimes in Parties to the OECD Anti-Bribery Convention

Model 1: the tax administration has responsibility for directing and conducting criminal tax investigations. This model is applied in **Australia, Canada, Germany, Greece, Ireland, Israel, Japan, Korea, New Zealand, Poland, South Africa, Switzerland, the United Kingdom and the United States.**

Model 2: the tax administration has responsibility for conducting criminal tax investigations, under the direction of the public prosecutor. This model is applied in **Austria, Estonia, Hungary, Latvia, Germany, the Netherlands, Poland, Portugal, Sweden and Spain.** In **Spain** investigations are currently directed by an examining judge.

Model 3: a specialist tax agency, under the supervision of the Ministry of Finance but outside the tax administration, has responsibility for conducting criminal tax investigations. This model is applied in **Greece, Iceland and Turkey.**

Model 4: the police or public prosecutor has responsibility for conducting investigations, including into tax crimes. This model is applied in **Argentina, Australia, Belgium, Brazil, Bulgaria, Chile, Colombia, Costa Rica, the Czech Republic, Denmark, Finland, France, Iceland, Lithuania, Luxembourg, Mexico, Norway, [Peru], Russian Federation, the Slovak Republic, Slovenia and Spain.**

Note: Italy is not included in the four models. According to the report on "Effective Inter-Agency Co-Operation in Fighting Tax Crimes and Other Financial Crimes", in Italy, "responsibility for carrying out investigations into financial crimes, including tax crimes, sits with the Guardia di Finanza, which can conduct such investigations both independently and also under the direction of the public prosecutor. The Guardia di Finanza is also able to carry out civil tax investigations and audits in accordance with its own administrative powers." In addition, some countries are listed under several Models to reflect to different existing frameworks in their respective jurisdiction. This is the case for Australia, Greece, Iceland, Poland and Spain. More detailed explanations can be found in the OECD report on "Effective Inter-Agency Co-Operation in Fighting Tax Crimes and Other Financial Crimes", p. 14.

Source: OECD (2013b)

Depending on the model, the tax authorities' criminal investigative powers vary. Some Parties have enhanced their institutional capacity by establishing specialised investigative units. In the Czech Republic for instance, a tax enforcement unit (KOBRA) composed of officers from the police, customs and tax administration was created in 2014 to facilitate the sharing of information in individual tax crime cases. This cross-sectoral approach may facilitate the detection of foreign bribery related to tax crimes.

The scope of investigative powers granted to tax authorities can contribute to substantiate suspicions of foreign bribery prior to reporting to law enforcement. In **Israel**, a specialised investigative unit dedicated to, *inter alia*, financial offences, organised crime and foreign bribery was set up in 2011 at the Israeli Income Tax Administration

(ITA) (i.e. the Yehalom Tax Unit). Israeli tax examiners have broad powers to investigate tax returns, including the ability to request returns, information and accounting books, to seek information about suppliers and customers, and to access official information. Tax inspectors may also rely on investigative measures usually reserved for the Israeli Police, including accessing bank account information, under the authorisation of the Minister of Public Security. In **Belgium**, tax authorities enjoy broad investigative powers, including the possibility to carry-out on-site inspections and to issue requests to government and public bodies to produce documents. In yet other Parties, tax authorities may also request bank information. It should be noted that most tax authorities would have these powers. What varies is the extent to which these powers can be used for a criminal case, and for sharing with non-tax authorities.⁷⁵

Whether expenses are considered *prima facie* deductible may also have some bearing on the ability of tax examiners to enforce the non-deductibility of bribe payments. Putting the onus on the taxpayers to justify the deductibility of their expenses may put the tax authorities in a stronger position to request additional documentation proving the legality of the expenses for which deduction is claimed. In **the Netherlands**, it is up to the taxpayers whose deduction has been denied to prove that (1) the expenses have actually been made, (2) something was done in return for the payment of such expenses; and (3) if nothing was obtained in return, that the payment served a business purpose. Similarly in **Canada, Denmark, Latvia, South Africa and the United States**, when the tax authorities deny a tax deduction, taxpayers have the onus of proving the legitimacy of the deduction. In the **Czech Republic**, the onus is on the taxpayer to provide supporting documentation or to substantiate a deduction upon request by the tax authorities. On the contrary, in Belgium, the burden of proof is on the tax authorities, meaning that it is for the tax authorities to prove that the expenses are not deductible. Similarly in **France**, tax authorities must demonstrate that the expense directly or indirectly benefited a public official or a comparable individual although the deduction can be rejected on other grounds.⁷⁶

2. How to foster detection

An important prerequisite for the detection of foreign bribery by tax authorities is the existence of a framework allowing and facilitating the sharing of information from tax to law enforcement authorities. In addition to the existence of a reporting framework, tax authorities need to be adequately informed and trained on the need and the ways to detect potential foreign bribery.

2.1. Reporting framework

2.1.1. Reporting from tax to law enforcement authorities

As a starting point, a clear duty to report suspicions of foreign bribery to law enforcement authorities is essential. Accordingly Convention Parties commit “to establish an effective legal and administrative framework and provide guidance to facilitate

⁷⁵ Israel Phase 2 Report (2009), para. 65; Israel Phase 3 Report (2015), para. 140, <http://www.oecd.org/daf/anti-bribery/israel-oecdanti-briberyconvention.htm>

⁷⁶ Netherlands Phase 3 Report, para. 116; Czech Republic Phase 2 Report, para. 77; Belgium Phase 3 Report, para. 118 and France Phase 3 Report, para. 151.

reporting by tax authorities of suspicions of foreign bribery arising out of the performance of their duties to the appropriate domestic law enforcement authorities” under the 2009 Tax Recommendation and the 2010 Recommendation of the Council to Facilitate Co-operation between Tax and Other Law Enforcement Authorities to combat serious crimes. From the outset, a distinction needs to be drawn between the spontaneous reporting by tax authorities to law enforcement from the sharing of information upon request from law enforcement authorities in the context of criminal investigations and proceedings. This section focuses only on the spontaneous sharing of information from tax authorities as a primary source of detection of foreign bribery.

Twelve Parties received WGB recommendations aimed at improving the spontaneous reporting of foreign bribery instances by tax to law enforcement authorities in the Phase 3 monitoring round. These recommendations are of three types: (i) to consider putting into place reporting obligations for tax officials, (ii) to remind tax officials of their obligation to report foreign bribery instances and (iii) to provide clear guidance to tax officials on the reporting procedure.

Thirty-eight Parties to the OECD Anti-Bribery Convention (92.7%) provide for some form of spontaneous sharing of suspicions of crimes by tax to law enforcement authorities, whether on the basis of a statutory obligation or a discretionary ability to report. In 31 Convention Parties, tax authorities are under a statutory duty to report suspicions of foreign bribery to law enforcement.⁷⁷ Reporting is either done through the official channels of the tax administration up to law enforcement authorities, or directly to law enforcement authorities. For instance, in **Brazil**, tax examiners must first report to their head of department who in turn reports to the prosecutor. The same applies in other Convention Parties such as **Chile, Estonia, France, and the Netherlands**.⁷⁸ In **Australia**, tax auditors are obligated to refer any suspected foreign bribery cases to the Australian Taxation Office fraud investigation area, which would then refer the matter to the Australian Federal Police. In some Convention Parties, such as **Austria, Norway or Sweden**, failure to report to law enforcement is subject to sanctions although these have not been applied yet. Eight Parties permit (but do not require) tax officials to spontaneously report foreign bribery to law enforcement.⁷⁹ In particular, **Canada** amended its legislation following recommendations made by the WGB.⁸⁰ In 2015, Canada amended the Income Tax Act to permit its Revenue Agency (CRA) to provide confidential taxpayer information to law enforcement on a discretionary basis. The CRA must first establish that there are reasonable grounds to believe that the information will afford evidence of a listed serious offence, including foreign bribery and the decisions to release information must be vetted at senior levels within CRA. Four Convention Parties, however, still have legal barriers in place that prohibit the spontaneous sharing of

⁷⁷ Argentina, Austria, Belgium, Brazil, Bulgaria, Chile, Colombia, the Czech Republic, Estonia, France, Germany, Greece, Hungary, Iceland, Italy, Japan, Latvia, Luxembourg, Mexico, the Netherlands, Poland, Portugal, Russian Federation, Slovak Republic, Slovenia, South Africa, Spain, Sweden, Switzerland, Turkey and the United Kingdom.

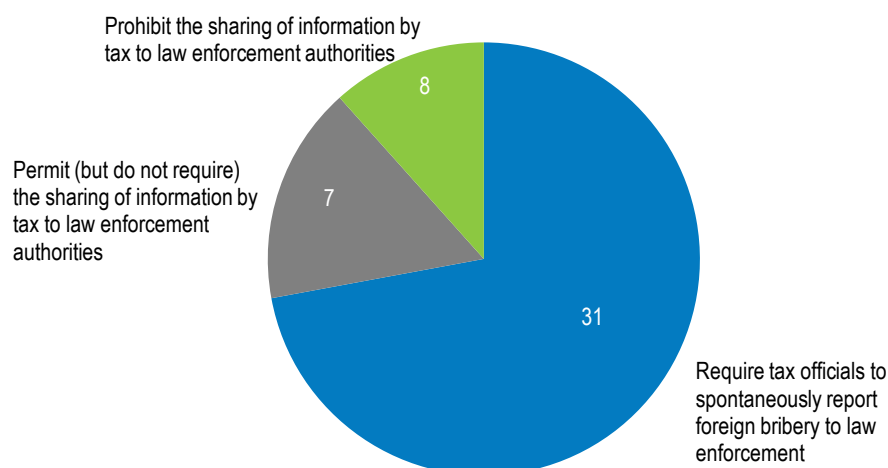
⁷⁸ Brazil Phase 3 Report, para. 143 and France Phase 3 Report, para. 152

⁷⁹ Australia, Denmark, Ireland, Israel, New Zealand, Norway and the United States.

⁸⁰ Canada Phase 2 Report, recommendation 4.c and Phase 3 Report, recommendation 8.b.

suspicions of foreign bribery with criminal law enforcement authorities (i.e. Finland,⁸¹ Greece, Korea, and Switzerland in certain cantons). The prohibition does not apply if tax officials are required to disclose information in the course of criminal proceedings.

Figure 7. Reporting requirements for tax officials in the 43 parties to the Anti-Bribery Convention



The reporting by tax to law enforcement authorities may depend on the level of proof necessary to trigger such a report. In most Parties, a mere suspicion is sufficient. In some Parties, however, the duty to report incumbent on tax authorities is qualified, and the threshold is higher than just a mere suspicion. In **South Africa** for instance, tax officials need more than a mere suspicion of bribery before they report the matter to law enforcement. These thresholds may deter tax officials from reporting, as they would require that allegations be further substantiated before being reported, which tax officials may neither have the resources nor the specific expertise for. Law enforcement authorities may be better placed to carry out the investigative measures necessary to verify whether the allegations are well-founded.

On the contrary, a lower threshold can encourage tax authorities to come forward and report to law enforcement authorities. **Norway** for instance, used to apply a standard of “probable (just) cause” to the reporting by tax authorities. That standard was lowered in 2007 and tax authorities are now only required to have “reasonable grounds” to suspect that bribery has been committed to report to law enforcement authorities. The introduction of a lower threshold has facilitated the reporting and cooperation with law enforcement authorities, according to the Norwegian tax authorities.⁸² In Austria and Germany, the level of suspicion that triggers the reporting obligation is a “certain probability that a crime has been committed based on specific circumstances that lead to the suspicion”, but it is not necessary to hold a strong suspicion.⁸³

⁸¹ Finnish tax authorities can respond to requests for information from law enforcement authorities, but can only report suspected corruption on their own initiative where it relates to a tax or tax related offence (e.g. falsification of taxation-related documents).

⁸² Norway Phase 3 Report, paras. 86-87

⁸³ Austria Phase 3 Report, para. 136

Country practice: Effectiveness of the requirement for tax auditors to report suspected acts of foreign bribery to law enforcement authorities

Germany	<p>An obligation for tax authorities to report suspected cases of bribery is established in the Income Tax Act. This obligation was reinforced by way of a circular issued by the Federal Ministry of Finance in October 2002. A 2008 ruling by the Federal Finance Court (BFH) further strengthened this reporting framework.⁸⁴ In its ruling, the BFH established that relevant information must be forwarded to the law enforcement authorities in all cases involving expenditures or the granting of benefits as defined by in the Income Tax Act, including bribes paid to foreign public officials. Moreover, the BFH must forward relevant information in cases where suspicious expenses have not been deducted.</p> <p>In practical terms, tax auditors document their investigation of suspicious business transactions. The documentation is particularly important if auditors decide not to go forward with a case because the suspicion in their view is not sufficiently substantial. If suspicious payments are wilfully not further investigated, this may be seen as an obstruction of justice.</p> <p>If tax auditors consider that there are sufficient grounds they forward the relevant documentation to their agency or department, which is responsible for the exchange of information with the law enforcement agencies. It is important to note that, according to the BFH's ruling, tax authorities do not have to assess whether there is sufficient evidence for a successful prosecution or whether – for example – a case may be time-barred. This assessment is the sole duty of the prosecutor's office.</p> <p><i>Source: Germany Phase 3 Report, paras. 173-175.</i></p>
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2.1.2. Reporting from tax to non-criminal administrative authorities

Eleven Parties have put in place non-criminal corporate liability regime for foreign bribery (OECD, 2016b).⁸⁵ In seven of these countries, the law enforcement authorities are in charge of enforcing administrative liability of legal persons. One Party – **the United States** – has both criminal and non-criminal corporate liability regime. In the three remaining countries (*i.e.* **Brazil**, **Colombia** and **Greece**), enforcement of the foreign bribery offence against legal persons is incumbent upon administrative authorities and not law enforcement authorities. In these three countries, the question therefore arises as to whether this may impact the spontaneous sharing of information by tax authorities. This is because reporting obligations apply to the reporting to criminal law enforcement authorities. In **Colombia** for instance, the legislation originally did not allow for transmission of tax information to the Superintendency of Corporations – the authority in charge of proceedings against legal persons for foreign bribery offences. In February 2016, Colombia amended its legislation and as a result, “the National Taxes and Customs Directorate must (now) inform the Superintendence of Companies of all suspicious activity reports indicating alleged conducts of typical behaviours established such as foreign bribery.” In **Brazil**, the Ministry of Transparency and the Office of the Comptroller General can only request tax information after proving the initiation of

⁸⁴ Federal Finance Court (Bundesfinanzhof), Decision of 14.July 2008, Ref. VII B 92/08.

⁸⁵ The eleven countries are: Brazil, Bulgaria, Colombia, Germany, Greece, Italy, Latvia, Poland, Russian Federation, Sweden and Turkey.

administrative proceedings against legal persons.⁸⁶ In **Greece**, tax authorities would not be able to report directly to the Ministry of Finance, but only to law enforcement authorities who may in turn report to the Ministry of Finance. In any event, Greek tax officials may only provide confidential tax information in cases involving the State or tax-related fraud, tax evasion and other tax crimes.⁸⁷

2.1.3. Reporting from tax to foreign authorities

In the context of spontaneous exchange of information, tax authorities may come across information that could be relevant to foreign law enforcement authorities. Sharing of such information would only be done through their tax counterparts. The spontaneous sharing of tax information to foreign law enforcement authorities is based on the Multilateral Convention on Mutual Administrative Assistance in Tax Matters (MAAC)⁸⁸ and the OECD Model Tax Convention (Article 26). Under the 2009 Tax Recommendation, Parties to the Anti-Bribery Convention shall consider including the optional language of Article 26 of the OECD Model Tax Convention in their bilateral tax treaties.⁸⁹ Twenty-seven Convention Parties have inserted language based on the OECD Model Tax Convention into at least one of their bilateral tax treaties.⁹⁰ An additional twelve Parties have ratified the MAAC which aims to achieve the same objective.⁹¹

The optional language in the OECD Model Tax Convention allows information that has been received for tax purposes to be shared with other law enforcement agencies and judicial authorities for use in the case of certain serious matters, including corruption, and to fight financial crimes. The sharing of information is conditioned on two criteria: if the recipient country wishes to use the information for any non-tax purpose (such as foreign bribery investigations), it should (i) obtain consent from the supplying country to use the received information for a specified non-tax purpose and (ii) confirm that both the supplying and the recipient country can use the information for such non-tax purposes under its own laws.

Similarly, Article 7 of the MAAC provides that: “A Party shall, without prior request, forward to another Party information of which it has knowledge in the following circumstances: *a.* the first-mentioned Party has grounds for supposing that there may be a loss of tax in the other Party; (...) and *e.* information forwarded to the first-mentioned Party by the other Party has enabled information to be obtained which may be relevant in

⁸⁶ Colombia’s Phase 2 Report, para. 66, Law 1778 of 2 February 2016 (article 22); Brazil’s Phase 3 Report, para. 144.

⁸⁷ Greece’s Phase 3bis Report, para. 156.

⁸⁸ 39 out of the 41 Parties to the Anti-Bribery Convention have ratified the MAAC as amended in 2010.

⁸⁹ Article 26 of the OECD Model Tax Convention was revised in July 2012.

⁹⁰ Argentina (with the caveat that the OECD Model Tax Convention conditions the sharing of tax information for non-tax use only to the law of the supplying Party and that Argentina domestic legislation does not contemplate the use of tax information for criminal investigations by non-Argentine authorities), Australia, Austria, Belgium, Chile, Colombia, Estonia, Finland, France, Germany, Netherlands, Norway, Portugal, Russian Federation, Slovak Republic, Slovenia, South Africa, Spain, Sweden, and Switzerland. Hungary, Ireland, Latvia, Mexico, New Zealand, Turkey and United Kingdom introduced such language in less than five of their bilateral treaties.

⁹¹ Brazil, Canada, Czech Republic, Denmark, Greece, Iceland, Italy, Israel, Japan, Korea, Luxembourg and Poland.

assessing liability to tax in the latter Party.” Provided that the same conditions are met, Article 22(4) of the MAAC allows information received for tax purposes to be used for non-tax purposes and therefore be transmitted to law enforcement authorities to be used in criminal investigations. To date, no foreign bribery case has been detected by foreign tax authorities and shared with law enforcement authorities on the basis of the MAAC or OECD Tax Model Convention.

Box 14. How the automatic exchange of tax information between tax authorities may assist in future detection of foreign bribery.

Tax administrations have well established mechanisms for exchanging tax information with each other under international agreements for the exchange of tax information, including company ownership, accounting and bank account information. A significant expansion of tax information exchange occurred with release of the OECD’s 2014 Standard for Automatic Exchange of Financial Account Information in Tax Matters. 100 jurisdictions have now committed to annually exchange information on certain financial accounts held by non-residents in their jurisdiction. The first exchanges of this information occurred in September 2017, and will provide tax administrations with data on their taxpayers’ financial assets held abroad, which may have otherwise gone undetected. Such data could be relevant for detecting the proceeds of tax evasion, as well as possibly being relevant in investigating other financial crimes, such as money laundering and foreign bribery.

2.2. *Training and awareness activities*

Strengthening the legal framework to fight bribery must go hand in hand with effective and vigorous application of those laws. To this end, the OECD developed the Bribery Awareness Handbook for Tax Examiners (the Tax Examiners’ Handbook) specifically addressing red-flag indicators of bribery and corruption. The handbook was first issued in 2001 and was made available in 18 languages. The latest version was published in 2013 and is available in 7 languages. The Handbook provides practical guidance to help tax inspectors and investigators identify suspicious payments likely to be bribes, so that the denial of deductibility can be enforced, and bribe payments detected and reported to the appropriate domestic law enforcement authorities.

Indicators of bribery can be discovered in a wide range of documentation available to tax authorities, the most obvious being tax returns, bank records and financial accounts. Tax examiners and auditors may also look for indicators in publicly available information as well as in internal audit reports, court reports and anonymous tip-offs. The Handbook (OECD, 2013a) identifies five categories of indicators:

- Indicators concerning the taxpayer’s external and internal risk environment,
- Indicators concerning the taxpayer’s transaction,
- Indicators concerning payments and money flows,
- Indicators concerning the outcome of the taxpayer’s transactions; and
- Indicators concerning recipients of the proceeds of possible corruption.

Attention should also be drawn to the identification of bribe payments that may be hidden as allowable expenses such as gifts or contributions, entertainment industry expenses etc. In most Parties, the Tax Examiners’ Handbook is at a minimum being disseminated or made available online. This may, however, be insufficient to ensure that

tax examiners and auditors are able to identify the deliberate mislabelling of bribe payments in tax accounts. The provision of proper, in-person trainings and guidance is therefore essential, and twenty-nine Parties to the OECD Anti-Bribery Convention have received recommendations in this respect during their latest evaluation by the WGB.⁹² Some country reports have also identified positive experiences. The extensive training provided to tax auditors has had a remarkable impact in Germany on the number of foreign bribery cases detected and investigated.⁹³

The Handbook may be used to train both newly appointed and current tax examiners on the detection of bribe payments disguised as legitimate business expenses. Specific training addressing foreign bribery, rather than general training on the detection of economic crimes in general, contributes to effectively training tax examiners to identify the deliberate mislabelling of bribery payments in tax accounts. In the Parties that have concluded foreign bribery cases, an analysis of the way the bribes were recorded in tax returns and the reason why tax authorities failed to identify them would assist in strengthening tax examiners' expertise. The WGB has repeatedly recommended to Parties that such *post mortem* analysis be conducted.⁹⁴

Country practices: Guidelines and awareness raising for tax authorities	
Australia	The Australian Taxation Office has developed guidelines drawing on the Tax Examiners' Handbook. www.ato.gov.au/About-ATO/About-us/In-detail/How-we-do-things/Guidelines-for-understanding-and-dealing-with-the-bribery-of-Australian-and-foreign-public-officials/
Denmark	Denmark organised a conference (the first Nordic Agenda on Tax Crimes Anti-Corruption Conference) which included anti-corruption training for tax inspectors from Nordic countries and established a Danish/Norwegian-led initiative to collect extensive case materials for future trainings and projects (Denmark's Phase 3 Report, para. 146).
Italy	The Italian tax administration organises regular training courses for tax auditors on detecting corruption, including foreign bribery, covering topics such as the collection of evidence and the format for reporting suspicions of foreign bribery to law enforcement authorities (Italy's Phase 3 Report, para. 133).
Norway	In Norway, a working group was created to provide training sessions for tax examiners on the detection of bribery, based on case experiences as well as the Tax Examiners' Handbook, which has been translated into Norwegian and distributed to all employees within the Norwegian tax authorities. Cross-departmental training with police and customs officers was also organised (Norway's Phase 3 Report, para. 85).

⁹² This includes recommendations in the Phase 2 evaluations of Latvia and the Russian Federation, the Phase 3 evaluations of Argentina, Austria, Belgium, Brazil, Bulgaria, Canada, Chile, Czech Republic, Estonia, Finland, France, Greece, Hungary, Iceland, Ireland, Israel, Korea, Luxembourg, Mexico, New Zealand, Portugal, Slovak Republic, Slovenia, South Africa, Spain, Switzerland and the Phase 4 evaluation of the United Kingdom.

⁹³ Germany's Phase 3 Report, commentary after para. 180.

⁹⁴ For example, the United Kingdom's Phase 4 Report, para. 223 and Chile's Phase 3 Report, para. 155.

3. How to detect foreign bribery in practice

Based on the number of concluded foreign bribery enforcement to date, five Parties (i.e. Finland, France, Germany, Japan and Switzerland) have concluded foreign bribery cases following a report made by tax authorities or detected during criminal tax investigations. Evidence of foreign bribery may surface essentially at three stages: during the verification of taxpayers' declarations, in the course of regular tax audits or, more often, in the context of criminal tax investigations.

3.1. *Detection of foreign bribery in assessing tax returns*

Foreign bribery can be first detected during the handling of tax returns. Sufficient knowledge about the taxpayers' business practices, the industry sectors and environment they operate is necessary to enable tax examiners to detect suspicious payments. While some payments may be *prima facie* suspicious – such as those involving large amounts, those made to tax heavens, recurring payments or tax deductions of fees paid to foreign agents – tax examiners also need to pay close attention to payments recorded in the categories of allowable expenses, such as deductions for promoting and advertising expenses, consultant fees etc., which may disguise bribery. In this respect, however, the Australian tax authorities note that Australian companies do not usually tend to claim bribe payments as deductions (or as disguised deductions), but that such bribe payments are usually made through a foreign subsidiary.

3.2. *Detection of foreign bribery during tax audits*

Foreign bribery is more likely to be uncovered in the course of tax audits. The first step is for tax authorities to include bribery into their risk assessment and tax audit plans to be able to determine whether bribe payments have been included in tax accounts. When this was not already in place, the Working Group has recommended that Parties' tax authorities include bribery in their risk assessment and tax audits. Greece, for instance, was recommended to include bribery in the risk assessments and audits by tax authorities, and to carry out relevant compliance checks with a view to identifying bribes during the examination of tax returns.⁹⁵

Country practices: How bribery is included in the risk assessment for tax audits	
Australia	In Australia, tax auditors consider bribery risks on the basis of the company's characteristics. Bribery risks will be assessed based on the country profile of where the company operates (i.e. whether the country has a higher risk for bribes and facilitation fees as a way of 'doing business'), the company's code of conduct and extent to which there is an explicit policy of not paying bribes, how that code of conduct has been implemented and enforced at a practical level including how the board of directors, audit committee and internal audit gain assurance that it is being complied with, and whether there are other internal controls and safeguards implemented to minimise the risk that bribes are paid to public officials. Should the ATO receive specific intelligence regarding payment of a bribe, this will also influence the risk rating and likelihood of inquiries being made.

⁹⁵ Germany's Phase 3 Report (2011), recommendation 12(b).

Italy	In Italy, the audit plan is based on a risk analysis of factors such as the countries in which the entity operates and the size of the business of that entity.
South Africa	In South Africa, tax audit cases are selected either based on a random process or on risk-based factors. These factors include unaccounted income, excessive commissions or consultancy fees, specific industries (e.g., construction), offshore payments, government contracts, etc. In this respect, it can be useful for tax authorities when planning tax inspections to clearly define: (i) the basis of risks considered when deciding which company/ies to audit; (ii) the time-lag between audits; and (iii) whether specialised expertise on specific business sectors and specific knowledge of the tax risks related to each activity may be useful.

In **Germany**, corporate audits performed by the tax authorities are the most common trigger for investigations of bribery offences. The reasons for audits may differ – there are regular and special audits or tax investigations regarding income tax, VAT or other taxes. Tax authorities usually audit or investigate on-site, in the company’s office and may search through books, records and other relevant sources. Bribe payments have to be accounted for if not taken from slush funds or black money. This means that bribe payments in most cases are accounted for as expenses in company records. At the time of Germany’s Phase 3 evaluation by the WGB in 2011, 15 cases of suspected foreign bribery offences had been initiated by reports from the tax authorities since 2006.⁹⁶ In Germany’s experience, various red flags are indicators that certain expenses are in fact bribe payments. In most cases, not only one red flag will raise suspicions but a combination of red flag indicators may be found during the audit.

Country practice: Red flag indicators by tax authorities	
Germany	<p>Suspicious expenses are often found in the following accounts:</p> <ul style="list-style-type: none"> • Consulting fees • Commissions • Third party services • Marketing • Sponsoring • Publicity expenditure <p>Suspicious invoices or entries often show the following elements:</p> <ul style="list-style-type: none"> • No specific contractual basis for payments • Amounts that have been rounded up, often having the character of a lump sum • Missing or nondescript specification of services rendered • No regular letter-head

⁹⁶ Germany’s Phase 3 Report (2011), paras. 173-175.

- Missing invoice number
- Missing predefined address or bank account information
- Backdating of invoices
- No supporting documents available
- Unusual/economically unreasonable transactions
- Payments to business partners in countries pervaded by corruption

The following schemes are used to disguise bribe payments:

- Fictitious invoices for consulting services of non-existent companies/shell-companies.
- Accounting of fictitious services of close relatives of the bribee
- Use of straw-men who provide fictitious services, sometimes through fictitious employment services
- Over-invoicing of ingoing and outgoing invoices

German tax authorities auditing companies are in a unique position to uncover the above-mentioned red flags in company records because of their extensive investigating competencies. However, several challenges exist. First, suspicious expenses have to be identified in the books of the briber. Secondly, the connection between the bribe payer and bribe recipient needs to be established. Here, the extensive competencies are particularly helpful because tax authorities are in a position to receive detailed information on the recipient of the (suspicious) payments. Tax auditors can investigate accounts, books, records, also using digital data analysis and may question relevant personnel.

Box 15. Germany Case Study: Intermediary case

A company arranged for an intermediary in an African country to receive contracts locally. The payments to the intermediary were accounted for as expenses in the company records. During a tax audit, auditors detected that the payment was made in cash, was invoiced using an internal receipt, and was labelled as “decision-making support”.

Tax auditors submitted the case to the Special Division for Corruption within the Tax Office. After assessment, the case was reported to the Division for Internal Investigations, a specialised body within law enforcement authorities for criminal investigations into malpractice and corruption offences. The report was made on the basis of section 4 paragraph 5 no. 10 of the Income Tax Act, which, on the one hand, stipulates the non-deductibility of bribe payments, and, on the other hand, lays down reporting obligations for tax authorities when detecting suspicious payments.

Under the lead of the Public Prosecutor’s Office, the Division for Internal Investigations initiated a search of company premises on the basis of the report from the tax authorities. The findings of the searches were in turn shared with the tax authorities. The Public Prosecutor’s Office then decided to coordinate and take the lead on both investigations –into the criminal tax offence as well as the corruption offence. The ensuing court proceedings ended with a high monetary sanction for the accused.

Source: Germany

In **France**, external inspections of large corporations are carried out by the Department for National and International Verifications (DVNI), in the Directorate General for Public Finances, under the Ministry of Economy and Finance. The DVNI is organised into departments specialised according to business sector with specific knowledge of the tax risks related to each activity on the one hand, and internal consultants specialised in international tax issues on the other. The inspection departments apply risk analysis, inspect documentation and make on-site inspections during which they consider the payment amounts, their destination and whether or not the beneficiary is an intermediary. As a result, between 2008 and 2011 the French tax authority required reimbursements in 18 cases totalling EUR 4.117 million based on the tax legislation relating to bribery (article 39-2bis Code Général des Impôts). One foreign bribery investigation has resulted from a report by the DGFIP to the Paris Public Prosecutor's Office.⁹⁷

Regular and frequent tax audits are also important. Following a recommendation made by the Working Group in Phase 2 in 2003, **Germany** undertook to reduce the time-lag with regard to the performance of tax audits of the largest companies. The German Federal Government and the Länder established minimum standards for the timely performance of tax audits of companies.⁹⁸ By conducting tax audits within a narrower time frame enables irregularities to be detected sooner. Other Parties to the OECD Anti-Bribery Convention received similar recommendations, such as **Luxembourg** which was asked to increase the intensity and frequency of on-site inspections by its tax authorities.⁹⁹

3.3. *Detection of foreign bribery during criminal tax investigations*

Foreign bribery can also be detected in the context of criminal tax investigations. In the conduct of such investigation, tax inspectors may get information revealing the commission of other crimes, including foreign bribery. In practice, several foreign bribery cases have been detected in this context.

- In **Finland**, two cases involving the bribery of foreign public official (one in the early 1990's and the other in 1998) had been revealed by reports of tax inspectors. The cases were, however, handled as tax frauds and not as foreign bribery investigations per se.¹⁰⁰
- In **Japan**, during the course of joint investigations between tax inspectors and public prosecutors into allegations of tax evasion by a Japanese company, public prosecutors identified slush funds and found that the money was used for bribing foreign public officials. Further investigations revealed that bribe payments were made to a senior official of a foreign public procurement authority in relation to a substantial infrastructure project that was financed in part by official development assistance (ODA) from Japan. The bribers and the company were prosecuted and found guilty of bribing foreign public officials. 101

⁹⁷ France Phase 3 Report, paras. 147-149 and 152

⁹⁸ Tax audits are regulated by the "Betriebsprüfungsordnung" (tax audit regulation).

⁹⁹ Luxembourg Phase 3 Report, para. 156

¹⁰⁰ Finland, Phase 3 Report, para. 5.

¹⁰¹ Japan Phase 3 Report, paras. 13 ; 47 and 98-99

- In **Portugal**, one foreign bribery allegation was also detected during a tax crime investigation against a Portuguese company. In this case, the Portuguese company was selling goods to a supermarket chain owned by one of the highest-ranking Angolan military officials. The sale was made through an offshore company and some of the proceeds were allegedly diverted to a Swiss bank account as kickbacks benefitting Angolan officials. A total of USD 2 million were paid to various individuals in 2006-2010.¹⁰²
- In **Switzerland**, the Tax Administration of the Canton of Geneva identified bribes payments in the context of controls undertaken following a warning from the Federal Tax Administration of suspicions of VAT fraud. On 17 February 2010, the Tax Administration of the Canton of Geneva advised the cantonal Office of the Attorney-General of illegal payments that had been made by a director of several Geneva hotels. Following this report, a case was opened by the Geneva Office of the Attorney-General. The hotel director was subsequently sentenced for bribery of foreign public officials.¹⁰³

Conclusion

Recent major cases have highlighted the intrinsic links between foreign bribery and related tax offences. Tax authorities have a key role to play in the detection of foreign bribery provided that legal frameworks and appropriate channels are in place to report alleged instances to law enforcement authorities. The few Convention Parties that do not allow the spontaneous sharing of tax information with law enforcement authorities should enact corresponding legislation, as prescribed by the 2009 Tax Recommendation. Beyond the legal requirements and reporting channels, tax authorities need to be regularly reminded of their role in detecting foreign bribery and to be provided with regular in-person trainings on detecting red flags of bribery, including, for instance, through dissemination of, and training based on, the Tax Examiners' Handbook. Feedback from law enforcement authorities to tax authorities in the context of actual bribery cases will also be essential in developing a culture of awareness within the tax administration and the expertise of these authorities in detecting possible transnational bribery. New programmes for exchange of information between tax authorities, and possibly beyond to law enforcement, such as the automatic exchange of tax information between tax authorities, might further assist in the detection of foreign bribery.

¹⁰² Portugal Phase Report, para.

¹⁰³ Switzerland Phase 3 Report, para. 79 and Annex 4, Summary Punishment Order of the Attorney-General of the Republic and Canton of Geneva, 2 December 2010

Chapter 6

Financial Intelligence Units

Introduction

The measures taken by countries to combat money laundering as well as terrorist financing are powerful tools in the fight against foreign bribery. A substantial amount of criminal proceeds are generated from foreign bribery and by a variety of illicit means. The proceeds of bribery and corruption, whether benefiting the corrupt officials or the bribe payers, are often laundered so that they can be enjoyed without fear of detection or confiscation. International standards, including the OECD Anti-Bribery Convention, the United Nations Convention against Corruption (UNCAC)¹⁰⁴ and the Recommendations agreed by the Financial Action Task Force (FATF)¹⁰⁵ recognise the importance of fighting money laundering in the anti-corruption context. According to the OECD Convention, all Parties are required to treat money laundering in relation to foreign bribery and domestic bribery in the same manner, as required by Article 7 of the OECD Anti-Bribery Convention.¹⁰⁶ The 2009 Recommendation further requires Parties to the OECD Anti-Bribery Convention to take concrete and meaningful steps to raise awareness in the public and private sectors for the purpose of preventing and detecting foreign bribery (Recommendation III.i) and to ensure that accessible channels are in place for the reporting of suspected acts of bribery of foreign public officials in international business transactions to law enforcement authorities (Recommendation IX.i). In reviewing implementation of the OECD Anti-Bribery Convention by the Parties, the WGB thus explores how anti-money laundering (AML) mechanisms can support the detection of foreign bribery, including via Financial Intelligence Units (FIUs).

Efforts to combat money laundering and foreign bribery are intrinsically linked and have the potential to be mutually reinforcing. FIUs are essential players in the fight against corruption and bribery and the laundering of the proceeds of these crimes. In

¹⁰⁴ Under the UNCAC, countries are required to criminalise money laundering, to adopt measures to effectively prevent it and to establish Financial Intelligence Units.

¹⁰⁵ The Anti-Money Laundering and Counter Financing of Terrorism (AML/CFT) standards set by the FATF Recommendations are important tools in the fight against corruption because they support the detection, tracing, confiscation and return, where appropriate, of corruption proceeds, and they promote international cooperation in the efforts to do so.

¹⁰⁶ Article 7 of the OECD Anti-Bribery Convention states: “Each Party which has made bribery of its own public official a predicate offence for the purpose of the application of its money laundering legislation shall do so on the same terms for the bribery of a foreign public official, without regard to the place where the bribery occurred”. See also commentary 28 of the OECD Anti-Bribery Convention.

Poland for instance, this role was acknowledged as the FIU fully participates in the Government's Programme for the Prevention of Corruption. FIUs can have valuable knowledge of the persons potentially involved in bribery schemes, including their business activities, in particular through reports of suspicious transactions. This can greatly contribute to successfully detecting and prosecuting these crimes, including in countries where corruption-related funds are laundered through sophisticated financial systems.

Foreign bribery frequently involves money laundering of the bribe or the proceeds of bribery. Thus, AML reporting systems can reasonably be expected to detect foreign bribery cases regularly, and to add value to ongoing cases. In reality, the statistics in this regard are somewhat disappointing. By way of illustration, among the countries Parties to the OECD Convention, suspicious transaction reports (STRs) from FIUs involving foreign bribery-based money laundering were the origin of only 6 of the 263 bribery schemes analysed for the purpose of this Study.¹⁰⁷

Counterexamples however can be put forward.¹⁰⁸ In **Switzerland** for instance, in 2016, 60% of judicial proceedings initiated for acts of bribery of foreign public officials¹⁰⁹ were opened on the basis of an FIU report. The role of TRACFIN (**France's** FIU) in uncovering instances of foreign bribery has received praise from the WGB.¹¹⁰ **Argentina's** FIU has also recently contributed to the detection of one foreign bribery case as a result of intensive training and awareness-raising initiatives in the private sector related to the detection of corruption and bribery. In **Norway**, one recent foreign bribery investigation has been initiated by an FIU-report.

The lack of detection in practice has been highlighted by the WGB in its country reviews, especially in the context of the Phase 3 and Phase 4 evaluations. In this context, most of the Parties to the OECD Anti-Bribery Convention have been asked to take measures in order to increase detection via AML mechanisms (including via preventive measures applicable to reporting entities).¹¹¹ Some countries have taken initiatives that ultimately contribute to fostering the detection of foreign bribery:

¹⁰⁷ This report endeavours to measure, and to describe, transnational corruption based on data from the 427 foreign bribery cases that have been concluded between the entry into force of the OECD Anti-Bribery Convention in 1999 and June 2014. This trend is corroborated by a review conducted by Europol ("From suspicion to action - Converting financial intelligence into greater operational impact", <https://www.europol.europa.eu/publications-documents/suspicion-to-action-converting-financial-intelligence-greater-operational-impact>, 2017) that shows that only 4% of STRs received by the FIUs within the European Union relate to corruption.

¹⁰⁸ Please note that statistics provided by FIUs in the section of this Chapter are not comparable to those published in the Foreign Bribery Report (that only refers to concluded cases). In particular, they might not refer to cases that are closed but to cases under investigation or prosecution that FIUs have contributed to detect.

¹⁰⁹ Under Swiss law, bribery of foreign public officials covers all types of corruption involving a foreign public official, including but not limited to bribery of foreign public officials in international business transactions.

¹¹⁰ See the Phase 3 Report of France. TRACFIN sends every year to the law enforcement authorities between 30 and 50 reports for suspicion of bribery.

¹¹¹ These countries are: Argentina, Belgium, Brazil, Czech Republic, Chile, Estonia, Denmark, France, Greece, Iceland, Israel, Korea, Luxembourg, Mexico, The Netherlands, Portugal, Poland, Slovak Republic, Slovenia, South Africa, Spain, Sweden, Turkey, United Kingdom.

Country practices: mechanisms to foster the detection of foreign bribery	
France: Example of valuable initiatives to foster detection via AML mechanisms	Together with the Anti-Corruption Agency (the <i>Service central de prévention de la corruption</i> or SCPC), Tracfin has produced a guide to detecting potentially corrupt financial operations. The guide was first distributed in 2008. As of mid-June 2014, a new edition of this guide, extensively recast and updated, has been available to reporting entities. The guide presents red flags and typologies based on practice, for use by both financial and non-financial professions. Hard copies of this guide are distributed at various training and awareness-raising events organised by the SCPC and Tracfin.
Mexico: Example of valuable initiative to identify and monitor Politically Exposed Persons (PEPs)	A risk assessment model for corruption was implemented in 2016 by the FIU-Mexico, which examines various metrics associated with financial transactions and transactions in the non-financial sector to assign a level of risk to individuals who by their nature may be involved in acts of corruption, such as PEPs, public entities of the various powers of government at the federal, state and municipal level, state-owned companies, public officials, as well as related individuals or companies. Among the indicators evaluated are unjustified cash deposits or withdrawals, triangulation of resources between companies related to PEPs or public officials, unjustified international transfers, and acquisition of luxury goods.
Switzerland: Positive examples of awareness raising initiatives vis-a-vis financial intermediaries	Between January 2014 and June 2017, the Money Laundering Reporting Office-Switzerland, (MROS) provided about 150 conferences and training sessions to reporting entities. More than 3,500 professionals attended. Such sessions are particularly focused on detection of corruption and provide real life examples of such cases, making these awareness raising efforts very practical and useful.

1. What role for the FIU?

All Parties to the OECD Anti-Bribery Convention have established FIUs to receive and analyse reports of suspicious financial transactions.

The FIU is an important element in any AML regime, particularly in the early, pre-investigative or intelligence gathering stage. The FIU also acts as an interface between the private sector and law enforcement agencies, assisting with the flow of relevant financial information. The core function of every FIU is to receive, (and as permitted, request), analyse and disseminate to the competent authorities, disclosures of financial information, and related analysis. Linking financial information to possible underlying forms of crime is one of the key challenges in this process. The role of the FIU in receiving and analysing STRs is therefore critical in the fight against foreign bribery. FIUs must be well equipped to play this role, particularly as it relates to human and information technology resources as well as adequate operational independence. During its Phase 3 review process, the WGB has systematically reviewed whether FIUs are adequately resourced to effectively detect money laundering cases predicated on foreign bribery, and at least three countries have been asked to take steps in that regard¹¹².

¹¹² These countries were Denmark, Estonia and Greece.

Box 16. Organisational models of Financial Intelligence Units (FIUs)

1. **The Judicial Model** is established within the judicial branch of government wherein “disclosures” of suspicious financial activity are received by the investigative agencies of a country from its financial sector such that the judiciary powers can be brought into play. An example of this model is the FIU of Luxembourg.

2. **The Law Enforcement Model** implements AML measures alongside already existing law enforcement systems, supporting the efforts of multiple law enforcement or judicial authorities with concurrent or sometimes competing jurisdictional authority to investigate money laundering. Operationally, under this arrangement, the FIU will be close to other law-enforcement units, such as a financial crimes unit, and will benefit from their expertise and sources of information. Examples of such a model are the UKFIU in the United Kingdom and Hungary’s FIU.

3. **The Administrative Model** is a centralized, independent, administrative authority, which receives and processes information from the financial sector and transmits disclosures to judicial or law enforcement authorities for prosecution. It functions as a “buffer” between the financial/non-financial and the law enforcement communities. Examples of such FIUs are the Belgian Financial Intelligence Processing Unit (CTIF/CFI) in Belgium, Slovenia’s Office for Money Laundering Prevention (OMLP), FINTRAC (Canada) and the United States’ FinCEN. Under this model, two sub-categories of FIUs exist: those that can only use the financial information received by the reporting entities to carry out their analytical functions; and those that, in addition to this information, have access, either directly or through the liaison officers, to the information of the criminal prosecution authorities. TRACFIN and MROS are in this second category.

4. **The Hybrid Model** serves as a disclosure intermediary and a link to both judicial and law enforcement authorities. It combines elements of at least two of the FIU models. Some FIUs combine the features of administrative-type and law-enforcement-type FIUs, while others combine the powers of the customs office with those of the police. An example of this model is the Netherlands Financial Intelligence Unit Nederland (MOT) in the Netherlands.

2. What can be detected?

While the focus of the FATF Recommendations¹¹³ is on combating money laundering (and terrorist financing), they include specific measures which recognise corruption and bribery risks. For example, the FATF Recommendations require countries to make corruption and bribery predicate offences for money laundering, financial institutions to take action to mitigate the risks posed by politically exposed persons (PEPs), and countries to have mechanisms in place to recover through confiscation the proceeds of crime and to ratify and implement the UNCAC.

¹¹³ www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations.html

Box 17. Useful FATF requirements for the detection of bribery

(i) Understanding national risks and coordination.

The FATF Recommendations require countries to identify, assess, and understand the money laundering risks for the country and take action which is proportionate to those risks (Recommendation 1). Such a risk assessment may include consideration of the risks posed by the laundering of the proceeds of corruption offences, depending on the country risk profile. In such cases, relevant anti-corruption bodies could be consulted to provide input into the risk assessment. The FATF Recommendations also require countries to have in place national co-ordination and cooperation mechanisms for AML/CFT purposes (Recommendation 2). Many countries have standing committees or multi-agency bodies that have been established for this purpose. These mechanisms may be an effective tool to engage anti-corruption authorities, and form part of multi-agency bodies, where relevant.

(ii) Preventive measures including customer due diligence and record keeping

Customer due diligence (CDD) is the process of identifying the customer, including the beneficial owner, and of developing a clear understanding of the nature of a customer relationship, in order to effectively understand and manage the risks stemming from that relationship. The FATF Recommendations require financial and non-financial institutions to carry out CDD on their customers in certain circumstances, including when establishing a business relationship, and when carrying out occasional transactions above a specific threshold. CDD can be an effective measure to mitigate money laundering risk associated with corruption offences and to support investigations and prosecutions into corruption. The collection of information required by CDD measures can assist financial institutions and DNFBPs to detect suspicious activity which may be linked to corruption, and to flag such activity. FATF requirements applicable to politically exposed persons are also an important tool in to detect corruption;

(iii) Detection, investigation, prosecution, and confiscation

The FATF Recommendations require countries to implement domestic AML measures that provide valuable tools for tracing assets, conducting financial investigations, and facilitating the confiscation of the proceeds of predicate offences (including corruption and related offences). These tools can add value to any corruption case, even where it may not be possible to pursue related money laundering charges; and

(iv) International coordination

To fight corruption, countries need to implement effective laws and mechanisms which enable them to provide a wide range of mutual legal assistance (MLA), execute extradition requests and otherwise facilitate international co-operation. The FATF Recommendations require countries to have mechanisms that facilitate international co-operation and co-ordination for all authorities (policy makers, the FIU, law enforcement, supervisors and other competent authorities) at the policy and operational levels.

AML mechanisms have the potential to detect several types of suspicious financial schemes that can reveal foreign bribery. In practice, several types of financial flows can be detected as follows:

- In looking at what the recipient of a bribe, typically the public official, has done with the money once it has been received.
- In detecting the bribe transaction: bribes paid to public officials are often hidden, and it is the companies and the individuals who are paying the bribes that are responsible for ensuring that they are not detected at the outset.

- In relation to the proceeds for the company or individual who bribed the public official, arising from the corrupt transaction: these can include, for example, the price of a contract that would not match the knowledge that the reporting entity has of its client, or the transfer of funds on the bank account of bribe payer using suspicious schemes (via a shell company for instance).

The table below shows examples of reported transactions that have contributed to the detection of foreign bribery cases:

Table 1. Foreign bribery cases detected by Financial Intelligence Units

Financial scheme detected	Case
Transaction related to the bribe	<p>Case 1 (Belgium) – Wire transfers on a bank account opened by a civil servant or a public officer awarding public contracts, the allocation of public subsidies, the issuance of permits, approvals and aggregations</p> <p>Case 2 (Belgium) – Wire transfers of bribes followed by important cash withdrawals,</p> <p>Case 3 (Canada) – Various intercompany transfers from a Canadian company were made to its parent company in Europe. A portion of these funds made their way back to Canada via electronic funds transfers to other related companies in Canada.</p> <p>Case 4 (France) - Detection of sudden changes in the financial flows on a client's private bank account, without economic justification: several transfers of EUR 100 000 without explanations on a private account, and transferred to other banks.</p> <p>Case 5 (France) – Corporate transactions without economical consistency, compared to the usual levels of turnover or operating margin: a company sends USD 3 M to a private person in a sensitive country A. The bribe payer explains to its bank that it is contractually engaged with its client not to give details about such payment; (ii) a company sends EUR 2,5 M to a private person justified by false contracts (no trace of such contract's contents in the company's bank accounts, neither in the accounting books nor the custom declarations).</p> <p>Case 6 (Switzerland) – a bribe paid out of, rather than into the bank account. Such was the case involving a business relationship opened in the name of a real-estate company abroad (X). Payments were made from this account to the account of a company working in the same sector and in the same country as X. The transactions were supposed to be the result of acquiring real estate. But the financial intermediary's investigations revealed that the company whose accounts had been credited belonged to the relatives of a political figure who had enabled X to obtain planning permission against the regulations of the country in question. The MROS analysis proved that the sales contracts for the real estate were forged and that the payments were bribes. The case was forwarded to the prosecution authorities.</p>
Transaction related to the proceeds of the bribe	<p>Case 1 (Belgium) – The use of shell companies and offshore places. Funds are transferred by order of a shell company in an offshore place (difficult or impossible to identify the beneficial owners of the ordering company)</p> <p>Case 2 (Belgium) – Investment of the proceeds of the bribe by a foreign PEP in the real estate sector, in the purchase of securities or in life insurance products.</p> <p>Case 3 (Canada) – Middle Eastern and North African foreign officials and their families were transferring and acquiring illegally gained assets in Canada and took comprehensive action to hide or disguise the true beneficial owner.</p> <p>Case 4 (France) – Life insurance contracts: a business man known as an intermediary in international transactions invests EUR 200 000 in a life-insurance portfolio. This portfolio is requested as a pledge (collateral) to secure a loan granted by another bank to the business man to purchase a real estate property. Four months later, the loan is in default and the collateral is called.</p>

	<p>Case 5 (Switzerland) – MROS handled a case where the bank account of a foreign public works company received a number of significant payments, which triggered an in-depth inquiry into the payments by the bank. The client presented the bank with formal contracts from the authorities of the country where the company operated. These contracts showed that the company had been contracted to build a gas pipeline between two towns in the said country. From consulting the available databases and information received from the FIU of the country in question, MROS established that the contracts had been forged and that the building activities corresponding to the payments were non-existent but rather the result of corruption by foreign public officials.</p>
<p>Transaction related to the payment of the benefit received by the bribe recipient</p>	<p>Case 1 (Switzerland) – The foreign client of a Swiss bank simultaneously opened three new accounts for the purpose of receiving funds relating to three life-insurance policies with a foreign insurer. The client said the funds were derived from savings from his professional activities as well as from his 40% share in a company supplying video surveillance equipment. One month later, the client's wife also opened an account into which funds relating to a new life-insurance policy were to be paid and explained that these funds came from her earnings and her 20% share in the same company. Inquiries by MROS with the FIU in the clients' country of origin revealed that the funds originated from public contracts for installing video-camera systems in urban areas and that these contracts had been rigged by corrupt public officials.</p> <p>Case 2 (Switzerland) – Company X, representing a European country in dealings with a state-owned Latin American company, informed the financial intermediary that it had received commissions for this service. Of the payments made by the European country for this purpose, two had been transferred from X's account to the account of an offshore company under the pretext that the latter had also been providing lobbying services to the state-owned Latin American company. Since there was no conclusive document to support this allegation, the financial intermediary reported the case to MROS. Thanks to information obtained from the FIU of the country where the offshore company was registered, MROS learned that the offshore company was a domiciliary company. MROS also discovered the name of the company's director and established that he had been reported to MROS in an earlier SAR on suspicion of corruption. Since the transactions made to the offshore company could not be plausibly explained by the client and another person close to the client was suspected of corruption, MROS forwarded the report to the prosecution authorities.</p>
<p>Any other financial scheme</p>	<p>Case 1 (Switzerland) – Two foreign businessmen, working in the residential construction sector, each had at a certain bank a personal account and three accounts in the name of three domiciliary companies abroad of which they were joint beneficial owners. The finance plan of these three companies raised questions. Indeed, these companies had bank accounts in different countries in their own name, and large amounts of money were circulating between them without any kind of economic or commercial justification. Thanks to information MROS received on these bank accounts from the FIUs in the countries concerned, it appeared that some transactions had come from or were destined for offshore companies registered in jurisdictions well-known for accommodating such companies and whose beneficial owner was a political figure in a European country. The transactions made to these offshore companies corresponded to bribery payments made to this political figure for his part in helping to secure public procurement contracts in third countries where he had powerful connections. The transactions also corresponded in part to revenue from contracts secured in this person's own country with his support. The case was forwarded to the prosecution authorities, who opened an investigation.</p>

3. Who can detect and how?

Almost all Parties to the OECD Anti-Bribery Convention (94%) have broadly applied mandatory Customer Due Diligence (CDD) and reporting requirements to their financial sectors and to designated non-financial businesses and professions (DNFBPs) – the reporting entities – in the circumstances required under the FATF Recommendations. The FATF recognises the importance of financial institutions (such as banks, securities firms

and money remitters) and DNFBPs (such as lawyers, accountants and trust and company service providers) in countering money laundering. To increase the transparency of the financial system, the FATF Recommendations require a reliable paper trail of business relationships and transactions for a minimum of five years, and financial/non-financial institutions are required to identify the beneficial owner of their customers. These preventive measures are relevant in the fight against any financial crime and their implementation can contribute to better detect foreign bribery.

CDD and other preventive measures can be effective measures to mitigate the risk of money laundering and related criminal offences. In particular, the FATF Recommendations require countries to ensure that financial institutions and DNFBPs implement enhanced due diligence measures to prevent the misuse of the financial system by PEPs and to detect such abuse when it occurs.

Box 18. Politically Exposed Person – PEP – definition

Foreign PEPs are individuals who are or have been entrusted with prominent public functions by a foreign country, for example Heads of State or of government, senior politicians, senior government, judicial or military officials, senior executives of state owned corporations, important political party officials.

Domestic PEPs are individuals who are or have been entrusted domestically with prominent public functions, for example Heads of State or of government, senior politicians, senior government, judicial or military officials, senior executives of state owned corporations, important political party officials.

Persons who are or have been entrusted with a prominent function by an international organisation refers to members of senior management, i.e. directors, deputy directors and members of the board or equivalent functions.

The definition of PEPs is not intended to cover middle ranking or more junior individuals in the foregoing categories

Source: FATF Recommendations

Due to their position it is recognised that many PEPs are in positions which can be abused for the purpose of committing money laundering and related predicate offences, including corruption-related offences such as foreign bribery. The WGB has identified that countries Party to the OECD Anti-Bribery Convention generally require financial institutions and DNFBPs to have appropriate risk management systems in place to determine whether customers or beneficial owners are foreign PEPs, or a family member or close associate of a foreign PEP. Under the FATF Standards, financial institutions must, in addition to performing normal CDD measures, be required to obtain senior management approval for establishing or continuing such business relationships, take reasonable measures to determine the foreign PEP's source of wealth and source of funds, and conduct enhanced due diligence of the business relationship, including enhanced monitoring. Taking appropriate measures in relation to PEPs increases the possibility of detecting instances where public officials are abusing their positions or their influence for private gain. Such measures may also facilitate the detection of transactions related to the payment of the bribe (the PEP or related persons as recipients or beneficiaries of the transaction) or the movement of the proceeds of corruption (the PEP or related persons initiating the transaction). In the first instance, spotting such transactions can contribute to detecting the originator of the transaction, i.e. the bribe payer, and therefore reveal the

active side of bribery. In all instances, tracing back the flow of money involving a PEP can contribute to detecting the supply side of bribery. In Belgium, a transnational corruption case was detected and reported by the FIU, involving a PEP.

Box 19. Belgium Case Study: Electronics Company Case

Four international transfers, totalling more than USD 2.2 million, from a firm in the electronics sector in Asia credited a Belgian bank account belonging to a Central African company. The account of this African company had been opened for doing business with companies in Belgium and Europe. The manager was a resident in Africa. These four international transfers were followed by transfers to South Korea, Cyprus and, to a lesser extent, France. The movements recorded on the account were irrelevant to the envisaged nature of the business relationship, namely: the payment of suppliers in Europe. According to press reports, the person who identified himself as the intermediary in this case had served as an adviser to a Minister of Defense of the country in Central Africa. Other articles found on the Internet referred to development projects managed by the South Korean company that would have paid kickbacks to military forces of the Central African country in order to obtain the conclusion of contracts. Payments were made to a person close to the African government.

Source: Belgium FIU. "Cases transferred to the judiciary authorities related to corruption: trends and typologies", www.ctif-cfi.be/website/images/FR/typo_ctifcfi/corruption.pdf. June 2016. Available in French and Dutch.

Financial institutions and DNFB's careful scrutiny of transactions, including, in some instances, through monitoring of the media, has also led to uncovering transnational corruption cases.

Box 20. Switzerland Case Studies: The major role the media plays in detection

Case 1. X, a foreign business man and beneficial owner of three domiciliary companies, each with its own bank account at the same bank, asked his bank to accept payment of a substantial sum of money into one of the accounts. When asked by the financial intermediary to explain the transaction, X revoked it. This prompted the financial intermediary to step up its inquiries; it noticed some very recent press articles accusing X and one of the three companies of being at the center of a particularly major political corruption scandal. Indeed, X was said to be the main driving force in setting up a joint venture between a sovereign wealth fund from his country of origin and a company in a third country. The joint venture was said to have received significant loans from third-party companies; repayment of these loans was said to have been diverted to different people who were the beneficial owners of the reported bank accounts. The case was reported to MROS, whose inquiries not only confirmed the financial intermediary's suspicions regarding the beneficial owner of the reported accounts, but also shed light on the kick-backs probably received by the heads of the sovereign wealth funds and prominent political leaders.

Case 2. A bank learned from a newspaper report that one of its clients, a business man and former minister of a South American country, was suspected of having accepted bribes from a construction company in return for awarding public procurement contracts in his country of origin. The press articles mentioned the name of a domiciliary company X whose beneficial owner was the former minister and a bank account opened in another European country in X's name. Bribes received for awarding public procurement contracts to the corrupt company were said to have been paid into this account as well as into the Swiss account opened in the name of a domiciliary company Y whose beneficial owner was the said ex-minister. MROS showed that Y's Swiss account had been credited with a significant sum of money from X's bank account opened in the country mentioned in the press report.

However, bribes paid to public officials are often hidden, by using intermediaries, for example, to hide corrupt transactions, or by transferring funds through financial centres. Bribes are also often paid to employees of state-owned and state-controlled enterprises (who are considered public officials for the purpose of the Anti-Bribery Convention), and these may not always be picked up by reporting entities as PEPs.

Reports of suspicious transactions by financial institutions and DNFBPs play a critical role in the fight against bribery and money laundering. Such reports can be the first sign of a suspicious activity by a customer and are an important source of information available to investigators. They have the potential to uncover corruption activity, trigger foreign bribery investigations and be used to support ongoing financial investigations. However, all reporting entities may not have the same capacity and ability to detect foreign bribery. Awareness-raising and training initiatives are in that respect essential to improve such capacity across all reporting entities (see below).

4. Fostering detection

Encouraging detection by the reporting entities and within the FIUs seems to require at least three prerequisites: (i) developing typologies and red flags for the private sector, (ii) adopting feedback policies and (iii) having targeted training.

FIU staff involved in the analysis of STRs must be sufficiently trained to understand the indicators of foreign bribery to determine when an STR may be relevant to corruption investigations. Law enforcement authorities and the FIU could consider work together to develop a series of parameters or ‘red flags’ for FIU staff for the referral of FIU analysis to law enforcement authorities, which are specific to the context of that jurisdiction. All relevant authorities should work with the FIU to ensure that they maximise the use of other reports collected, such as cash transaction reports, wire transfers or cross-border movements of currency or bearer negotiable instruments, in corruption investigations. Developing more performant IT systems within the FIUs to gather, analyse and share information is also essential.

Typologies and red flags for use in the private sector. Evidence collected among the countries Parties to the OECD Anti-Bribery Convention shows that FIUs are able to identify substantial numbers of STRs that are worthy of further investigation by law enforcement in those Parties, but that, unfortunately, in most countries, very few of these involve foreign bribery. One issue may be that reporting entities are not able to adequately identify transactions involving laundering of bribes and proceeds of bribery. In this respect, guidelines and typologies on money laundering relating to foreign bribery are necessary to illustrate the methods and trends used and therefore that have some potential for detection. Such guidelines can assist financial institutions and other reporting entities in identifying suspicious transactions which may conceal foreign bribery. They can be issued by the public sector or at the initiative of the private sector (larger financial institutions have their own red flags, developed in some countries with the support of the authorities). While the FIUs of most Parties already provide typologies, very few refer specifically to the bribery of foreign public officials. Twelve countries, or 38% of countries Parties to the OECD Anti-Bribery Convention, were asked in Phase 3 to provide better guidance to reporting entities for instance by developing up-to-date typologies on money laundering where the predicate offence is foreign bribery.¹¹⁴ Some

¹¹⁴ The countries were: Brazil, Chile, Estonia, Greece, Israel, Korea, Mexico, New Zealand, Portugal, South Africa, Sweden and Turkey.

of the countries Parties to the OECD Anti-Bribery Convention have however developed interesting tools to support detection of foreign bribery in the private sector.

Country practice: Promoting communication on trends and typologies	
Belgium	<p><i>Facts</i> - from December 1993 to 31 December 2016, 147 cases related to corruption were transmitted by the FIU to the judicial authorities. More than half of these cases involved foreign PEPs, as defined under Belgian law and the FATF recommendations.</p> <p><i>June 2016 Update of the Guidance to reporting entities</i> – a review of the trends and typologies in the detection of corruption was published by the FIU in June 2016. This study differentiates between the nationality of the briber (foreign public official or Belgian briber or briber resident in Belgium), between the type of underlying offences (corruption of public officials or private sector corruption) and the types and money laundering techniques used (use of cash or wire transfers, use of intermediaries, non-financial intermediaries such as lawyers, recourse to private banking and payments via offshore centres). The annual activity report also includes a section with statistics and case studies on money laundering of funds issued from corruption.</p>

An illustration of recent successful initiatives to improve the fight against financial crimes through public-private partnerships is the Fintel Alliance (www.austrac.gov.au/fintel-alliance-launch), established by AUSTRAC, **Australia's** FIU. It was launched in March 2017 with three clear operational goals: (i) help private sector partners more easily identify and report suspicious transactions; (ii) help law enforcement partners more quickly arrest and prosecute criminals and (iii) work with academia to build knowledge and gather insight. AUSTRAC also produces case studies based on information that reporting entities and foreign FIUs have provided. Publishing case studies (www.austrac.gov.au/publications), particularly those based on reporting entities' information, is viewed as an important tool in demonstrating how FIUs, law enforcement agencies, and taxation and corporate regulators value this information. Corruption-specific typologies are also an important source of information for reporting entities to allow them to detect the proceeds of corruption and bribery, which often appear legitimate on the surface. This information is also important as these entities are required under the FATF Recommendations to understand, manage and mitigate their money laundering risk. Many FIUs that have been operational for a number of years have collected substantial amounts of tactical and operational intelligence. The databases of the FIUs can be made available for strategic analysis to allow the acquisition of knowledge in the area of corruption, including foreign bribery, to shape and further improve the work of an FIU. In this regard, the FIU can first collect relevant information related to potential instances of foreign bribery, stemming from the reports provided by the reporting entities, the FIU's own operational intelligence, public sources, commercial databases, information from law enforcement agencies, etc.

In a first step, it may make sense to focus on a specific area, e.g. high level cases (starting from a certain threshold), or cases related to a specific risk sector e.g. defence, pharmaceutical or extractive industries. The product of this strategic analysis can be a typology analysis (schemes to launder the proceeds of corruption that appear to be constructed in a similar fashion), a geographic/regional analysis, a behavioural analysis (operations used by a group of persons, e.g. how companies establish and use slush funds) and/or an activity analysis (e.g. weaknesses in a specific sector).

Feedback. While STRs provide a valuable source of intelligence in the identification and tracing of proceeds of corruption, adequate feedback on the value of STRs is not always provided back to reporting entities. In working with the private sector, FIUs and regulatory authorities should consider ways to provide such feedback, within the applicable national laws, to enhance the value provided by STRs for bribery investigations. Combined with guidance and typology information, feedback to reporting entities can ensure that valuable information is provided to FIUs through STRs. Increased feedback from FIUs to reporting entities may allow the latter to fine tune their reporting procedures, produce better reports and catch more relevant suspicious transactions.

Country practices: Feedback to reporting entities	
Canada	<p>FINTRAC provides feedback to all reporting entities in a variety of ways. These include through publishing guidance on its website, conducting outreach visits to the reporting entities, general and sector-specific training sessions and webinars, email and mailing lists, and AML/CFT public events. FINTRAC also deals with general enquires through a dedicated call line, and has published policy interpretations on its website. Specific feedback on STRs has also been provided to reporting entities. Topics on such feedback include common errors observed in entities' report, what makes a good STR, ML/TF indicators, feedback on reports used in financial intelligence disclosures to law enforcement partners, and types of STRs received and the information included in them. Further, FINTRAC has a dedicated team that regularly engages major reporting entities, including providing them with timely policy guidance and relevant information.</p>
Portugal	<p>The FIU gives feedback to the reporting entities. The updating of information takes place quarterly and is provided through a standard form that includes information with detailed progress on a case-by-case basis. The following information is provided:</p> <ul style="list-style-type: none"> • "Under analysis" when the information is being analysed by FIU in order to confirm or disconfirm the suspicions, • "Completed" when the analysis is concluded. It is a purely administrative status, given that the information can be retrieved at any time and used in further analysis when confronted with further information received; • "Referral to investigation" when the analysis by FIU confirmed the suspicion on the communication received. In this case information on the outcome shall be provided (DCIAP / Unit of the Criminal Police responsible for the investigation / Other OPC -for example the Tax Authority). <p>In addition to this feedback all reporting entities receive the FIU's annual report providing information, by sector (financial and non-financial), of statistical data on the number of reports on suspicious transaction received; the number of suspicious communications confirmed; the offences underlying money laundering operations detected; the number and value of suspension proposals / freezing of bank accounts made to the Judicial Authorities arising from the analysis conducted; data relating to international and national cooperation verified; training / awareness actions held; analysis of case studies - laundering typologies. The FIU holds biannual meetings with reporting entities. The meeting aimed to disseminate good practices and mutual cooperation between these entities, supervisory / inspection entities and the FIU. In addition and whenever requested, the FIU participates in training activities for reporting entities.</p> <p>Source: Follow-up to the Phase 3 Review, November 2015.</p>

At present, the amount of feedback appeared inadequate in some countries evaluated under the OECD Anti-Bribery Convention. During the Phase 3 process, three countries (Israel, Portugal and South Africa) were asked to provide better feedback to reporting entities with a view to improving the quality of foreign-bribery related reports. Only Portugal took steps to provide such feedback.

Training. It is important that competent authorities raise awareness and provide training to reporting entities to assist them to detect suspicious activity with regard to foreign bribery. FIUs should contribute to this process. This can include issuing of and training on red flags/indicators for foreign bribery as seen before (see in particular the French and Swiss examples) and publishing guidance on practical implementation of enhanced risk/PEP requirements (e.g. demonstration of databases; and/or indicators for corruption risks). In **Poland** for instance, relevant FATF publications (including in relation to the detection of Politically Exposed Persons) are translated and published as a way to provide guidance to the reporting entities. The FIUs in **Bulgaria** and in **Argentina** also provide trainings to reporting entities and publish annual reports that provide information on trends and typologies. In 2015, AUSTRAC (**Australia**) produced a strategic analysis brief that provides information about money laundering methods, vulnerabilities and indicators associated with politically exposed persons and laundering the proceeds of corruption including foreign bribery.¹¹⁵ FINTRAC (**Canada**) has conducted outreach and training for reporting entities of sectors that have obligations related to PEPs (domestic and foreign) and heads of international organisations. FINTRAC has met with these sectors via teleconference to present guidance and discuss practical aspects of their obligations. The reporting entities were able to ask questions and receive answers on the obligations. FINTRAC also regularly provides presentations on PEPs and heads of international organisations at several different forums and conferences.

5. The need for national multi-agency cooperation

A clear commitment by all relevant stakeholders to collaborate in the fight against foreign bribery and to exchange information is crucial to the effective detection of foreign bribery. This includes FIUs, law enforcement, supervisory bodies and the private sector.

Box 21. **Canada Case Study: the role of FIUs in assisting corruption investigators**

Canadian law enforcement officials were made aware of the possibility that assets that had been acquired by allegedly corrupt foreign public officials had been transferred to Canada. The country in which the officials resided requested that Canada identify and restrain any property that the foreign officials or their family members or associates (“subjects”) had transferred to Canada. The information provided by the requesting country was relatively high level in nature resulting in the need for an in-depth domestic investigation to determine: 1) where the assets/properties were located; 2) in whose name they were registered; and, perhaps most challenging to discern, 3) whether the registered owners were, in fact, the true beneficial owners. Financial information from Canada’s FIU, FINTRAC, helped identify financial institutions that had potentially been used by the subjects as well as a number of financial records and real estate transactions that were potentially relevant to the request. Based on this and other information, a Production Order was granted which required specific financial institutions that were believed to be used by the subjects to provide relevant documentation to law enforcement officials. As a result of the coordination among domestic partners in responding to the foreign country’s request, evidence (numerous bank accounts and financial holdings in various foreign bank and offshore accounts) was revealed which indicated that assets, including property in Canada, were acquired by the corrupt foreign officials and transferred overseas to, or registered overseas in, other jurisdictions in yet other individuals’ names.

¹¹⁵ See www.austrac.gov.au/sites/default/files/sa-brief-peps.pdf.

Through the receipt of STRs and other information, the FIU is a repository of vital financial information that is critical in assisting law enforcement agencies in initiating or enhancing corruption-related investigations. Information received from reporting entities can be enhanced where the FIU has the possibility to access databases, whether held by private sector companies or government agencies (tax, customs, police, etc.), to undertake its core functions, notably the operational analysis of STRs and related data. The FIU is well positioned to assist corruption investigators regarding financial investigations.

Box 22. United States Case Study: VimpelCom (2016)

In the VimpelCom case, the United States authorities report that the review of FINCEN financial reports has helped identify suspicious payments. It was followed up with investigative action.

To enhance the usefulness of the information provided by the FIU to law enforcement authorities investigating bribery and corruption, the information should flow upstream as well as downstream. Naturally, the FIU should forward intelligence reports and other financial intelligence of possible money laundering violations with a nexus to bribery. But it is also essential that law enforcement provide feedback to the FIU on the information provided by the latter. This allows for continuous improvement in the quality and quantity of information exchanged. If such information is shared with the FIU, this will allow the FIU to integrate information on possible corruption offences into its database and to potentially use this information for operational and strategic analysis. Such analysis by the FIU may significantly assist in ongoing or future corruption investigations. In addition, FIUs (as required by the FATF Standards) should also be informed of the outcome of investigations or prosecutions that originate in STRs from FIUs. This not only helps increase awareness of the broader importance of the FIU in the anti-bribery enforcement framework, but can provide a useful opportunity to identify ways in which to improve information exchanges in future cases. This can also help to more systematically and more effectively use financial intelligence in bribery cases. Finally, this raises the importance of FIUs' access to law enforcement data, including databases (and preventing situations where the FIU carries out review of cases already closed by the law enforcement authorities).

FIUs have in place procedures for the dissemination of information to any relevant authorities domestically. National co-ordination and cooperation mechanisms for AML purposes are to be encouraged in line with the FATF Standards. Many countries have standing committees or multi-agency bodies that have been established for this purpose. **The Netherlands** have promoted an interesting cross-agency approach.

Other country experiences in this area are worth being highlighted. In the **United Kingdom**, for instance, the FIU is placed under the auspices of a national police unit for organised and international crime. In **Sweden**, the FIU is placed within the Police. Many FIUs, including in France and the **United States**, host liaison officers working for tax or law enforcement bodies. The arrangement has made cooperation an integral part of everyday work, speeded up processes and decreased administrative burden. In many countries Parties to the OECD Anti-Bribery Convention, FIUs have information-sharing agreements with law enforcement bodies. In **Austria**, for instance, the FIU has such an agreement with the Federal Bureau of Anti-Corruption (BAK), the Federal Agency for State Protection and Counter Terrorism (BVT) and the Ministry of Finance. In **Poland**,

intensive training programmes associate both law enforcement bodies and the FIU. Despite such arrangements, very few FIUs get feedback about the reports they make to law enforcement bodies in relation to corruption. In its Phase 3 evaluations, the WGB encouraged such feedback in four reports. In **Switzerland**, legislation provides for an exchange of information between the FIU and the supervisory bodies. It also gives MROS access for its analytical work to any information held by federal or local authorities. Public prosecutors have a legal obligation to give feedback to the MROS regarding the cases originated from the FIU. They promptly notify the FIU about any investigation of money laundering, organised crime or terrorist financing, irrespective of whether this case originates from a report by the FIU. Collaboration with prosecutors takes place via daily contacts and bilateral meetings, where necessary. Finally, collaboration between the various authorities responsible for fighting financial crime and corruption was improved in 2013 by the creation of the Interdepartmental Coordination Group on Combating Money Laundering and Terrorist Financing (GCBF). This platform enables, inter alia, collaboration between various authorities in the preparation of joint risk analysis reports, one of which is under preparation for corruption. In **France**, TRACFIN has a legal and judicial division headed by two magistrates. They ensure a continuous and smooth dialogue with the Ministry of Justice and the prosecutors who conduct investigations based on TRACFIN's reports.

Country practice: Cross-agency cooperation	
Netherlands	<p>The MOT operates as an autonomous and independent entity under direct mandate of the Minister of Security and Justice. Its primary processes are supported and facilitated by the National Police which gives FIU-the Netherlands direct access to Law Enforcement databases of the National and Regional Crime Squads and Intelligence Divisions. Furthermore FIU-the Netherlands works closely together with the Anti Money Laundering Center of the FIOD through liaison connections that provides all the required tax data and Fiscal Expertise. Both the facilities of the National Police and the FIOD enables FIU-the Netherlands to carry out its statutory tasks. Specifically on prioritized topics such as Terrorism Financing, Corruption, Fraud, Underground Banking, Criminal Assets and Financial Facilitators and related crimes as Drugs, Human Trafficking and so on, the FIU-the Netherlands cooperates intensively with intelligence and law enforcement agencies to deliver valuable financial intelligence products. FIU-the Netherlands continuously develops high level strategic and technical analyses methods to detect signals within its unusual transactions database related to earlier mentioned criminality topics. To enhance this working method the FIU-the Netherlands delivers news reports to reporting entities to give them indicators and red flags. FIU-the Netherlands is member of the Financial Expertise Center (FEC) to deliver knowledge and Expertise for various Taskforces and Fusion Groups on topics to improve the Integrity of the financial sector and infrastructure in The Netherlands. In 2013, the matching of the database of the Infobox Criminal and Inexplicable Assets (iCOV) with suspicious transactions files of FIU-the Netherlands was put in place. The objective is to ease the exchange and availability of financial data across agencies.</p>

6. The key role of international cooperation

Foreign bribery can be combatted more successfully if a multi-stakeholder, comprehensive approach is chosen, taking into consideration the money laundering aspects of the offence. Typically, in large corruption and bribery cases, the location of the predicate offence (bribery or other corruption-related offence) is different from the place

where the proceeds of corruption are laundered. Simply checking national databases will therefore not necessarily lead to any result, and the FIU will depend on information gathered abroad.

As money laundering is a global problem, communication among countries is a key element to enhance the effectiveness of AML measures. As is broadly recognised, lack of effective information sharing between countries can hinder investigations, in particular with respect to transnational offences such as foreign bribery. Corrupt officials seek to move their illicit proceeds out of the country where the corruption offence occurred as soon as possible to avoid detection. Bribe payers generate complex bribery schemes via several jurisdictions to distance themselves from the transaction and the recipient of the bribe. Improved communication between the jurisdictions involved may improve the odds of detecting transnational bribery and recovering illicitly transactions related to corruption and bribery.

Exchanges of information between FIUs, without undue obstacles and in line with the Egmont Group *Principles for Information Exchange Between Financial Intelligence Units for Money Laundering and Terrorism Financing Cases*¹¹⁶ and the FATF Standards are an essential precondition for FIUs to be able to contribute to the global fight against corruption, including foreign bribery. The number of these exchanges has grown considerably over the past years.¹¹⁷ Such exchanges are only possible if the FIUs benefit from adequate operational independence and are protected from undue influence in the execution of their mandates. Access to relevant domestic information (including police and court-related information), having the requisite authority to share it with their foreign counterparts and the counterparts' authority to use the information for their own investigations and prosecutions, must all be in place to enable FIUs to assist in combating corruption.

Mechanisms of cooperation among FIUs have an advantage over the formal mutual legal assistance mechanisms in criminal matters in terms of efficiency and speed. While gathered, analysed and exchanged pieces of information may not necessarily be used as evidence in demonstrating the predicate offence, they have the potential to help locate and freeze potential proceeds of bribery and further prepare the ground for relevant formal co-operation, not only within relevant state agencies, but also across jurisdictions. Both methods, formal and informal, are complementary. In terms of international cooperation, FIUs can act as a bridge on behalf of law enforcement bodies, obtaining information from another jurisdiction through FIU to FIU cooperation.

¹¹⁶ www.apml.gov.rs/REPOSITORY/422_5-princ_info_exchange%5b1%5d.pdf

¹¹⁷ For instance, this trend is confirmed in the European Union, as showed by Europol in its 2017 review referred to above.

Country practices: FIU-to-FIU cooperation	
Australia	AUSTRAC, the Australian FIU, has entered into terms of exchange with more than 80 countries and regularly hosts representatives of foreign government agencies including law enforcement and taxation authorities. AUSTRAC has also officers out-posted to other agencies (domestically and internationally), including the Indonesia's FIU to enhance cooperation and the sharing of financial intelligence. Such mechanisms can bring cases of foreign bribery to light. (AUSTRAC)
Finland	Three of Finland's allegations have been reported to the FIU by its foreign counterparts. (Finland's Phase 4 Report, 2017)
Switzerland	In 2016, MROS requested cooperation from its counterparts abroad in 146 out of the 633 cases of suspicion of bribery of foreign public officials under its review. Information was provided in almost 70% of these cases for which criminal proceedings were opened. (MROS)

Conclusion

Effective AML systems can prevent the perpetrators of transnational bribery offences from enjoying the proceeds of their crime, or laundering the bribe itself. The FIU is an important element in the AML framework, particularly at the intelligence gathering stage, where the FIU acts as an interface between the private sector and law enforcement agencies. More globally, FIUs can add value to the overall multi-stakeholder anti-corruption efforts, thanks to their analytical function, their capacity to exchange information, domestically and internationally and their role in reaching out and providing guidance to the private sector.

Increasing FIUs' capacities to detect foreign bribery requires a joint and integrated effort from all parties involved. Enhanced and effective partnerships with the private sector are a key lever to improve detection of suspicious financial flows related to bribery. In addition to adequate awareness-raising and training on the particular complexities of the foreign bribery offence, FIUs need to be given the means of developing analytical skills, including through adequate financial, human and technical resources. Access by FIUs to relevant data from the law enforcement community is also one of the keys to the success of detection while ensuring that data protection laws are duly preserved.¹¹⁸ This Chapter shows the potential for not only a better and more systematic detection by FIUs of foreign bribery but also the need for increasing awareness among FIUs of foreign bribery as a criminal phenomenon and the role they can actively play in countering this crime. Sharing good practices should also remain a priority, including beyond the WGB membership. Further work with the Egmont Group and the FATF could help keep this important issue under review and bring together AML and anti-corruption efforts in a more effective way.

¹¹⁸ The importance of this issue is highlighted by Europol in its 2017 review.

Chapter 7

Other government agencies

Introduction

Several government agencies other than the tax administration or FIUs (addressed in chapters 5 and 6) can play a role in the detection of foreign bribery. This is essentially the case of agencies which interact with companies operating abroad in different capacities, be it for supporting investment or exporting efforts, or by nature of their regulatory role.

This is for instance the case of securities regulators and anti-corruption agencies. This is because the largest listed companies operating abroad are scrutinised by securities regulators, and sometimes in more than one jurisdiction. Listed companies would have to comply with strict reporting requirements which include the reporting of general corporate misconduct such as foreign bribery. As a matter of fact, in November 2016, the mining company Rio Tinto which is listed on the United Kingdom and Australian stock markets, self-reported to the United States, United Kingdom and Australian authorities alleged foreign bribery in relation to contractual payments made to a consultant providing advisory services in the Republic of Guinea.¹¹⁹ The Australian Securities and Investment Commission (ASIC) in turn referred the matter to the Australian Federal Police for consideration under a memorandum of understanding signed by the two entities to share information in foreign bribery investigations.

Anti-corruption agencies, depending on their structure and mission, can also uncover bribery in the course of their preventive work. This may for instance be the case of the newly created French anti-corruption agency (*Agence Française Anticorruption* – AFA). One of the agency’s mandates is to assess whether French companies have put in place adequate corporate compliance systems to prevent and detect bribery. Should AFA officers detect facts that may constitute foreign bribery, the Director of the AFA is required to refer the matter to law enforcement authorities. As the agency was set-up in March 2017, it remains to be seen with the development of the agency’s activities how much of a detection role it will play in uncovering the bribery of foreign public officials.

The WGB considers more particularly the role played in combatting foreign bribery by foreign representations abroad, as well as agencies providing export credit support and development aid, as provided under the 2009 Recommendation for Further Combating Foreign Bribery (“the 2009 Recommendation”), the 2006 Recommendation of the Council on Bribery and Officially Supported Export Credits (“the 2006 Export Credit Recommendation”) and the 2016 Recommendation of the OECD Council for development Co-operation Actors on Managing the Risk of Corruption (“the 2016

¹¹⁹ www.riotinto.com/media/media-releases-237_20002.aspx

Recommendation”). This chapter therefore focuses on the role played by these agencies. In addition, interaction with competition authorities is addressed, as this has more recently become a topic of interest with several foreign bribery cases also raising competition law violations, and vice versa.

1. Foreign representations

1.1. What role for foreign representations?

Foreign diplomatic missions have a strategic role to play in the detection and reporting of foreign bribery. Under the 2009 Recommendation, Adherents commit to ensure that “appropriate measures are in place to facilitate reporting by public officials, in particular those posted abroad, directly or indirectly through an internal mechanism, to law enforcement authorities of suspected acts of bribery of foreign public officials in international business transactions detected in the course of their work.”

Officials posted abroad are well positioned to report foreign bribery to law enforcement authorities in their home country. This is thanks to their knowledge of the business opportunities in the host countries, as well as their familiarity with the local environment, including local media. Indeed, bribery allegations are often reported in the media of the foreign countries where bribes have allegedly been paid rather than in the national media of the alleged bribe payers. On the other hand, diplomatic staff need to reconcile their public interest duty to report crime committed by their nationals, with the role they play in supporting their companies operating abroad.

To date, eight Parties – Argentina, Australia, Denmark, Finland, Latvia, Spain, the United Kingdom and the United States – are known to have detected foreign bribery through their diplomatic representations abroad. Building on these positive experiences of those Convention Parties, this chapter aims to illustrate how their experience may be replicated.

1.2. Reporting of foreign bribery by foreign representations

Reporting to law enforcement authorities is facilitated when a clear obligation and reporting channels exist for public officials posted abroad to report credible allegations of bribery. In at least 16 Parties, reporting is made through internal channels, and not directly to law enforcement officials. Reporting is either done to hierarchical superiors or to specific divisions of the Ministry of Foreign Affairs (MFA), including its legal department.¹²⁰

¹²⁰ Argentina, Australia, Austria, Brazil, Bulgaria, Chile, Denmark, Germany, Israel, Japan, Netherlands, New Zealand, Portugal and Spain.

Country practices: Reporting procedure for MFA officials posted abroad	
Netherlands	<p>Under the Dutch MFA's Code of Conduct for Bribery Abroad, embassy officials are required to transmit information on suspected acts of foreign bribery to the Integrity reporting office within the MFA's Financial and Economic Affairs Department, which in turn informs the relevant regional director and the Consular Affairs Department. The regional director then decides whether the information is sufficient to be transmitted to the Ministry of Justice, which would then inform law enforcement authorities. MFA officials failing to comply with the reporting obligations will be considered in violation of their duties and subject to disciplinary measures.</p> <p>In 2015 one embassy reported the attempt by a Dutch civilian (employed at a NGO) to bribe an official abroad. In this case a foreign public official reported to the Dutch embassy that an attempt to bribe a public official was conducted by a Dutch NGO. This case was reported to the Dutch National Corruption Prosecutor.</p> <p><i>Source: Netherlands Phase 3 Report, para. 147</i></p>
New Zealand	<p>The Ministry of Foreign Affairs and Trade (MFAT), in response to recommendations made by the WGB, established reporting procedures in Consular Instructions for MFAT officials posted in embassies. Reports are to be made to the MFAT's Legal Division, which forwards all criminal suspicions of foreign bribery to the New Zealand Serious Fraud Office. An oral and written briefing on these reporting obligations is provided to all Heads of Mission prior to their appointment, and hotlines have been established to facilitate such reporting.</p> <p><i>Source: New Zealand, Phase 3 Report, para. 132</i></p>

While structuring of the reporting procedure through internal channels is legitimate, this should not cause unnecessary delays which may be prejudicial to effective investigations by law enforcement authorities. In Argentina for instance, reports are required to be channelled to the Head of Mission and then the General Directorate of Legal Matters which then reports the matter to the prosecutor. However, the one foreign bribery allegation directly detected by the MFA through foreign media took five months to reach the prosecutor's office.¹²¹

1.3. Awareness and training of foreign representations

Officials posted abroad should receive adequate and specific instructions on the foreign bribery offence, their role in reporting it to law enforcement authorities, and the reporting procedures. Emphasis on active media monitoring can be particularly useful to lead to effective detection and reporting of potential foreign bribery. Once posted abroad, measures should be taken to remind these officials of their duty to report. In 23 WGB countries, MFA officials posted abroad have been reminded of their role to report foreign bribery by way of circulars.¹²²

¹²¹ Argentina Phase 3bis Report, para. 205

¹²² Argentina, Australia, Belgium, Brazil, Bulgaria, Chile, Colombia, Czech Republic, Denmark, Estonia, France, Germany, Greece, Israel, Italy, Japan, Luxembourg, Netherlands, New Zealand,

Country practices: Training measures addressed to MFA officials posted abroad	
Canada	The Legal Bureau and the Royal Canadian Mounted Police provide MFA officials abroad with pre-posting training on the policy for reporting allegations of foreign bribery and on anti-corruption prevention.
Israel	MFA officials abroad are reminded about the foreign bribery offence and their reporting obligations prior to being posted and annually through a circular. In 2017 the circular was updated to instruct MFA officials to inform the headquarters of any public communications, including media reports or other public information, in the country of posting regarding allegations of bribery and corruption involving Israeli nationals or legal entities, with training sessions planned in this regard.
Netherlands	The Dutch MFA Code of Conduct for Bribery Abroad includes a specific Annex on foreign bribery and provides advice on actions embassy officials should undertake when confronted with suspicions of foreign bribery, including detailed guidance on the reporting of foreign bribery. In this regard, the Code of Conduct expressly states that newspaper articles or information from a local, well-organised NGO would be of interest to law enforcement authorities. This is complemented by a website aimed at providing embassy officials with other specific tools.
United Kingdom	The Foreign and Commonwealth Office designed a toolkit available to all staff overseas in order to inform and give advice regarding the obligations placed on staff as a result of the Bribery Act. A dedicated reporting channel for embassy and consulate staff overseas was set up and is managed by the SFO, to enable the reporting of allegations of acts of bribery committed by UK nationals, companies or other incorporated bodies. As a result of these initiatives, 75% of the 30 reports of bribery and corruption received by the SFO since 2013 from government agencies have come from the Foreign and Commonwealth Office.

1.4. How can foreign bribery be detected?

To date, eight Convention Parties – Australia, Canada, Denmark, Finland, Latvia, Spain, the United Kingdom and the United States – are known to have detected foreign bribery cases through their diplomatic representations abroad.¹²³ The **United Kingdom** provides a good example of successful reporting by officials posted abroad: its overseas missions had reported 49 foreign bribery allegations at the time of its 2012 evaluation by the WGB. The effectiveness of these efforts is notably illustrated by a foreign bribery conviction that originated from this means of detection in the Messent case.

Portugal, Switzerland, Turkey and the United Kingdom. This list is based on information contained in the Phase 2 and Phase 3 country evaluation reports of the Working Group on Bribery.

¹²³ This figure does not include the cases where foreign bribery allegations were referred by officials posted abroad in cases that were already known by law enforcement authorities and in which investigative steps had already been taken. In Brazil for instance, one foreign bribery case was referred by Brazilian representations abroad in November 2013, two years after an investigation by the foreign country had been opened and widely publicised and after the company itself had disclosed that it was under investigation.

Box 23. United Kingdom Case Study: Messent (2010)

In August 2006, the SFO and the City of London Police initiated a joint investigation, against Julian Messent who was a director of London-based insurance business PWS International Ltd (“PWS”) for corrupt payments of almost USD 2 million made to Costa Rican officials in the state insurance company, Instituto Nacional de Seguros (INS) and the national electricity and telecommunications provider Instituto Costarricense de Electricidad (ICE). The corrupt payments were paid to Costa Rican officials, their wives and associated companies, as inducements or rewards for assisting in the appointment or retention of PWS International Ltd as broker of the lucrative reinsurance policy for INS.

Following elections in Costa Rica in 2002, officials at the Costa Rican state insurance company and national electricity and telecommunications provider were replaced. Enquiries were made into the contract with PWS and questions were raised about payments made under it. The Foreign and Commonwealth Office overseas mission in Costa Rica referred the case to the SFO in October 2005 and the case was accepted for investigation in August 2006. Messent pleaded guilty at Southwark Crown Court to two counts of making corrupt payments between February 1999 and June 2002, contrary to s1 (1) of the Prevention of Corruption Act 1906 and received a 21-month prison sentence.

Source: SFO Press Release (26 October 2010) and OECD (2012) Phase 3 Report.

In other cases, the initial report by the foreign representations did not necessarily lead to the successful conclusion of the foreign bribery case.

- The **Danish** MFA also referred foreign bribery allegations to law enforcement authorities (SØIK) in the Motor Vehicle Case, implicating a subsidiary of a Danish company in an African country. In December 2011, a court in the African Country dismissed the case due to lack of evidence and SØIK accordingly terminated its case.¹²⁴
- In **Finland**, one case was detected in part by the MFA and in part through the media in 2005. Instrumentarium, a Finnish medical-supply company, was accused of paying EUR 8.3 million in bribes in 2001-2002 to Costa Rican officials, including a former president, to secure a EUR 35.8 million contract for the sale of hospital equipment. The Finnish prosecution believed the Finnish executives secured the negotiations with bribes and provided the Ministry of Foreign Affairs with erroneous information in order to receive interest subsidy for development assistance projects. The bribes were paid as commission payments to an intermediary distributor company. The bribe-recipients were convicted of embezzlement in Costa Rica in 2009 and sentenced to three years’ imprisonment (reduced from five years on appeal in 2011). Finland detected the allegation through a report from the MFA, media reports, and information obtained from Costa Rica. The case came to the attention of the Finnish authorities through the media in Costa Rica where the allegedly bribed officials resided. The investigation in Finland was initiated in 2005 based on a criminal complaint by the competent domestic authorities.” In April 2012, aggravated bribery charges were brought against three executives – but not Instrumentarium itself – in the District Court of Helsinki. All were acquitted in 2013. The Court concluded that the circumstantial evidence was insufficient to show that the Finnish defendants

¹²⁴ Denmark, Phase 3 Report, para. 16 ;

knew (or considered it “highly likely”) that the commission payments to the intermediary would be used to bribe Costa Rican officials.¹²⁵

- In **Latvia**, one investigation was initiated in 2014 following a report by a Latvian diplomat to the Corruption Prevention and Combating Bureau (KNAB) that a Latvian entrepreneur allegedly bribed senior foreign public officials to obtain public procurement contracts. Latvia was, however, unable to confirm the allegations with foreign authorities because the foreign country was experiencing conflict, and the matter was subsequently closed.¹²⁶
- The **Spanish** embassy in Panama also reported to Spanish law enforcement media allegations of bribery of public officials in Panama involving Spanish nationals and a company in February 2010. Law enforcement authorities subsequently notified the embassy that an investigation could not be initiated because there were no specific individuals identified. The Working Group, however, noted that the press reports referred to a particular Spanish company.¹²⁷

Although these cases did not actually lead to enforcement actions, the fact that law enforcement authorities provided feedback to foreign representations abroad is positive and should be encouraged systematically when officials posted abroad have made such report. Such feedback helps foreign representations refine their understanding of what constitute foreign bribery. It also sends a strong message that the reports they make are taken seriously, and this can also encourage them to continue cooperating in the subsequent investigations, should further information be disclosed.

2. Export credit agencies

2.1 What role for export credit agencies?

Export credit agencies (ECAs)¹²⁸ deal with companies involved in international business transactions and, therefore, have a responsibility to take reasonable precautions to avoid providing credit, cover or support to transactions tainted with foreign bribery. Accordingly, the 2006 Recommendation of the Council on Bribery and Officially Supported Export Credits (the 2006 Export Credit Recommendation) recommends that “*Members take appropriate measures to deter bribery in international business transactions benefiting from official export credit support, in accordance with the legal system of each member country and the character of the export credit and not prejudicial to*”

¹²⁵ OECD (2017) Finland Phase 4 Report, Helsinki Times (January 2013) “*Finns accused of bribing Costa Rican officials deny accusations*”: www.helsinkitimes.fi/finland/finland-news/domestic/5180-finns-accused-of-bribing-costa-rican-officials-deny-accusations.html; and Helsinki Times (May 2013) “*Court rejects bribery charges in hospital equipment sales*”: www.helsinkitimes.fi/finland/finland-news/domestic/6407-court-rejects-bribery-charges-in-hospital-equipment-sales.html. OECD (2017) Finland Phase 4 Report, Helsinki Times (January 2013) “*Finns accused of bribing Costa Rican officials deny accusations*”; and Helsinki Times (May 2013) “*Court rejects bribery charges in hospital equipment sales*”

¹²⁶ Latvia, Phase 2 Report, para. 19.

¹²⁷ Spain Phase 3 Report, para. 10.

¹²⁸ List of Official Export Credits Agencies of OECD members: www.oecd.org/tad/xcred/eca.htm.

the rights of any parties not responsible for the illegal payments".¹²⁹ ECAs also have a responsibility to promote anti-bribery compliance measures and to make sure that, both before and after credit, cover or other support has been approved, appropriate due diligence measures are undertaken to identify if foreign bribery has taken place. Any credible evidence of such bribery should be reported by ECAs to law enforcement authorities.

The ECAs' role is not to detect foreign bribery *per se*; however, these agencies are nevertheless well-placed to identify foreign bribery. Some ECAs have developed processes – either based on measures contained in the 2006 Export Credits Recommendation or based on additional measures – which can lead to the detection of foreign bribery red flags.

This section is not meant to be a review of how the 2006 Export Credit Recommendation is being implemented by its Adherents¹³⁰ or the Parties to the OECD Anti-Bribery Convention.¹³¹ It rather aims to illustrate how the measures contained in the 2006 Export Credit Recommendation as well as additional measures adopted by certain ECAs can lead to the detection of bribery of foreign public officials. As of the time of this study, a review of the 2006 Recommendation was ongoing by the OECD Working Party on Export Credits and Credit Guarantees ("the ECG"). The good practices identified in this section are not meant to replace or influence the discussions in that respect.

2.2 *How can foreign bribery be detected?*

The 2006 Export Credit Recommendation provides a list of measures to deter foreign bribery, both before and after credit, cover or other support has been granted. ECAs have also developed additional measures that can lead to detecting foreign bribery. The availability of audit powers can be an advantage in detecting foreign bribery red flags. In this respect, the Office of the Inspector General (OIG) of the United States ECA, US EXIM, conducts and supervises audits, investigations, inspections, and evaluations related to agency programs and operations. The OIG has law enforcement agents trained to handle investigations when enhanced due diligence determines that there is a reasonable basis to believe that bribery may be involved in the transaction.¹³²

What can ECAs do to detect bribery prior to granting support?

From the outset, a distinction must be drawn between actions that are taken for all applications prior to granting credit, cover or other support (*i.e.* screening) and actions that are taken on a risk-based basis (*i.e.* enhanced due diligence). Measures taken on a risk-based basis, may lead to the uncovering of bribery in the transactions benefiting from

¹²⁹ OECD (2006) Recommendation of the Council on Bribery and Officially Supported Export Credits available here: www.oecd.org/officialdocuments

¹³⁰ All ECG Members, plus Brazil, Colombia, Costa Rica, Latvia, Lithuania, Peru and the Russian Federation. All OECD Members are also ECG Members, except Chile and Iceland, which do not have active export credits programmes.

¹³¹ Some WGB countries are not (yet) adherents to the OECD Council Recommendation on Bribery and Officially Supported Export Credits. This includes Argentina, Bulgaria, and South Africa. Colombia's ECA - Bancóldex - is an invitee to the OECD Working Party on Export Credits and Credit Guarantees.

¹³² OECD (2016) Export Credits and Bribery: 2015 Review of Responses to the Survey on Measures Taken to Combat Bribery in Officially Supported Export Credits, para. 90.

official support. This is particularly the case when assessing the use of intermediaries and the level of their commissions, and the exporters and/or applicants' external risk environment. ECAs can make a risk-based assessment on when to request agents' commissions from exporters and, where appropriate, applicants, which, in turn, triggers such a request. Based on this approach, resources can be judiciously allocated to conducting enhanced due diligence in these identified cases.

Assessment of the use of intermediaries and the level of their commissions:

Under the 2006 Export Credit Recommendation, ECAs should require that exporters and, where appropriate, applicants, disclose, upon demand: (i) the identity of persons acting on their behalf in connection with the transaction, and (ii) the amount and purpose of commissions and fees paid, or agreed to be paid, to such persons.

The verification of commissions paid to intermediaries at the time of application or before a final decision to provide support is made, can serve as a deterrent of bribery payments to foreign public officials. This is all the more relevant given that three out of four foreign bribery cases concluded to-date have involved payments through intermediaries and that agents¹³³ were used in 41 % of these cases. Most ECAs will provide support for agents' commissions where these are included in the export contract.¹³⁴

Country practices: Disclosure requirements regarding agents commissions	
UK Export Finance (UKEF)	<p>UKEF requires applicants to provide the names and addresses of the agents as well as the country or countries where any commission, fees or other remuneration is/are payable to any agent, the amounts and purpose of any commissions, the services which the agent is providing and whether the level of commissions is consistent with the nature and level of those services. UKEF also seeks local legal advice on whether regular procurement process have been observed and whether the employment and payment of agents is legal under the laws of the buyer's country, using the UK overseas diplomatic missions.</p> <p><i>Source: OECD (2016c, para.50), United Kingdom (UKEF) Responses to Survey on Measures taken to Combat Bribery in Officially Supported Export Credits, p.13.</i></p>
BPI France – COFACE:	<p>The French ECA, BPI France will require exporters to provide details of commissions paid (amount, purpose and identity of the agents) if the exporter is listed on any debarment lists, if it has been convicted in the past or currently facing prosecution for bribery or if there is evidence pointing to suspicions of bribery.</p> <p><i>Source: France Phase 3 Report para.177</i></p>

¹³³ In these cases, the agents involved include sales and marketing agents, distributors and brokers based either locally on the country where the bribes were paid or elsewhere. (Source: OECD (2014) Foreign Bribery Report: An Analysis of the Crime of Bribery of Foreign Public Officials, p.29)

¹³⁴ According to the responses to the survey, 21 ECAs allow for official support to be provided for agents' commissions included in the export contract; 13 ECAs may provide support. Ten ECAs, however, do not usually provide support for agents' commissions – Brazil/BB, Colombia, Estonia, France, Greece, Latvia, Mexico, Russia/EXIMBANK, Turkey and the United States/USDA.

While the ECG has not developed a common methodology on what ECAs should do to assess agents' commissions, ECAs can undertake enhanced due diligence measures when, for example:

- Commissions are paid to an intermediary whose identity is unclear.
- Intermediaries are used with no logical economic or commercial basis and without a clear and practical explanation of the purpose of the role they are to perform.
- Commissions exceed a certain threshold. Some ECAs apply a maximum ceiling, often 5% or a set amount in currency, to commissions included in the export contract.
- Concerns arise in relation to the use of agents and the possibility of foreign bribery, for example, concerning the financial structure of the transaction or the contract bidding process.

Enhanced due diligence measures may include benchmarking commissions against standard business practice for the country/sector and verification of the agents' work history, including whether they have the relevant expertise and qualifications for the particular country/sector. These verifications can be made on the basis of publicly available information, and/or as well as any other available sources including foreign representations in the relevant countries

Countries report different practices in assessing the appropriateness of agents' commissions.

Country practices: Assessing appropriateness of agent's commissions	
Australia	Agent commission fees that are above 5% of the contract value are submitted to enhanced scrutiny and the Australian EFIC evaluates the commission's "commercial reasonableness". <i>Source: Australia Phase 3 Report para. 154</i>
Brazil	The ABGF requires the exporter to demonstrate that the level of commissions is consistent with standard business practice if the commissions and/or honorarium paid to the agent represent more than 5% of the contract value. In a specific case, ABGF became aware through a press report from a reputable source that an exporter was being investigated abroad for corruption. As a result, ABGF used the Brazilian representation abroad via Ministry of External Relations to verify the authenticity of the information and to confirm if the complaints were related to the corruption of foreign public officials. The approval was suspended until the due diligence processes was finished.
Denmark	Before EKF provides support for agent commission fees, details of the commissions associated with the transactions will be requested and trigger enhanced due diligence if the commission's amount exceeds 5 % of the contract value or EUR 4.5 million. Enhanced due diligence would consist of requesting additional information on the agent's assignments and tasks, and checking that the commissions are reasonably proportionate to the value of the product or service provided. <i>Source: Denmark Phase 3 report para. 180</i>
Norway	GIEK conducts an enhanced due diligence if the commission either is of large absolute value, constitutes more than 5% of contract value or is large relative to the duties performed by the agent.

Even when ECAs have set thresholds on the percentage of the contract value that may be charged as agents' commissions, enhanced due diligence might also be conducted on a risk-based approach over agents' commissions falling below that threshold, for example, if the commission is of large absolute value. ECAs in Brazil/BB, France, Greece, Mexico, Russia/EXIMBANK and Turkey require the details of any agents' commissions to be provided even though agents' commissions do not form part of the value of the contract for which they provide support.

Box 24. United Kingdom, France, Germany Case Study: Airbus (ongoing)

The recent Airbus investigation by the UK Serious Fraud Office (SFO) illustrates the risks that agents' commissions be used to bribe foreign public officials. In April 2016, Airbus reported to UKEF that it had discovered inaccuracies in applications for export support concerning the use of overseas agents. UKEF's application requires that the exporter notify it of any changes to the details represented therein. Following this self-disclosure, UKEF referred this information to the SFO. In July 2016, the SFO launched an inquiry into Airbus' use of third party consultants to win international aircraft orders, after the company admitted it had failed to notify export credit authorities about these agents on certain deals. Export credit agencies in the UK, France and Germany all suspended financing of Airbus deals after the disclosures and the French Parquet National Financier also opened a preliminary investigation into the same subject.

Assessment of the external risk environment:

Although not envisioned in the 2006 Export Credit Recommendation, the external risk environment can also be considered by ECAs during their due diligence. Close scrutiny over the external risk environment in which the exporter and/or applicant are operating may lead ECAs to identify if foreign bribery has taken place, for example:

- When support is sought in relation to a project/contract based in a high risk country.
- When support is sought for transactions in high risk or highly regulated industries or one which requires government authorisations and licenses. Sectors commonly referred as being high risk are the extractive industry, construction and infrastructure sector, healthcare and the defence sector.

In terms of higher risk industrial sectors, the Foreign Bribery Report found that almost two-thirds of foreign bribery cases occurred in the extractive, construction, transportation and communication sectors.¹³⁵ This is due mainly to the high levels of expenditure and the frequent dealing with public officials at various levels to obtain the licenses, permits, and concessions necessary for the contract to materialise. However, no country or sector is immune from corruption and ECAs, in undertaking enhanced due diligence, will frequently look at the measures that have been taken to mitigate these risks, including whether applicants and/or exporters have in place adequate internal controls, ethics and compliance measures for the purpose of preventing and detecting foreign bribery.

¹³⁵ OECD (2014) Foreign Bribery Report : an Analysis of the Crime of Bribery of Foreign Public Officials, p. 22

What can ECAs do to detect bribery after support was authorised?

Even after credit cover or other support has been approved, ECAs may be expected to continue keeping a watchful eye on transactions to identify whether foreign bribery has taken place. This would include for example:

- Material changes to the pre-support anti-bribery declarations or disclosures made.
- Changes to the financial terms and conditions of the transactions, such as any increases of prices with no commercial justification, actions taken outside the terms of the contracts, and unexplained payments to third parties.

Allegations of foreign bribery can also be referred by third parties, including whistleblowers, the media, as well as information provided by participants in the transaction. In this respect, maintaining lines of communications open, such as confidential public hotlines for whistleblowers, can be instrumental in allowing for such allegations to reach ECAs (TI, 2010).

In such situations, ECAs may consider reporting to law enforcement authorities, depending on the specific circumstances of each case. Where bribery is subsequently proven after support is provided, ECAs are expected to take appropriate action, such as denial of payment, indemnification or refund of sums provided, as long the rights of any parties not responsible for the illegal payments are not prejudiced.

2.3. The reporting of foreign bribery to law enforcement authorities: institutional frameworks in place for sharing of information with law enforcement authorities

The existence of a clear reporting obligation on ECA staff is instrumental in ensuring that transactions detected as potentially involving bribery are reported to law enforcement authorities for investigation and potential prosecution. All Adherents to the 2006 Export Credit Recommendation commit to “develop and implement procedures to disclose at any time to their law enforcement authorities instances of credible evidence of bribery” in the award or execution of the export contract. ECA employees are not considered public officials in at least 11 Parties to the OECD Anti-Bribery Convention, and therefore are not subject to the statutory crime-reporting obligations generally incumbent on public officials.¹³⁶ Nine of these eleven ECAs have, nevertheless, developed procedures to disclose credible evidence of bribery to law enforcement authorities as prescribed by the 2006 Export Credit Recommendation. In most cases, such instances are reported internally via legal departments, senior management, and compliance committees/management boards for disclosure to law enforcement authorities (OECD, 2016c, para.58).

Under the 2006 Export Credit Recommendation, ECAs are expected to report “credible evidence” of bribery. This is defined as “evidence of a quality which, after critical analysis, a court would find to be reasonable and sufficient grounds upon which to base a decision on the issue if no contrary evidence were submitted”. ECAs do not possess the same tools and powers as law enforcement authorities to investigate bribery allegations and it is therefore key that such allegations are referred to law enforcement authorities regardless of whether the allegations are made before or after a commitment for export credit support has been provided.

¹³⁶ Argentina, Australia, Czech Republic, Estonia, France, Italy, Japan, Luxembourg, Portugal, Slovenia and South Africa.

In light of the few reports that have been made to date by ECAs, the question may be whether such a qualified threshold of having to report “credible evidence” as opposed to mere suspicion may not deter ECAs from reporting to law enforcement authorities. US EXIM has reported that, in its experience, ECAs are unlikely to develop “credible evidence” of bribery in a transaction. As a result, US EXIM’s standard is that any reasonable suspicion of a crime is reported to the Office of the Inspector General (OIG). Other ECAs, however, are reluctant to report mere suspicions to their law enforcement authorities, especially before providing support, as this may lead to the related application or cover being suspended.

Country practices: How ECAs have in practice reported foreign bribery allegations to law enforcement authorities	
Slovenia	In Slovenia, SIDB was confronted with a transaction (Construction Case) which it had reason to believe might have involved foreign bribery. Enhanced due diligence measures were applied and the allegation was reported to law enforcement authorities. The allegation subsequently did not result in a foreign bribery investigation and prosecutors decided to prosecute for the offence of abuse of authority or trust in business. This example, however, demonstrates that reporting should be made, regardless of whether charges are ultimately brought for foreign bribery.
South Africa	The South African export credit agency ECIC once came across a case of foreign bribery after support was granted during the implementation phase of one of its contracts. In this case, the bribery allegation was brought to the attention of ECIC in November 2012 by the bank which was the insured party. The bank in turn had received a report from the company who was the borrower under the loan who discovered the alleged bribery involving a South African contractor after ECIC support had been provided and the loan had been disbursed. ECIC conducted enhance due diligence on the allegations and the information provided on the bribery allegations were disclosed to law enforcement in June 2013.

Cases have come to light where ECAs have received allegations of bribery and have undertaken internal investigations, but have not reported them to law enforcement authorities:

- Two clients of the **Belgium** ECA Credendo - Ducroire at the time - reported allegations of bribery of foreign public officials. Subsequently, Credendo conducted in-depth checks and determined that the persons involved had been dismissed by the companies. Credendo did not report the alleged cases to the Belgium law enforcement authorities.¹³⁷
- Similarly, the Board of Directors of the **Spanish** ECA, CESCE, twice received evidence that bribery may have been involved in the award or execution of export transactions. The first time, media reported that a Spanish company in the energy sector seeking support had paid bribes in an Eastern European country. The company was put on CESCE’s “watch list”, was invited to complete a questionnaire and met with CESCE officials. In the second instance, the exporter self-reported suspected bribery in its operations to CESCE management. CESCE

¹³⁷ Belgium Phase 3 Report, para.170

did not report the alleged cases to law enforcement authorities because it concluded that there was no credible evidence of bribery.¹³⁸

- In **Brazil**, the National Bank of Economic and Social Development (BNDES) identified a potential foreign bribery case and initiated an internal investigation. No report, however, was made to the Brazilian law enforcement authorities.¹³⁹

Other cases, however, have been reported where ECAs received allegations of bribery and did report them to law enforcement authorities.

2.4. Training/awareness-raising for ECA officials to raise their capacity to detect bribery of foreign public officials

ECA employees need clear guidance on how to avoid supporting transactions tainted with foreign bribery. To this end, ECA employees should be trained to identify the various “red flags” for bribery and when additional or enhanced due diligence is appropriate. Guidelines and training programmes should address both the screening of applications and the enhanced due diligence of potential exporters and/or applicants, as well as the financial structures of the projects to which the exports are destined. They could also include elements allowing ECA employees to assess agents’ commissions: a meaningful assessment of fees against standard business practices requires that ECA employees have sufficient specialised expertise. Standardised guidance on what standard business practice is in each sector of each country, on each type of project could be developed in order for ECA employees to gain such expertise.

Guidelines and training can usefully be developed to assist ECA employees in identifying red flags of foreign bribery and the procedures for reporting to senior management and/or to law enforcement authorities. In this respect, the WGB has recommended that such guidelines address both the factors to be considered when determining whether evidence alleging foreign bribery is “credible”, as well as reporting procedures.¹⁴⁰

Country practices: Fraud and corruption procedures regarding corruption risks	
United States	<p>US EXIM's internal Fraud and Corruption Procedures [in the process of being revised as of the time of this study] include the following within a broader section regarding corruption risks:</p> <p>iii. Bribery. Bribery, like other forms of corruption, is very difficult to detect in the underwriting phase of a transaction. Potential red flags for bribery are:</p> <ul style="list-style-type: none"> • The use of agents, intermediaries or seemingly unnecessary parties in the contracting, shipment, operations or payments connected to a transaction; • In large transactions, a contract procured on a “sole source” basis, or a bid process that is not open and transparent. • The pricing for the goods or services appears to be unusually high.

¹³⁸ Spain Phase 3 Report, para. 173

¹³⁹ Brazil Phase 3 Report, para.172

¹⁴⁰ Such recommendation was made in the context of the Phase 3 monitoring cycle to Brazil, Denmark, Greece, Finland, Italy and Portugal,

3. Providers of Official Development Assistance

By nature, development assistance is usually conducted in countries and sectors that may present high risks of corruption. This is due to several factors including the nature and large amount involved in the projects funded by development aid, the use of numerous local subcontractors, frequent interactions with public officials, often in cash-based economies with fragile regulatory frameworks and weak law enforcement. The threats that corruption poses to development have long been recognised by aid donors. In 1996, even prior to adoption of the Anti-Bribery Convention, the OECD Council adopted the Recommendation of the Development Assistance Committee (the DAC) on Anti-Corruption Proposals for Bilateral Aid Procurement, whereby Parties committed to promote the proper implementation of anti-corruption provisions in international development institutions. Building on the 1996 Recommendation, the DAC and the WGB jointly developed the 2016 Recommendation of the OECD Council for Development Co-operation Actors on Managing the Risk of Corruption (“the 2016 Recommendation”) which recognises that “corruption poses serious threats to development goals” and that it can be “an ongoing and tenacious condition of the operating context for development activities.” Accordingly, Parties to the Anti-Bribery Convention commit to promote the proper implementation of anti-corruption provisions in international development institutions and to work closely with development partners to combat corruption in all development co-operation efforts. Twenty-nine Parties to the Anti-Bribery Convention are providers of official development assistance (ODA) under the DAC definition,¹⁴¹ and also fund development aid projects through bilateral cooperation agreements that are implemented by the private sector.¹⁴²

In practice, and despite the particular risks and importance that ODA-funded contracts represent, few foreign bribery instances have been detected by development aid agencies. This chapter will focus on the mechanisms developed by certain Convention Parties – sometimes prior to the 2016 Recommendation – which have enabled the successful detection and reporting of bribery through ODA providers, and how these experience can be replicated in other Parties.

3.1. *What role for ODA providers?*

The role of ODA providers is to ensure that funds are used to contribute to the development of the recipient countries through specific projects, and are not diverted to corruption and bribery, both in the award and during the execution of ODA contracts. It is therefore crucial that aid providers incorporate corruption risks into ODA-funded projects to be able to prevent and detect its occurrence. This has been recognised in the 2016 Recommendation which states that Members must “set up or revise their system to

¹⁴¹ Twelve Parties are not members of the Development Assistance Committee (DAC) as they do not provide ODA as defined by the DAC: Argentina, Brazil, Bulgaria, Chile, Colombia, Costa Rica, Estonia, Israel, Latvia, Lithuania, Mexico, Russia, South Africa, Turkey (and Peru).

¹⁴² Other WGB Parties, such as Argentina, Brazil, Chile, Colombia, Israel and Mexico, only provide technical assistance and have not engaged to date in other forms of co-operation or private sector involvement.

manage risks and respond to actual instances of corruption practices in development cooperation.¹⁴³

ODA providers are structured differently among Parties to the OECD Anti-Bribery Convention. They are either part of the Ministry of Foreign Affairs (MFA), a dedicated Ministry (such as the German Ministry for Development) or a separate government agency or entrusted to a private entity.

3.2. *Reporting of foreign bribery by ODA providers*

Given that, in most countries, ODA is administered by the Ministry of Foreign Affairs or a state owned agency, staff will generally be considered as government officials and therefore subject to the same statutory crime-reporting obligations generally incumbent on all public officials. It is therefore important that appropriate reporting channels are in place and communicated to ODA staff. Under the 2009 Recommendation, members should ensure that “easily accessible channels are in place for the reporting of suspected acts of bribery of foreign public officials to law enforcement authorities.” The WGB formulated recommendations to 23 WGB countries to develop corresponding reporting procedures and raise awareness of ODA staff of their obligation to report.¹⁴⁴

Country practice: ODA reporting processes	
Australia	In Australia the Department of Foreign Affairs and Trade (DFAT) administrates ODA. ¹⁴⁵ The DFAT Fraud and Anti-Corruption Plan requires its employees to report foreign bribery to the Transnational Crime Section —for consideration of referral to the Australian Federal Police or other relevant law enforcement agencies as appropriate. The channel for reporting foreign bribery is advertised on the Department’s internet site and requires using a detailed ‘What to report’ form, http://dfat.gov.au/about-us/publications/Documents/fraud-what-to-report-form.pdf . This reporting channel is accessible to departmental staff (including locally engaged staff at overseas posts) as well as external parties that receive Australian government funds, including all aid program funds. DFAT has received one matter involving the alleged bribery of foreign officials by an Australian person or company, which was reported to the Australian Federal Police in March 2014.

3.3. *Awareness and training of ODA providers*

As is the case in other government agencies, staff of ODA providers, including locally-engaged staff in partner countries, should receive clear guidelines and appropriate training on what the foreign bribery offence is and the role they can play in preventing and detecting bribery in the ODA-funded transactions. This, in turn, may lead to an increase in the number of foreign bribery cases reported to law enforcement authorities. In particular, the 2016 Recommendation prescribes that trainings should:

¹⁴³ OECD (2016) Recommendation of the Council for Development Co-operation Actors on Managing the Risks of Corruption III

¹⁴⁴ Australia, Austria, Brazil, Bulgaria, Canada, Denmark, France, Greece, Ireland, Israel, Japan, Korea, Latvia, Luxembourg, New Zealand, Poland, Portugal, Russian Federation, Slovenia, South Africa, Spain, Sweden and Turkey. This list is based on information contained in the Phase 2 and Phase 3 country evaluation reports of the Working Group on Bribery.

¹⁴⁵ Development aid used to be administered by AusAID - a separate agency. It is now part of the Department of Foreign Affairs and Trade (DFAT).

- Include discussions of scenarios and exploration of possible responses, to make codes of conduct and other anti-corruption rules practically applicable and meaningful across different social, cultural, and institutional settings;
- Clarify the roles and responsibilities of different ODA staff and tailor the extent and specialisation of training according to their exposure to corruption risk;
- Assure that training of all staff involved in posts that are more directly involved in dealing with corruption risks (such as programme design, management, procurement and oversight) goes beyond the internal ethics and reporting regime, to include corruption risk identification, assessment and mitigation approaches as well as understanding the main international obligations to which their country has committed.

Country practices: The role of foreign representations in training of ODA staff	
Sweden	In terms of training, the Swedish International Development Cooperation Agency (SIDA) developed a mandatory e-learning training on anti-corruption together with the MFA. A Manual for SIDA's Contribution Management Process (Manual) also addresses the issue of corruption in general and provides guidance to SIDA staff. In particular, the Manual prescribes that any suspicion of corruption relating to SIDA's operation, at any stage of the project/programme cycle, must be reported to an immediate superior, even when staff may be unsure whether the matter constitutes possible corruption or other forms of irregularities, or when one specific person cannot be identified. A suspicious course of events is enough, such as an unusual financial transaction. A manager who receives information about suspected corruption must then contact the head of the unit/embassy responsible for the contribution as well as SIDA's investigation group. No specific reporting channel has been formalised. Rather, reporting is done on a case by case basis. As a result of this process, SIDA has reported suspicions of corruption (although not foreign bribery) to Swedish and/or foreign law enforcement authorities.
Netherlands	In the Netherlands, where ODA is administered by the MFA, the Dutch diplomatic representations and other relevant MFA staff have a role to play in preventing corruption in ODA-funded transactions, monitoring ODA-funded projects, and detecting and reporting suspicions or incidents of corrupt behaviour. The MFA therefore associates embassy staff in countries where ODA is delivered to training activities in the field of anti-corruption policies. An Anti-Corruption Task Force was created within the Dutch MFA with responsibility for reviewing internal procedures and instruments used to identify potential risks for corruption and help build safeguards against leakage of funds, due to corrupt and fraudulent practices involving Dutch ODA projects and programmes. <i>Source: Netherlands, Phase 2 Report, paras. 69 72 and 75</i>

3.4 How can foreign bribery be detected?

Foreign bribery may be detected before approving ODA-funded contracts or transactions as well as during the execution of the contracts. Consideration should be given to factors linked to the external risk environment where the ODA project will take place. To this effect, the 2016 Recommendation emphasises that corruption risk must be assessed throughout the project cycle and not just as a stand-alone exercise at the project design phase.

Country practices: How due diligence mechanisms can detect foreign bribery	
France	<p>The Development Agency (AFD) and its affiliate in charge of private sector financing (PROPARCO) perform checks throughout the execution of the projects with a view to detect any misappropriation of funds, including through foreign bribery. Beyond the initial due diligence prior to the first disbursement of aid, checks are also performed after development aid is disbursed as well as throughout the execution of the project, using the AFD's network of agencies and representative offices abroad and permanent contact with the main partners of the projects they finance. Controls include an analysis of the execution of the contract and its financial terms. Final ex post checks are also performed at the end of the project. Foreign bribery allegations must be reported through hierarchical channels, including allegations reported in the press concerning projects covered by the AFD and PROPARCO.¹⁴⁶</p>
New Zealand Framework in preventing and detecting corruption in NZAID ODA funded-contract	<p>MFAT's standard ODA grant funding arrangements include an anti-corruption clause and "right to audit" clauses to allow MFAT to investigate any alleged fraudulent, collusive or coercive practices related to its funding.</p> <p>Entities bidding on ODA-funded contracts must complete an accreditation form in which they must identify whether they are subject to corruption risks; describe the potential impact of these risks; and the likelihood of the risks occurring.</p> <p>A Fraud Control Programme was established to detect misconducts, including foreign bribery in ODA-funded transactions. MFAT employees are provided approximately every 18 months with training on identifying red flags and potential risks or corruption (including foreign bribery), reporting and protected disclosures. The MFAT Audit and Risk Divisions provide fraud policy briefings to all MFAT staff departing for overseas postings. These briefings include the obligation for personnel to report allegations of foreign bribery.</p> <p>Suspicious of foreign bribery involved in ODA-funded contracts must be reported to MFAT's Audit and Risk, as well as Legal Divisions, which would take preliminary steps to get more information to support the suspicions and assess that information. Notification of suspected frauds or corruption generally would come from the development partner responsible for implementing the activity or from MFAT's monitoring of the activity. Where there is a criminal suspicion that a New Zealand company or individual was involved in foreign bribery in relation to an ODA-funded contract, MFAT would report the suspicion to New Zealand's SFO.</p> <p>A reporting hotline and whistleblower policy have also been established to prevent and respond to suspicions of fraud.</p> <p><i>Source: New Zealand Phase 3 Report, paras. 137-139 and Phase 3 Follow-up Report, p. 34</i></p>

Fraudulent use of ODA funds, including foreign bribery, would essentially be uncovered during the monitoring of the execution phase of ODA-funded contracts and during audits of the ODA-funded projects and activities conducted by relevant authorities (i.e. financial audits of projects are most often conducted by contracted third parties). In this

¹⁴⁶ "Politique générale de l'AFD et de PROPARCO en matière de lutte contre la corruption, la fraude, les pratiques anticoncurrentielles, le blanchiment de capitaux et le financement du terrorisme", www.afd.fr.

respect, under the 2016 Recommendation, countries commit to set up or revise their systems to manage risks and respond to actual instances of corruption in development co-operation. In particular, such systems should provide for internal audit services and access to investigatory capacity, within or outside the agency, to respond to audit findings. Beyond financial audits of the ODA provider itself, the 2016 Recommendation stresses the importance of programme-oriented audits which may lead to detecting foreign bribery (OECD, 2016d, Section 4 ii and iii). The monitoring of the Recommendation, notably in the context of the country evaluations by the Working Group on Bribery, will provide an opportunity to review countries' practices in this regard.

Box 25. Red-flag indicators identified by SIDA

- Delayed and deficiencies in reporting
- Invoicing up to the ceiling
- Lack of supporting documents for reported costs
- Unusual, complex or non-operating transactions
- Weak board with low focus on internal controls and law
- Operations that are essentially different from what is normally conducted in comparable organization

Internal audit resources already exist in some ODA providers.

Country practices: ODA agencies with audit functions	
Australia	DFAT has a programme of compliance audits, which includes a component for identifying risk areas where fraudulent use of Commonwealth funds could or has occurred.
Germany	<p>Development cooperation lies within the responsibility of the Federal Ministry of Economic Cooperation and Development. Germany has two implementing agencies: KfW (Kreditanstalt für Wiederaufbau) is responsible for implementing German Financial Cooperation while GIZ (Gesellschaft für Internationale Zusammenarbeit) is implementing German Technical Cooperation.</p> <p>Both GIZ and KfW have extensive compliance mechanisms in place. KfW prevention measures are implemented at different levels and different project cycles. Prior to any project, financing audits as well as an IT-supported dedicated Know-Your-Customer and customer due diligence system are carried out to identify bribery. KfW continuously monitors projects through the application of obligatory procurement and disbursement guidelines as well as continuous project supervision (usually in form of "implementing consultants"). Projects assessments with regard to fraud and corruption aspects are regularly carried out, both desk-based and on-site. All bribery suspicions must be reported to KfW's independent compliance department.</p> <p>GIZ's compliance management system contains strict regulations called Orientation and Rules that apply to areas where bribery of foreign public officials could occur. These include the prohibitions to take or offer bribes, regulations regarding presents as well as regarding attendance fees or per diem allowances. Audit pays special attention to these regulations.</p>

Some ODA agencies have the internal investigative capacity to follow-up when audits uncover suspicions of bribery, or when reports are received. This has been identified as an asset for ensuring that ODA funds are not diverted to bribery. The study prepared in the lead-up to the 2016 Recommendation recognised that “in-house investigative capacity may not be necessary for all agencies and access to investigators who are familiar with the context and objectives of development work and can respond to suspicions of corruption in a timely manner.” “Better linkage between the functions of internal auditors and their mandate regarding anti-corruption objectives” was also highlighted as a factor that can contribute to better detection of foreign bribery in ODA funded contracts.¹⁴⁷

Country practice: Detecting corruption in the UK Department for International Development (DfID)	
United Kingdom	<p>Emphasis is put on monitoring of delivery partners. DfID has oversight of bilateral aid procurement and supervises local partners and non-governmental organisations (NGOs) who are subcontracted to deliver DfID-funded aid. Should DfID staff suspects that fraud has occurred in the project they manage, they must refer the matter to the Internal Audit Department’s Counter-Fraud Section which is responsible for investigating corruption involving DfID funds. According to a 2017 Report by the UK Comptroller and Auditor General from the National Audit Office, the main way for DfID to detect fraud is through a combination of management monitoring and reporting, and through staff, delivery partners and suppliers reporting suspicions or making allegations. In fact, two-thirds of fraud allegations have been reported by delivery partners. DfID has noted that the number of allegations reported has increased, which it believes is a result of its work to increase awareness of fraud and reporting requirements among its staff and suppliers. DfID has a whistleblowing policy: DfID staff, individuals from delivery partners and third parties can report anonymously using a dedicated email and phone line. Formal agreements with delivery partners have been strengthened requiring all suspicions of fraud to be reported to the Counter Fraud Section. Furthermore, internal audit may detect corruption through its regular reviews of country programmes and specific reviews conducted where specific concerns are raised.</p> <p><i>Source: UK Independent Commission for Aid Impact, (November 2011), The Department for International Development’s Approach to Anti-Corruption: http://icai.independent.gov.uk/wp-content/uploads/DFIDs-Approach-to-Anti-Corruption3.pdf; National Audit Office (February 2017), “Department for International Development, investigation into the Department’s approach to tackling fraud”: https://www.nao.org.uk/wp-content/uploads/2017/02/Investigation-into-the-Departments-approach-to-tackling-fraud.pdf, United Kingdom’s Phase 3 Report (2012) and OECD Development Co-operation Peer Reviews: United Kingdom (2014).</i></p>

Foreign bribery in ODA-funded contracts can also be detected by third-parties. Secure reporting mechanisms should therefore be accessible to implementing partners, whistleblowers, the media and competitors. In the case of the Australian DFAT, the ‘What to report’ form (<http://dfat.gov.au/about-us/publications/Documents/fraud-what-to-report-form.pdf>) is also accessible to external parties that receive Australian development aid, including contractors, third party service providers, partner governments, multilateral organisations, non-government organisations and other funding recipients. The Danish

¹⁴⁷ Elizabeth Hart (2016) Mapping Policies and Practices : What Are Agencies Implementing and What Have They Learned, p.37

development agency, Danida, created an anti-corruption hotline accessible to its staff and external parties to report the misuse of Danish development funds. In Sweden, a whistleblower function, allowing anonymous reporting, was set up in March 2012 and is available on SIDA's intranet for staff, and to external third parties on the external home page of SIDA.¹⁴⁸ Fourteen incoming suspicions of corruption have been reported through SIDA's whistleblower function since 2014. In Germany, both GIZ and KfW have confidential whistleblowing systems in place which are also available to project beneficiaries and other third parties.

Although, to date, few cases have been detected by staff of national ODA agencies, bribery in development projects has been detected by other national and international agencies, and sanctioned accordingly. Two foreign bribery cases have been uncovered among **Japan's** ODA-funded contracts but were not detected by Japan's International Cooperation Agency (JICA). The first case was detected in the course of investigating another alleged offence involving the same Japanese company.¹⁴⁹ The second case involved alleged bribery by the company Japan Transportation Consultants Inc. (JTC), and was self-reported in April 2013 after the Tokyo Regional Taxation Bureau identified unusual expense claims related to JTC's ODA projects in Vietnam, Indonesia, and Uzbekistan from 2009 to 2014. On 4 February 2015, the Tokyo District Court found JTC and three of its former executives guilty of foreign bribery and imposed a 90 million yen fine on the company and sentenced the three former executives to suspended prison sentences, ranging from two to three years.

Representatives of Swedish companies have also been convicted twice in **Sweden** for the bribery of a World Bank official, involving SIDA funds (in 2004 and in 2015). In 2015, the case concerned the bribery of Ukrainian officials by a Swedish company during procurement processes to win two World Bank-financed consultant contracts concerning water and wastewater projects in Ukraine worth approximately EUR 3 million (i.e. SEK 30 million). The projects were financed by SIDA through a World Bank-administered Trust Fund. The suspected circumstances were discovered by the World Bank which notified the company. The company thereafter notified the National Anti-Corruption Unit. The second case was also detected and referred to Swedish law enforcement authorities by the World Bank. It resulted in a final decision by the Appeal Court to sentence two natural persons for foreign bribery to a nine-month prison sentence and one natural person for accounting related fraud to a suspended two- year prison sentence and a EUR 1 235 (i.e. SEK 12 000) fine.

4. Competition authorities

Anti-competitive violations¹⁵⁰ and bribery are often linked. Both affect the way companies compete and create an uneven playing field for economic operators where the

¹⁴⁸ Denmark's Phase 2 Report, para.84 and; Sweden's Phase 3 Report, para.144, and www.sida.se/English/contact-us/whistleblower.

¹⁴⁹ Japan's Phase 3 Report, para. 13 ; FCPA blog, 15/02/16, www.fcpablog.com/blog/2009/2/16/vietnam-in-the-news.html.

¹⁵⁰ Anti-competitive violations refers to "a wide range of business practices in which a firm or group of firm may engage in order to restrict inter-firm competition to maintain or increase their relative market position and profit without necessarily providing goods and services at a lower cost or of higher quality". The role of competition authorities is to regulate anti-competitive violations such

awarding of contracts is no longer based on fair competition and merit. Overlaps between bribery and anti-competitive practices often exist. For instance, foreign bribery can be part of a bid-rigging scheme where bidders collude to inflate prices in their bids on procurement contracts, thereby artificially raising prices, the difference thereof being used to pay kickbacks to public officials who awarded each contract secured in return for their cooperation. A particular company may also offer bribe payments to a public official to secure an exclusive monopoly to operate in a specific market (TI, 2016). In addition, both would often rely on similar strategies for hiding their activities, including the use of slush funds and intermediaries. Competition authorities could therefore uncover elements of bribery when investigating violations of competition laws.

Cases involving both alleged bid-rigging and bribery have surfaced in at least two Convention countries. This section will look at how the experience of these countries may be enhanced and replicated so that competition authorities in other countries can improve their detection of foreign bribery during investigations into competition law offences. At the 2014 OECD Global Forum on Competition, it was agreed that an effective way for competition authorities to contribute to the fight against bribery could be to focus on public procurement. By limiting collusion, competition authorities significantly contribute to reducing corruption and bribery in public tenders.¹⁵¹

4.1 Sharing of information between competition and law enforcement authorities

Anti-competitive violations and bribery are pursued in distinct legal frameworks and generally by separate authorities. While competition authorities would investigate and sanction competition law violations – which are often administrative in nature – they may not necessarily refer foreign bribery allegations to law enforcement authorities for prosecution. Improving the sharing of evidence between competition and foreign bribery law enforcement authorities is therefore necessary to reinforce enforcement of bribery laws.

Some Convention Parties have entered into formal agreements to enable cooperation and sharing of information. In **Brazil**, for instance, the Federal Prosecution Service (FPS) is the prosecution authority with responsibility for foreign bribery offences. While the Ministry of Transparency and the Office of the Comptroller General (CGU) have exclusive jurisdiction over foreign bribery committed by legal persons, the Brazilian competition authority is the Administrative Council for Economic Defence (Conselho Administrativo de Defesa Econômica – CADE). CADE entered into formal agreements with the FPS in the State of Sao Paulo by way of a memorandum of understanding, which aims at coordinating resolution of cases by CADE and the FPS so that any agreement signed between a company or an individual with CADE may entail the signature of similar agreements with the FPS and vice versa. The Ministry of Transparency and the CGU have been working to establish technical cooperation with CADE to obtain information related to transnational bribery. At state level, CADE signed technical cooperation agreement with several state prosecution services. While these prosecution

as cartel activities, collusion, bid rigging, price fixing, abuse of dominance and fraud. OECD (2003) Glossary of Statistical Terms, <https://stats.oecd.org/glossary/detail.asp?ID=3145>.

¹⁵¹ OECD Global Forum on Competition (2014), Fighting Corruption and Promoting Competition - Executive Summary, www.oecd.org/competition/globalforum/fighting-corruption-and-promoting-competition.htm.

authorities are not responsible for enforcing foreign bribery committed by Brazilian companies and individuals, they do have jurisdiction over bribery cases involving foreign companies bribing Brazilian officials. A technical cooperation agreement was also established with the Brazilian Federal Police. Cooperation and information sharing agreements have also been formalised with two multilateral development banks: the Inter-American Development Bank and the World Bank both signed temporary memoranda of understanding (i.e. two and five years respectively) in 2015 and 2014 with CADE with a view to sharing information, both spontaneously and on request, for the detection of fraud and corruption.

Other Convention Parties have opted for informal cooperation channels to complement formal channels. In **Latvia**, the Corruption Prevention and Combating Bureau and the Competition Council developed both formal contacts (when the corruption bureau files an official application about a possible case) and informal contacts (at employee level). In **Sweden**, the Swedish competition authority has intensified its co-operation with the Swedish national anti-corruption unit.¹⁵² In some matters in the supervisory and case-handling activities of the Swedish competition authority, the principle of secrecy may apply. Nonetheless, secret information may be submitted to the prosecutors at the National Anti-Corruption Unit if there is a suspicion that a crime has been committed. In **the United-States**, the Criminal Division of Department of Justice investigates and prosecutes both anti-competition violations under the Sherman Act and FCPA violations. The coordination between the Antitrust and the Criminal Divisions is enhanced by the provision of trainings on antitrust crimes and bribery. It is also enhanced by the law enforcement assistance both Divisions receive from the Federal Bureau of Investigation (FBI), especially since new International Corruption Squads were set up within the FBI with dedicated FBI resources for antitrust and bribery. If the Antitrust Division investigates a case of potential bid rigging or price fixing and discovers in the course of the investigation that bribery or corruption may be involved, the Antitrust Division would share the evidence with relevant colleagues.¹⁵³ This has occurred in practice in at least two foreign bribery cases.

In some countries, however, there could be some obstacles to co-operation and reporting by competition authorities to law enforcement authorities. Companies can be exempted from administrative penalties under their competition authority's leniency programmes. Competition authorities may therefore decide not to report potential foreign bribery to law enforcement authorities to encourage companies to disclose anti-competitive violations under leniency programs and to avoid jeopardising this important source of detection. For instance, in France, the policy of the competition authority (i.e. *Autorité de la concurrence*) has been not to refer cases to the prosecutors in cases where parties being granted leniency might also be held criminally liable. In Canada, the Competition Bureau is subject to confidentiality rules set out in the Competition Act and is prevented from disclosing information gathered by or provided to it in the course of its investigations except to a Canadian law enforcement agency or for the purposes of the administration or enforcement of the *Competition Act*. In Hungary, the competition authority (GVH) must file a criminal complaint demonstrating a relatively high

¹⁵² OECD (2014) Global Forum on Competition Fighting Corruption and Promoting Competition: Summary of Discussions

¹⁵³ Ibid

probability of proof supporting the finding that foreign bribery has been committed. Both the need to file a formal criminal complaint and the threshold that needs to be met for such complaint can be a deterrent to the detection and reporting of suspicions of foreign bribery to law enforcement authorities. This may explain at least partly why, to date, no foreign bribery cases have been referred to law enforcement by the competition authorities in these countries.

Box 26. United States Case Studies: Marine Hose (2011); Kellogg Brown & Root LLC (2009)

Marine Hose (2011)

In September 2011, Bridgestone Corporation, a Tokyo-headquartered manufacturer of marine hose, agreed to plead guilty and pay a USD 28 million criminal fine for conspiring to violate the Sherman Act and the FCPA by rigging bids and making corrupt payments to foreign government officials in Latin America related to the sale of marine hose. A Bridgestone executive also pled guilty and was sentenced to serve two years in jail and pay a criminal fine for participating in the bid rigging and bribery conspiracies.

Source: Press release www.justice.gov/opa/pr/bridgestone-corporation-agrees-plead-guilty-participating-conspiracies-rig-bids-and-bribe and documents www.justice.gov/atr/case/us-v-misao-hioki.

Kellogg Brown & Root LLC (2009)

In 2009, Kellogg Brown & Root LLC (KBR), a global engineering, construction and service company, pled guilty to FCPA charges for its participation in a decade-long scheme to bribe Nigerian government officials to obtain engineering, procurement and construction (EPC) contracts to build liquefied natural gas (LNG) facilities on Bonny Island, Nigeria. The plea agreement in that matter bound both the Fraud Section and Antitrust Division regarding non-prosecution for both bribery and conduct related to the coordination of bids. As part of the plea agreement, KBR agreed to pay a USD 402 million criminal fine - at the time the second largest fine ever in an FCPA prosecution

Source: Plea Agreement <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/02/16/02-11-09kbr-plea-agree.pdf>.

4.2. How can foreign bribery be detected

Foreign bribery and procurement frauds often go hand in hand, in particular where bidder(s) enter into an agreement with a foreign public official to affect the outcome of the tendering process. Bribery can materialise throughout the procurement process, from the elaboration and definition of the specifications for a specific tenders, the selections of bidders' applications, the awarding of the procurement contracts, to the actual execution of the contract. The OECD study on Bribery in Public Procurement, Methods, Actors and Counter-Measures identifies indicators which can raise suspicions that foreign bribery or violation of competition laws may have occurred (OECD, 2007).

Box 27. Indicators of potential violations of foreign bribery or competition laws**Red-flag indicators related to the bidders and the external environment**

When designing tenders, bribery can occur so that bidding requirements and specifications are formulated in such way that it would favour specific bidders and preclude other competitive bidding: definition of technical and financial criteria. Participation criteria may for instance be drafted so as to be excessively selective or specifying features that are provided by only a few bidders. Bribery can also be aimed at the disclosure of confidential bid information so the contract can then be awarded to those familiar with the clauses and conditions. Potential indicators include:

- Supplier has a reputation of paying bribes;
- Commercial contracts different from the suppliers core business;
- Unjustified and unexplained favourable treatment of a particular bidder, including number or amount of contracts awarded to a given bidder;
- Recurrent and systematic rejection of bidders who ultimately act as subcontractors;
- Unnecessary intermediaries involved in contracts or purchases; and High risk sectors and/or countries.

Red-flag indicators related to the tendering process

During the selection of bidders, vulnerabilities lie with the discretion of procurement officials deciding over which companies meet the tender's specifications and evaluate the quality of bids submitted. Bribery can favour the selection of tenderers with unqualified or untested companies. Consideration should therefore be given to evidence of unusual bid patterns as well as to non-competitive procurement which may be more vulnerable to corruption absent tendering procedures (often justified by reasons of expediency in emergencies, or when national security interests are at stake). Potential indicators include:

- Long and unexplained delays between announcement of the winning bidder and the signing of the contract (this may be an indication of the negotiation of a bribe); and
- Frequent open or restrictive calls for tender that are inconclusive, ending in negotiated procedures.

Red-flag indicators related to the contract execution

Different techniques can be used to hide bribe payments, including the rendering of fictitious work, inflation of the work volume, changing in orders and using lower-quality materials than those specified in the contract. This includes:

- Unjustified high prices and important price increases;
- Low quality and late delivery acceptance by procurement official;
- Unusually high volume of purchases to a single source; and
- Unnecessary or inappropriate purchases.

Red-flag indicators related to the bribed officials.

Indicators can also be tied to the officials' actions on the receiving end. They may include:

- Unusually high volume of purchases approved by a single procurement official;
- Procurement official accepting inappropriate gifts or entertainment;
- Close relationship (including social) between the procurement official and the vendor;
- Unexplained sudden increase in wealth of the procurement official;
- Procurement official has undisclosed outside business;
- Procurement official declining promotions to other non-procurement position; and
- Procurement official acting beyond or below normal scope of duties in awarding or administering contracts.

Source: OECD, 2007.

Detection can be made through circumstantial and documentary evidence (i.e. bidding patterns, actors acting against their economic interests). During the selection process, some information may be revealed by unsuccessful competitors, whistleblowers and anonymous referrals. Detection during the execution of the contract would reportedly be easier as it is possible to refer back to initial tender's specifications (OECD, 2007).

In practice, law enforcement authorities have referred information relating to anti-competitive violations to competition agencies in several Parties.¹⁵⁴ For instance, in the Netherlands, the Authority for Consumers and Markets (ACM) is cooperating with the Fiscal Information and Investigation Service, (FIOD) in one investigation of possible violations of competition law and the FIOD is investigating possible foreign bribery. In Brazil, there are examples of antitrust and bribery investigations with close cooperation between CADE and Brazilian law enforcement authorities.

Box 28. Brazil Case Studies: Petrobras (2015); São Paulo Metro (ongoing)

Petrobras (2015)

The Petrobras case is an example of corruption and foreign bribery in public procurement associated with political party financing and bid rigging. Investigations initiated in March 2014 in the State of Paraná unveiled multiple networks of embezzlement of public funds from the Brazilian state oil company Petrobras. The existence of such networks was inextricably linked to cartel like frauds dating back to the beginning of the 2000s and articulated by a group of sixteen companies that were general contractors of Petrobras. The companies colluded to coordinate the awards of the bids and price arrangement in order to accommodate companies in the cartel. The scheme allegedly involves kickbacks paid to officials at Petrobras and to Brazilian politicians.

In March 2015, CADE and the Prosecution Service from the State of Paraná signed a Leniency Agreement with two companies allegedly involved in the cartel. CADE's role is to investigate the anticompetitive practices, which constituted the scheme's cornerstone.

São Paulo Metro (ongoing)

Allegations surfaced concerning the payment of a 15% commission (BRL 5.7 million) by a French company to obtain EUR 12.3 million (BRL 45.7 million) government contract in the State of São Paulo in 1990 and again to renew the EUR 38 million contract in 1998, for which, the company allegedly paid EUR 8 million (BRL 20 million), including EUR 2.5 million to then-mayor of the São Paulo region. Other foreign companies from Parties to the Anti-Bribery Convention are allegedly involved in the cartel and bribery scheme from Canada, Germany, Japan and Spain. Payments were allegedly made to the Ministry of Energy and board members of the Paulista Power and Transmission Company, via a lobbyist and two offshore companies registered in the Bahamas and Panama. Shell corporations were also set up in Uruguay as part of the kickbacks scheme.

CADE initiated an administrative inquiry after a leniency agreement was signed in May 2013 with the German company Siemens, the Federal Prosecution Service and the Prosecution Service of the State of São Paulo for possible competition law violations (illicit cartel) in August 2013. In February 2014, the investigations expended to also focus on active bribery and money laundering. The investigations are being coordinated between CADE, the Brazilian Federal Police, the Federal Prosecution Service and the Prosecution Service of the State of São Paulo. CADE has also forwarded the investigation findings to the Prosecution Service of the Federal District, to the Ministry of Transparency and to the General Comptroller Office of São Paulo. In March 2016, charges were brought against five executives of the French company for "crimes against the economic order".

¹⁵⁴ Australia, Lithuania, the Netherlands and the United Kingdom reported that they experienced cases where anti-bribery investigations led to uncovering violations of competition laws and sharing of information with competition authorities.

Conclusion

The government agencies discussed in this chapter have yet to realise their full potential in detecting foreign bribery. While it is recognised that each of these agencies carries a specific mandate which is not primarily to detect foreign bribery, their exposure to situations at risk of bribery justify them playing a more active role. As illustrated in this chapter, some Parties to the OECD Anti-Bribery Convention have successfully detected bribery through specific processes developed by and for these agencies, and other countries may wish to consider how these could be replicated in their jurisdictions. In particular, the need for clear reporting obligations and processes is key. Adequate training and awareness raising measures also need to be provided, taking into account the specific role of each of these agencies and including measures to identify red flags of bribery. It is also important that sufficient feedback is provided by law enforcement authorities to these agencies to continue improving their capacity to detect foreign bribery.

Chapter 8

Criminal and other legal proceedings

Introduction

The commission of the crime of foreign bribery can emerge in the course of other legal proceedings, such as criminal proceedings focused on other economic and financial crimes, civil suits and international arbitrations. To date, while 9 out of the 42 Parties to the OECD Anti-Bribery Convention have detected foreign bribery cases in the context of other legal proceedings, only 5 of the 263 foreign bribery schemes that have resulted in sanctions were detected in this manner. There is hence great potential to improve foreign bribery enforcement by enhancing detection through ongoing and unrelated legal proceedings.

As examined in previous chapters, laundering of the bribe and its proceeds may trigger anti-money laundering reporting and investigations. Tax crimes committed in the context of a bribery scheme may first be detected by tax authorities. Investigations into anti-competitive or cartel conduct by competition authorities could also reveal foreign bribery. The role of anti-money laundering, tax and competition authorities in detecting foreign bribery is examined in Chapters 5, 6 and 7 of this Study. Detection of foreign bribery in the course of requesting or providing mutual legal assistance is addressed in Chapter 9. Bribery of foreign public officials may also take place in a broader criminal environment that can be targeted by national law enforcement agencies investigating other crimes, such as fraud, embezzlement or bribery of domestic officials.

1. Detection through criminal proceedings

For the purposes of this Study, “criminal proceedings” is considered as any proceedings undertaken by law enforcement, prosecutorial or judicial authorities, whether in the course of preliminary or formal investigations, prosecutions, pre-trial resolution negotiations, criminal trials or judgment and sentencing. Many other transnational crimes, including violation of UN sanctions, extortion and fraud, can lead to uncovering transnational bribery. It is essential that law enforcement authorities be alert to any possible evidence of foreign bribery that could be discovered while investigating other offences. This is likely to happen especially when investigating economic or financial crimes but lessons can also be learnt through investigations into completely different matters.

1.1 Cases detected through separate criminal proceedings

Four foreign bribery schemes resulting in sanctions have been detected to date through investigations into other offences. The principal challenges that arise when it

comes to detecting and prosecuting foreign bribery in the course of another investigation include: whether prosecutors have the necessary independence to open a separate foreign bribery investigation; whether they have the requisite jurisdiction and mandate to open a foreign bribery investigation at their own initiative; and whether they have the necessary investigative powers to conduct the foreign bribery investigation. The solution to the first challenge is ensuring that prosecutors are free from undue influence, including in relation to the prohibited factors in Article 5 of the OECD Anti-Bribery Convention.¹⁵⁵ The WGB systematically examines Parties' implementation of Article 5 in the context of its evaluations. Recommendations made in the course of Phase 3 country evaluations have included ensuring that: government officials refrain from contacting prosecutors about specific cases; that proceedings cannot be influenced in light of a Minister of Justice's decision-making authority in foreign bribery cases; and that a Public Prosecutor's Office monopoly on criminal proceedings and their resolution is exercised independent of the executive.¹⁵⁶ In relation to the second challenge, prosecutors either need to have:

- **Broad jurisdictional powers** to open foreign bribery investigations at their own initiative, or be able to effectively refer such proceedings to colleagues in other jurisdictions (for example, the Agusta Westland case in Box 60) or who are specialised in bribery and economic crime investigations (for example, the Futaba case in Box 61).
- **A wide range of special investigative techniques** available to law enforcement authorities in foreign bribery cases, and ensuring that these authorities have sufficient human and financial resources to make use of them
- **Awareness and training on the offence of bribery of foreign public officials** and indicators of foreign bribery, including how to detect and report such indicators to the relevant investigative or prosecutorial unit, or initiate the investigation themselves.

Two **Italian** cases originated from investigations into offences which, at the very beginning, did not appear to be linked to foreign bribery. Both cases were the result of autonomous investigations started by prosecutors investigating different criminal frameworks.

¹⁵⁵ "Investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party. They shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved."

¹⁵⁶ For instance, Argentina, Phase 3 Report (2014); Austria, Phase 3 Report (2012); France, Phase 3 Report (2012).

Box 29. Italy Case Studies: Impregilo Case (ongoing); Agusta Westland Case (2014)

This case involved significant transactions with the Government of Panama and originated from interceptions of the telephone communications of Mr Valter Lavitola, a “fixer” who was very close to the Italian Prime Minister in charge at the time (Mr. S. Berlusconi). Those telephone interceptions were ordered in the framework of investigations aimed to verify a possible case of extortion perpetrated against Mr Berlusconi, and eventually led to a final conviction against Mr. Lavitola for attempted extortion.

From some of the intercepted conversations, and from a document found in the computer of a person used by Mr Lavitola as an intermediary towards Mr Berlusconi while he (Lavitola) was abroad in order to escape possible arrest warrants, evidence of a possible role for Mr Lavitola as an intermediary in the negotiations for the adjudication of a series of public procurement tenders published by the Government of Panama emerged. These concerned the doubling of the capacity of the Panama Canal and works connected with the system of “sluiceways”, construction of prefabricated and modular prisons; patrol boats and helicopters to combat drug trafficking; and electronic means of remote sensing and radar. The bribery consisted of at least USD 50 000 to fund former President of Panama, Ricardo Martinelli’s private trip, to Sardinia, along with a commitment by Impregilo to build a hospital worth USD 20 million. The bribes were in return for public procurement contracts to broaden the Panama Canal and construct the Panama City subway (worth USD 1.5 billion). In some of these intercepted conversations (e.g. in the “helicopter case”), symptoms of international bribery emerged with reference to the tenders in reason of an excessive intermediary percentage already agreed and to be transferred through a Company still to be created with the sole purpose to formally run the tenders.

Italian Prosecutors followed up on this and initiated specific in-depth investigations on every single and each transaction and supply and on the legal persons involved in the separate tenders called by the Panama authorities. Preliminary investigations then moved to the stage of prosecutions. Some prosecutions have been concluded. Others were still on trial in the Court of Naples, at the time of drafting. In January 2015, the Court of Naples published its decision accepting a plea agreement (*patteggiamento*) reached between the Naples Prosecutors’ Office and Valter Lavitola and sentenced him to 11 months’ imprisonment for bribery of foreign public officials in connection with this case. As of the time of this Study, trial was pending in Naples against several natural and legal persons accused of illegal activities in dealing with the tender relating to the construction of modular prisons in Panama, aimed to combat drug trafficking on the Canal.

Trials originating from these investigations were also pending in other Courts, depending on the territorial jurisdiction for each of them: for instance, a trial was ongoing in Rome in relation to the supply of ships and remote sensing. This is due to the fact that it was ascertained by the Naples Prosecutors, following to the preliminary hearing of an accused person, that the initial agreements about the corrupted behaviours were committed in Rome; therefore the proceeding relating to this branch of the investigations was moved to Rome.

Agusta Westland Case (2014)

This case relates to a contract for the sale of military helicopters to the Government of India by the Anglo-Italian Company Agusta Westland. Approximately EUR 30 million in bribes was paid in December 2012 to the then Chief of Staff of the Indian Air Force and his sons in return for the purchase by the Indian Government of 12 helicopters worth a total of EUR 556 million. The foreign bribery investigation was initiated following evidence obtained via interception of telephone communications in the context of a different investigation into alleged corrupt practices in the Italian public sector. The Italian Political Secretary of the Finance Minister at the time was suspected of having demanded and obtained illicit payments in order to promote the appointments of some persons as members of the Board of Directors of Italian State-owned companies. After the seizure of documents detained by one of Finmeccanica’s Directors for foreign and institutional relations and during the hearing of this person in front of the Prosecutors in Naples, these latter explicitly questioned him about further possible illicit corrupted practices of which he could be aware in relation to his functions inside the Company, so generating the information concerning “rumours” about possible cases of foreign bribery around the adjudication by Agusta Westland of an Indian tender relating to military Helicopters.

At this stage pro-active investigations were developed in Naples through telephone interceptions of the natural persons involved in this tender and the seizure of the overall related documentation existing in the premises of the Italian Company. After the foreign bribery investigations officially started, the persons under investigation attacked the territorial competence of the PPO in Naples. The General Prosecutor to the Supreme Court (competent for resolving conflicts among PPOs) decided in favour of the Court of Busto Arsizio since the company Agusta Westland was headquartered there. The investigation developed by the Public Prosecutor of Naples was then transferred, for reasons of territorial competence, to the Public Prosecutor Office of the Court of Busto Arsizio (near Milan) , which pursued the case to a successful conclusion, resulting in foreign bribery convictions of two natural persons and the sanction of two legal persons via *patteggiamento*. Proceedings are ongoing against three other defendants.

In **Japan**, a foreign bribery investigation was initiated in the context of a domestic economic crime investigation.

Box 30. Japan Case Study: Futaba Case (2013)

Futaba Industrial Co., (“Futaba”) is a corporation which manufactures automobile parts. In October 2013, the Nagoya Summary Court fined Takehisa Terada, former senior managing director of Futaba JPY 500 000 for violation of Japan’s Unfair Competition Prevention Act, which criminalises bribery of foreign public officials. Terada gave HKD 30 000 and a ladies handbag worth about JPY140 000 to a Chinese public official under the intention to avoid sanctions against violating laws and regulations of China and to receive administrative advantages. This case came to light in the context of Aichi Prefectural Police investigations into allegations of other economic crimes.

In this case, the Aichi Prefectural Police held several meetings with prosecutors in the Nagoya District Prosecutors Office to discuss legal and fact finding issues. The Nagoya District Prosecutors Office has designated special prosecutors in charge of investigating foreign bribery.

1.2 Mechanisms to encourage this kind of detection and reporting

All of the above case examples illustrate the individual initiatives taken by prosecutors to open separate foreign bribery proceedings which were not immediately related to the original investigation. They also illustrate the need to make the best and pro-active use of all available pieces of evidence. In particular, wiretaps have proven to be an important source of evidence to expand the initial investigation into another direction. The need to be proactive is even more apparent when the investigation focuses on key figures who act as intermediaries between politicians and businesses. Furthermore, specific training is essential to raise awareness among law enforcement authorities and to provide the necessary knowledge which allows rapid detection and the use of all available investigative means. It also goes without saying that effective communication between different domestic law enforcement agencies is essential to ensure effective detection and reporting of foreign bribery cases, along with transfer of proceedings, as necessary.

Lessons drawn from the above-mentioned cases demonstrate that law enforcement authorities and prosecutors must pay particular attention to evidence of foreign bribery that may arise while investigating other types of offences, in particular economic or financial crimes. In particular, close attention should be paid to:

- Proactive use of all investigative means, notably wiretaps;
- In-depth analysis of evidence for indicators of possible foreign bribery;
- Independence of prosecutors to open separate foreign bribery investigations at their own initiative;
- Awareness-raising and training for prosecutors specialising in other types of crime, on the need to detect and report or investigate foreign bribery;
- Clear lines of communication between domestic law enforcement authorities to ensure that foreign bribery detected in the course of other criminal proceedings is duly brought to the attention of specialised anti-corruption prosecutors.

2. Detection through civil proceedings

For the purposes of this Study, “civil proceedings” is defined to include any non-criminal dispute to be decided by a judge or resolved out of court. A potential case of bribery of foreign public officials can be the subject of various civil proceedings, such as investor or shareholder suits, suits by competitors, suits for breach of contract, civil actions by administrative agencies, or damages suits by whistleblowers.¹⁵⁷ The opportunity to detect a case of foreign bribery during civil proceedings requires both knowledge of the offence and willingness to report on the part of the parties to the dispute, their lawyers or the competent tribunal. When a contract is challenged in court it is likely that neither the claimant nor the respondent have any advantage in unveiling that the initial deal was the fruit of a bribe. In addition, lawyers may be bound by professional confidentiality and privilege rules. The role of lawyers in detecting and reporting allegations of bribery of foreign public officials is discussed in Chapter 10. Furthermore, a civil law judge may not be required or attuned to detect and report, *ex officio*, potential criminal offences revealed in the course of civil proceedings, particularly relatively new offences such as the bribery of foreign public officials. As a result, so far, only one foreign bribery case has been detected during non-criminal proceedings (see Box 62). Practical experience in some countries (for example, Italy) has shown that evidence or at least indications of corruption has emerged during divorce and other family cases where a wife/husband alleges the illicit behaviour of his/her spouse with the intention of challenging his/her declaration of assets.

Box 31. Canada Case Study: Hydro Kleen (2005)

The foreign bribery charges that were laid against Hydro Kleen systems Inc. came to light as a result of a complaint made to the RCMP by Innovative Coke Expulsion (ICE), a competitor of Hydro Kleen Systems Inc. (HK), regarding the conduct of a US border agent (Garcia) in relation to one of its employees (a former employee of HK). According to ICE, Garcia had been providing paid services to HK to facilitate its employees’ entry into the US. Garcia was also entering the names of competitors’ (including ICE’s) employees on the US national automated immigration lookout system, thereby precipitating secondary screening which ultimately resulted in an ICE employee being denied entry. This alleged conduct gave rise to both a civil suit and a criminal investigation. While the investigation initially focused on the alleged receipt of secret commissions by Garcia, contrary to subparagraph 426(1)(a)(ii) of the *Criminal Code of Canada*, these charges, as well as charges against HK for foreign bribery contrary to the (then newly enacted) *Corruption of Foreign Public Officials Act*, and the civil suit by ICE against HK and Garcia were pursued concurrently.

This case demonstrates the importance of having a trusted relationship between private sector companies and law enforcement (in this case the RCMP), which facilitated the reporting and the need for law enforcement authorities to be aware of their national foreign bribery legislation and to thoroughly investigate all potential charges that could arise from a fact pattern, as foreign bribery may occur alongside other offences.

As is the case for criminal judicial authorities, administrative agencies and civil judges involved in civil proceedings need to receive adequate training to be aware, detect and report foreign bribery which may arise in the context of such proceedings.

¹⁵⁷ The role of whistleblowers as a source of detection, and the need for effective whistleblower protection, is discussed above, in Chapter 2

3. Detection through arbitral proceedings

A final matter to consider in this chapter is the interaction between criminal and arbitral proceedings involving foreign bribery and whether arbitration can be a potential source of detection for foreign bribery cases. For the purposes of this Study, “arbitral proceedings” refers to international investment arbitrations, often used to resolve international investment disputes between a State and an investor. However, corruption allegations can also arise in the context of other commercial arbitrations. For example, commercial agents, intermediaries or indeed local joint venture partners who seek payment of their fees may have committed acts of bribery. An essential issue regarding the power and duty of arbitrators, or the arbitral tribunal, to report possible foreign bribery arising in the course of arbitral proceedings, is whether this would be a violation of their obligation to maintain the confidentiality of the proceedings. The Additional Protocol to the Criminal Law Convention on Corruption of the Council of Europe¹⁵⁸ is the only international instrument which takes into consideration the relation between corruption and arbitration. The Additional Protocol establishes an obligation for parties to criminalise the active and passive bribery of domestic and foreign arbitrators, but is silent on the duty or responsibility of arbitrators or the arbitral tribunal to report suspected bribery to national law enforcement authorities. Furthermore, professional codes of conduct for arbitrators do not, at present, require or encourage such reporting. There is hence a legal vacuum at the international level in this regard. Any duty of disclosure could therefore only arise in the context of national legislation to which the parties to the arbitration are subject.

Box 32. International Centre for the Settlement of Investment Disputes (World Bank)

The International Centre for the Settlement of Investment Disputes (ICSID) was established by an international treaty, with the express purpose to provide independent, delocalised, dispute settlement facilities to States and foreign investors. ICSID proceedings are self-contained and not subject to external review by domestic courts. In fact, consent to arbitration under the ICSID Convention is, unless otherwise stated, deemed consent to such arbitration to the exclusion of any other remedy. This principle also extends to the recognition and enforcement of ICSID awards: domestic courts may not re-examine the ICSID tribunal’s jurisdiction, the award on the merits or the fairness and propriety of the proceedings before the ICSID tribunal.

The interaction between ICSID tribunals and domestic courts is thus structurally very limited. Additionally, under the ICSID Convention, Rules and Regulations, arbitrators are bound by strict confidentiality rules. Upon appointment, each ICSID arbitrator shall sign a declaration of independence, which includes a commitment to “keep confidential all information coming to [his/her] knowledge as a result of [his/her] participation in [the] proceeding, as well as the contents of any award made by the Tribunal.” Therefore, there is very limited room, if any, for ICSID tribunals to share information acquired in the context of a case with national law enforcement agencies. Given this legal framework, collaboration between ICSID arbitrators and domestic law enforcement agencies is unlikely. It is worth noting, however, that there have been ICSID cases where questions of bribery have been dealt with under the umbrella of international public policy. ICSID reports that it promotes greater awareness of international law on foreign investment and the ICSID process and regularly publishes decisions and awards.

Source: ICSID

¹⁵⁸ <https://rm.coe.int/168008370e>.

3.1 *Corruption in arbitration cases*

Even where there is no legal requirement for an arbitrator to disclose corrupt activities, disclosure to the relevant authorities may fall under the public interest or interests of justice exceptions to confidentiality. For instance, recent arbitration legislation enacted in Parties to the OECD Anti-Bribery Convention provides for exceptions to the duty of confidentiality in arbitral proceedings.¹⁵⁹ In contrast, a report of the ICC Working Group on Criminal Law and Arbitration concluded that it would be “contrary to the nature of arbitration, contrary in particular to the trust that the parties place in [the] arbitrator, for an arbitral tribunal to report to the authorities the offences found”.¹⁶⁰ Nevertheless, in both civil and common law systems it is an established principle of law that no arbitral award may be granted when the claim arises from an illicit contract. According to the main jurisprudence of arbitral tribunals, in the context of bribery and other corrupt practices, a contract that either promotes corruption or is tainted by corruption would be therefore contrary to international public policy and would not be considered enforceable due to its violation of norms and customs. Presently, to the authors’ knowledge, 11 ongoing proceedings involving 10 different Parties to the OECD Anti-Bribery Convention are also the subject of international investment arbitrations. The arbitral proceedings pre-date the criminal proceedings for foreign bribery in four of these cases, whereas the arbitration was initiated after the foreign bribery investigations in another four cases. In three cases, the arbitrations and the criminal investigations were started at the same time. In some cases responses to MLA requests have been withheld pending the outcome of the arbitration. There appears to be an increasing number of arbitrations in connection to cases where criminal proceedings are ongoing or sanctions have been imposed for the foreign bribery offence.

¹⁵⁹ Section 23G(1) of the Australia International Arbitration Act 1974 (taking into account amendments up to Act No. 5 of 2011) reads: —*A court may make an order allowing a party to arbitral proceedings to disclose confidential information in relation to the arbitral proceedings... if: (a) the court is satisfied, in the circumstances of the particular case, that the public interest in preserving the confidentiality of arbitral proceedings is outweighed by other considerations that render it desirable in the public interest for the information to be disclosed; (ii) the New Zealand Arbitration Act 1996, in its Section 14E(2), reads: —The High Court may make an order [allowing a party to disclose any confidential information] only if— (a) it is satisfied, in the circumstances of the particular case, that the public interest in preserving the confidentiality of arbitral proceedings is outweighed by other considerations that render it desirable in the public interest for the confidential information to be disclosed; and (iii) the Scottish Arbitration Rules, at Rule 26(1), reads: —(1) Disclosure by the tribunal, any arbitrator or a party of confidential information relating to the arbitration is to be actionable as a breach of an obligation of confidence unless the disclosure— ... (c) is required —... (iii) in order to enable any public body or office-holder to perform public functions properly, (e) is in the public interest, (f) is necessary in the interests of justice.*

¹⁶⁰ ICC Working Group on Criminal Law and Arbitration (Doc 420/492).

Box 33. ICSID Case Study: World Duty Free Company Limited v. Republic of Kenya (ARB/00/7; 2006)

In the arbitration case *World Duty Free Company Limited (“WDF”) v Republic of Kenya* the dispute arose out of an agreement in 1989 between WDF (a UK-based company), an Isle of Man company, and the Kenya Airports Authority, acting on behalf of the Government of Kenya, for the construction, maintenance and operation of duty-free complexes at Nairobi and Mombasa International Airports. WDF brought a claim to the ICSID, claiming expropriation of its property and a breach of the 1989 Agreement, since the Government of Kenya instigated a takeover of the shares and assets of WDF. WDF submitted that from the outset, to be able to do business with the Government of Kenya, the CEO and shareholder of WDF was required to make a “personal donation” to the then President of Kenya. This donation amounted to USD 2 million. The ICSID tribunal concluded that a construction contract had been procured by corruption. Accordingly, the tribunal held (i) that the investor was not legally entitled to maintain any of its claims “as a matter of *ordre public international* and public policy under the contract’s applicable laws; (ii) that “bribery is contrary to the international public policy of most, if not all, States or, to use another formula, to transnational public policy; and (iii) that “claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld...” The facts in this case pre-date the OECD Anti-Bribery Convention.

Source: www.italaw.com/documents/WDFv.KenyaAward.pdf

Box 34. ICSID Case Study: Metal-Tech Ltd. v. Republic of Uzbekistan (ARB/10/3; 2013)

In 2000, Metal-Tech, an Israeli public company manufacturing molybdenum products, formed a joint venture with two state-owned companies in Uzbekistan to build and operate a plant for the production of molybdenum products. Metal-Tech was to contribute its technology, know-how, and access to international markets, as well as part of the financing needed for a new plant, while the Uzbek companies were to contribute buildings, constructions, machines, equipment, and raw molybdenum for the plant to process. In 2006, the Public Prosecutor’s Office for the Tashkent Region initiated criminal proceedings on the ground that officials of the joint venture had abused their authority and caused harm to Uzbekistan. A month later, Uzbekistan’s Cabinet of Ministers adopted a resolution that abrogated the joint venture’s exclusive right to purchase raw materials required for the production of molybdenum products and to export such products. As a result, the Uzbek companies terminated their contracts with the joint venture and bankruptcy proceedings were initiated against it. Despite Metal-Tech’s objections before the Uzbek courts, the joint venture was liquidated and delisted from the state registry of legal entities in 2009.

In its Request for Arbitration, Metal-Tech claimed that Uzbekistan had breached its obligations under its domestic laws and the Israel-Uzbekistan BIT by, *inter alia*, failing to accord Metal-Tech and its investment fair and equitable treatment and full and constant protection and security; breaching and repudiating the joint venture agreement; expropriating Metal-Tech’s property without due process of law; and taking unreasonable and discriminatory measures that impair the management, use, enjoyment, and disposal of Claimant’s investment. Uzbekistan denied Metal-Tech’s allegations, argued that the tribunal lacked jurisdiction to hear the claims under the BIT and Uzbek law, and submitted counterclaims to recover damages allegedly sustained as a result of Metal-Tech’s unlawful conduct.

Also in *Metal-Tech* an ICSID tribunal concluded that corruption had been sufficiently established through the proceeding, “to an extent sufficient to violate Uzbekistan law in connection with the establishment of the Claimant’s investment in Uzbekistan”. As a consequence, the investment has not been ‘implemented in accordance with the laws and regulations of the Contracting Party in whose territory the investment is made’ as required by [...] the BIT [...] and [thus] this Tribunal lacks jurisdiction over the dispute.” The facts in this case occurred before the entry into force of Israel’s foreign bribery offence.

3.2 *Facilitating detection and exchange of information in the context of arbitrations*

Understandably, confidentiality of proceedings is one of the main attractions of solving investment disputes through arbitrations. The potential for bribery allegations arising in the course of arbitral proceedings to be reported to law enforcement authorities would therefore represent a significant disadvantage to opting for arbitration. Nevertheless, solutions should be envisaged so that arbitration is not used as a safe haven for corrupt business deals. Guidelines or codes of conduct for arbitrators and arbitral tribunals could be updated to include guidance on interaction with national law enforcement authorities, such that if and when arbitral tribunals decide – as was the case in *Metal Tech v Uzbekistan* – that there is no basis for jurisdiction when the original investment contract was obtained through bribery, they may then inform the competent authorities. In addition to allowing for foreign bribery enforcement, this would reinforce the integrity and credibility of arbitration and resulting arbitral awards and have the additional advantage of avoiding corruption in the context of arbitral proceedings, such as bribery of the tribunal to influence the award.

Conclusion

Separate legal proceedings can be an important – and relatively easily accessible – source of information for potential bribery of foreign public officials. With regard to other criminal proceedings, law enforcement authorities should be trained to detect possible foreign bribery in cases involving cross-border transactions, and if necessary communicate with and refer to the relevant specialised unit. In relation to civil proceedings, administrative agencies and judicial authorities involved in such proceedings should be provided with effective training on detecting and communicating allegations of foreign bribery to law enforcement. Finally, with respect to allegations of bribery in international business arising in the course of international investment arbitrations, the arbitration community could consider issuing guidelines or codes of conduct to identify and address such allegations, including possible interaction with relevant national law enforcement authorities.

Chapter 9

International co-operation

Introduction

Beyond the significant role that international co-operation plays in securing evidence in foreign bribery cases, it can also be an effective tool to detect such cases. To date, 7% of bribery schemes resulting in sanctions have been detected through mutual legal assistance (MLA) requests.

Article 9 of the Anti-Bribery Convention provides that Parties should provide “prompt and effective legal assistance” to other Parties.¹⁶¹ While the primary task of a country receiving a mutual legal assistance (MLA) request is to execute the request, the recipient country can also detect foreign bribery offences falling under its jurisdiction through this request.¹⁶² Detecting foreign bribery can result from formal requests for cooperation as well as from information sought through informal channels of assistance. For instance, the Canadian SNC-Libya foreign bribery case was initiated on the basis of information received through international cooperation channels. Sweden has three investigations ongoing opened as a result of a request for assistance. Information referred from international organisations, notably multilateral development banks, can also lead to uncovering evidence of foreign bribery. Lithuania also initiated a foreign bribery investigation based on a request for assistance received from another Party to the OECD Anti-Bribery Convention. Several investigations have also been opened in Norway on such basis as well as based on information shared spontaneously, from other jurisdictions.

1. The need for efficient and proactive Central Authorities

As the main recipient of MLA requests, Central Authorities can play a key role in detecting foreign bribery offences. To this end, Central Authorities need to be well trained to be able to detect, in incoming MLA requests, potential foreign bribery offences that could fall under the jurisdiction of their countries. Central authorities have been designated in each Party and have the power to receive and respond to MLA requests.

¹⁶¹ Information on the frameworks for international cooperation can be found in the OECD Typology on Mutual Legal Assistance in Foreign Bribery Cases, available here.

¹⁶² In this context, the recipient country must strike a balance between its international obligation to execute within a reasonable time frame the request and its investigation of the offense committed within its own jurisdiction. While the primary emphasis should be on providing the assistance requested as quickly and efficiently as possible, there can be exceptions. In cases where a recipient country believes that a delay in executing a request might be justified to allow for its own investigation to progress, this should be fully discussed and coordinated with the requesting state.

The WGB regularly publishes a list of countries' contact points for Parties to the Anti-Bribery Convention for international co-operation.¹⁶³

In addition to Central Authorities, investigative and prosecution authorities are usually involved in the execution of requested measures. Therefore, Central Authorities have a key role to play in ensuring that these authorities, who actually carry out the requests, consider whether these may reveal foreign bribery involving their nationals and whether a domestic investigation is warranted.

Country practices: Role of Central Authority in sharing information with law enforcement from incoming MLA requests	
Israel	The Department of International Affairs of the Office of the State Attorney in Israel has been designated by Israel as the Central Authority for the receipt of MLA Requests under both the UNCAC and the OECD Convention. The Deputy Director of this Department is also a member of Israel's Inter-Ministerial Team on Foreign Bribery, which includes Israeli investigative and prosecutorial authorities in charge of foreign bribery enforcement. As a matter of policy and routine, the Deputy Director reviews incoming MLA requests to determine if the requests reveal facts or information that could indicate the commission of a foreign bribery offence under Israeli law. If that is the case, the information is passed on to the Inter-Ministerial Team to discuss and determine whether a domestic Israeli investigation is justified. At the same time, of course, all measures are taken to ensure the MLA Request is expeditiously considered and handled.

2. How can foreign bribery be detected?

2.1. From MLA requests

Evidence of foreign bribery can be detected both in the MLA request itself as well as from the documentation sent in support of the request. Recipient countries can require a country requesting MLA to provide supporting information indicating the existence of the alleged crime as a basis for executing the request. Stronger supporting information of the alleged crime may be asked in particular if the requesting country is asking for coercive measures such as search and seizure.¹⁶⁴

The description of the facts and evidence submitted can provide useful information to the recipient country about the possible implications of its nationals and companies in bribery committed abroad, and may therefore provide a basis for initiating an investigation. For example, an MLA request submitted by one country in the context of a passive bribery investigation may reveal information supporting the opening of an investigation into active foreign bribery committed by individuals or legal persons in the recipient country. The involvement of its nationals may become even clearer to the authorities of the recipient country when executing the request.

¹⁶³ Country Contact Points for International Co-operation, www.oecd.org/daf/anti-bribery/WGB-Country-Contact-Points-International-Cooperation.pdf.

¹⁶⁴ OECD (2012), Typology on Mutual Legal Assistance in Foreign Bribery Cases, p.22.

Box 35. Sweden Case Study: WIPO (2016)

The Swedish National Anti-Corruption Unit received an MLA request from the Swiss authorities in September 2013. The Swiss prosecutor initiated an investigation into a British citizen residing in Switzerland, Mr M, for allegedly taking bribes in the context of a public procurement tender for translation services organised by the UN World Intellectual Property Organization (WIPO). The bribe (hotel, restaurant visits and spa treatments in the amount of CHF 2 400) was paid by the CEO of a Swedish company, Mr J, who was a competitor in the public procurement for translations, and his daughter, Mrs J, had helped him with the reservations and all the payments for Mr M and his wife. The request from the Swiss prosecutor was for the Swedish authorities to perform interrogations of the Swedish citizens.

Based on this information, the Swedish National Anti-Corruption Unit decided to open an investigation. In this particular situation, the Swedish prosecutor realised that there were very limited possibilities for the prosecutor in Switzerland to be able to prosecute the Swedish citizens for their actions. The Swiss prosecutor therefore provided his Swedish counterpart, on request, all necessary evidence gathered in the Swiss investigation, including invoices from the hotel and e-mails between the Swedish citizens and the hotel.

On 7 September 2016 the Swedish Criminal Court sentenced Mrs J for giving bribes to a foreign public official. The sentence was a monetary sanction (100 days of her income). Mr J was found not guilty and therefore no corporate fines were imposed. As of the time of this study, the acquittal of Mr J and the company had been appealed and was pending in the Court of Appeal.

When an MLA request reveals information that may indicate a domestic foreign bribery offence in the recipient country, the prosecuting authority responsible for foreign bribery cases has a key role to play executing the incoming MLA requests related to bribery of a foreign public official, once it has been reviewed by the Central Authority. This allows the prosecuting authority to determine what, if any, connection to the recipient country exists, and whether there is sufficient evidence for opening an investigation.

Box 36. Switzerland, United States Case Study: Alstom Indonesia, Egypt, Saudi Arabia, and the Bahamas (2015)

In this case, Alstom SA, its subsidiaries, and its employees and agents paid bribes to government officials in various countries around the world, including Indonesia, Egypt, Saudi Arabia, and the Bahamas to secure power, signaling, and transport contracts.

After conducting a raid on the company's Swiss subsidiary, Switzerland sent an MLA request to the United States that identified potential violations of US law. The description of the facts in the request and the documents attached discussed the use of US intermediaries and US bank accounts to facilitate the alleged bribery scheme, as well as a US subsidiary engaged in the bribery. Based on the request, the US DOJ opened a case. The US DOJ and the Swiss Attorney General's office were in close contact and cooperation throughout the investigation. Switzerland provided significant assistance to US authorities, which allowed the US to substantiate its investigation.

In December 2014, Alstom pleaded guilty to violating the Foreign Corrupt Practices Act (FCPA) by falsifying its books and records and failing to implement adequate internal controls. In November 2015, Alstom S.A. was sentenced to pay USD 772 million criminal fine to resolve the criminal charges. Alstom's Swiss subsidiary also pleaded guilty to conspiracy to violate the anti-bribery provisions of the FCPA and sentenced. Alstom U.S. subsidiaries (Alstom Power Inc. and Alstom Grid Inc) entered into deferred prosecution agreements (DPA) in December 2014, admitting that they conspired to violate the anti-bribery provisions of the FCPA.

Source: United States and DOJ Website: www.justice.gov/criminal-fraud/case/united-states-v-alstom-sa-et-al-court-docket-number-314-cr-00245-jba-314-cr.

MLA requests from foreign jurisdictions have triggered foreign bribery investigations in several other Parties to the OECD Anti-Bribery Convention:

- MLA requests are the first source of detection of foreign bribery of foreign public officials in the **Czech Republic**. As of the time of this study, two cases of foreign bribery had been detected through this channel. The first case was detected through two MLA requests from a non-party to the OECD Anti-Bribery Convention. The resulting investigation was terminated because the Czech Republic did not have liability of legal persons at the time, and no Czech individuals were implicated in the allegations. The second case is pending and was detected through an MLA request from a Party to the OECD Anti-Bribery Convention.¹⁶⁵
- The **United Kingdom** also has experience in commencing domestic investigations based on information provided by foreign law enforcement authorities through MLA channels or less formally, notably based on exchanges with the **US SEC** (in the *Innospec* and *Mondial* cases) and **Norway's** National Authority for the Investigation and Prosecution of Economic and Environmental Crime (*ØKOKRIM*).¹⁶⁶
- In **the Netherlands**, following an MLA request from a non-Party to the Anti-Bribery Convention, Dutch law enforcement authorities launched a parallel investigation into a Dutch company suspected of bribing port authorities in a country not Party to the OECD Anti-Bribery Convention to obtain a contract to carry out dredging works.

2.2. *From informal cooperation channels*

Through informal cooperation, law enforcement officials can also receive information about foreign bribery allegations involving their nationals and companies abroad that they were unaware of. While information shared informally cannot be used directly for prosecution purposes, such information can be used as a basis to collect evidence and to initiate proceedings. For instance, informal channels can enable law enforcement authorities to exchange information with their foreign counterparts on a more informal basis before sending an MLA request. Informal cooperation can therefore be a way to detect potential cases and to facilitate access to information that can later be used as evidence in court proceedings. “Encouraging whenever possible mechanisms for informal cooperation before the submission of an MLA request” has been recognised by the G20 as a mechanism that may usefully help overcome MLA challenges.¹⁶⁷

Informal contacts can occur through bilateral exchanges or international networks. Such network includes the OECD Working Group meetings, the European Judicial Network, the Egmont Group, the IberRed network, the OAS Criminal Network, the Commonwealth Network of Contact Persons, CARIN, ARINSA, RRAG-GAFISUD and

¹⁶⁵ Czech Republic, Phase 4 Report, para. 35.

¹⁶⁶ UK Phase 4 Report, para. 48.

¹⁶⁷ G20 High-Level Principles on Mutual Legal Assistance: www.bmjv.de/SharedDocs/Downloads/EN/G20/G20_High-Level_Principles_on_Mutual_Legal_Assistance.pdf?jsessionid=BBE345A6F309680DAF50B44DECDEE2FA.2_cid334?__blob=publicationFile&v=1.

the StAR Initiative). Two recent networks – the International Foreign Bribery Taskforce (IFBT) and the Brasilia Agreement – have been set-up to facilitate direct and informal contact between law enforcement authorities in foreign bribery cases (see section 4).

Liaison officers posted abroad can also be useful to facilitate informal cooperation. Their physical presence facilitates informal contact with local law enforcement authorities and informal communications. Liaison officers can also come across foreign bribery allegations in the local media, court documents, and other sources, and informally approach local law enforcement authorities to seek more information. As an example, the **Australian** Federal Police has established a network of 93 international liaison officers posted in 30 countries. The **Danish** police liaison officers posted in four foreign countries are each responsible for a particular geographic region, and additional liaison officers are posted in Europol and Interpol.¹⁶⁸ The **Canadian** RCMP has approximately 50 liaison officers posted to 30 cities in the Asia Pacific, Middle East/Africa, Europe, North America and the South America/Caribbean regions.

Box 37. Israel Case Study: Eastern European case (ongoing)

The Israeli Central Authority became aware of a case involving possible foreign bribery in an Eastern European country, not Party to the OECD Anti-Bribery Convention, by the subsidiary of an Israeli company from the WGB case Matrix. (The matrix is a collation of allegations of foreign bribery prepared by the OECD Secretariat based on public sources, and used by the WGB to track case progress.) Since there was insufficient information to consider opening an investigation in Israel, the Israeli Central Authority contacted a colleague in the Eastern European country concerned whom they knew from meetings of the Council of Europe's PCOC Committee, who in turn put them in contact with the Anti-Corruption Agency of the Eastern European country. The Agency informed Israel's Central Authority that an MLA request had been sent to Israel pursuant to the COE Convention but had not yet arrived.

The Israeli Central Authority arranged to have a copy of the request sent by e-mail so it could be reviewed before it arrived formally and so that both the Inter-Ministerial Team and the Israel Police Legal Assistance Unit could be prepared to move quickly on the request. When the request was executed by an Israeli Police Unit, the evidence uncovered through the execution of the MLA Request ended up providing a basis for the opening of an Israeli investigation into foreign bribery.

Further MLA requests have been submitted and executed between the two countries and the Israeli Central Authority has conducted regular consultation and coordination with the Anti-Corruption Agency of the Eastern European country and has regularly informed the Inter-Ministerial Team of all relevant information and developments. The investigation is ongoing as of the time of this study.

3. Referrals from International Organisations

International organisations can play a crucial role in uncovering allegations of foreign bribery, referring those cases to national authorities for investigation and prosecution, and facilitating complementary forms of international co-operation. In this respect, the 2009 OECD Anti-Bribery Recommendation provides that countries should “seriously investigate credible allegations of bribery of foreign public officials referred to them by international governmental organisations, such as the international and regional development banks.” Such complementary international co-operation has proven to be

¹⁶⁸ Australia Phase 3 Report, para.52 and Denmark Phase 3, para. 153.

instrumental in the fight against foreign bribery. Convention Parties to have successfully sanctioned foreign bribery in 4 schemes initially detected through referrals from International Organisations. Two were referred to Sweden by the World Bank (Sweden), one was referred from OLAF to Belgium and one is unknown (Luxembourg).

A very significant example is the cooperation between the World Bank's Integrity Vice Presidency (INT) and national law enforcement authorities. Under the World Bank's policies and procedures as well as Memoranda of Understanding (MOUs) signed with certain countries, the Bank may refer information to national authorities regarding possible misconducts, including bribery, occurring in relation to Bank-financed projects. Because proceedings conducted by the Bank are administrative in nature, only limited investigative measures can be taken by the Bank. It may impose administrative sanctions, which can result in a limited or permanent debarment of individuals or companies from participating in Bank-financed contracts. These sanctions are public and, if they meet certain criteria, may result in cross-debarment by other multilateral development banks. The Bank does not have any criminal enforcement powers and makes referrals so that national law enforcement authorities may proceed with their own independent investigation and determine whether national laws have been violated. This is particularly relevant in matters involving bribery of foreign public officials in Bank-funded projects.

Box 38. United Kingdom Case Study: Macmillan Limited (2011)

The UK also has experience in commencing domestic investigations based on information provided by the World Bank and the European Bank for Reconstruction and Development (EBRD) including in the Macmillan Limited bribery case in Sudan. In this case, Macmillan made improper payments in an unsuccessful bidding process for an education project supported by a World Bank-managed fund in order to supply textbooks to south Sudan. The information was initially referred by the INT department of World Bank to the City of London Police former Overseas Anti-corruption Unit (OACU) in 2010. The referral consisted of a witness statement from an individual aware of the circumstances. Due to strict conditions governing sharing on INT material, the OACU conducted their own initial investigation and used the statement referred by the Bank as intelligence, rather than formally obtaining further material from the INT at the outset. OACU conducted searches of three individuals' homes and Macmillan's business premises and interviewed three individuals. This activity resulted in a significant amount of evidence. The Serious Fraud Office (SFO) became involved when the company in turn "self-reported". Following discussions between SFO and CoLP the investigations were merged. In 2010, the World Bank Group debarred Macmillan Limited, for a period three years. In 2011, the case was concluded in the UK by way of a civil recovery order requiring Macmillan to pay USD 17.7 million.

The OACU had an overarching Memorandum of Understanding (MoU) with the INT department of the World Bank. No specific MoU on this case. The UK SFO now also has an overarching MoU with the INT department of the World Bank.

Source: UK Phase 3 Report, UK Phase 4 Report ; World Bank (2010), — The World Bank Group Debars Macmillan Limited for Corruption in World Bank supported Education Project in Southern Sudan, Press Release No. 2010/370/INT, www.worldbank.org/en/news/press-release/2010/04/30/the-world-bank-group-debars-macmillan-limited-for-corruption-in-world-bank-supported-education-project-in-southern-sudan; The Guardian (2011); "Macmillan ordered to pay \$17m for corruption in South Sudan", <https://www.theguardian.com/global-development/2011/jul/25/macmillan-education-deal-south-sudan>

Since 1999, the World Bank has referred 452 cases to law enforcement authorities; of these, 135 went to signatories of the OECD Anti-bribery Convention. These referrals include foreign bribery, as well as fraud, collusion and coercion.

- In **the Netherlands**, Dutch law enforcement authorities started a criminal investigation following a referral from INT into alleged bribe payments made to World Bank and other foreign public officials in relation to the Bank-financed projects. In this case, an MOU was signed with the World Bank to further facilitate the exchange of information.¹⁶⁹ The MOU is not case specific which means that information can still be referred in other foreign bribery cases under this MOU.
- In **Denmark**, the Public Prosecutor for Serious Economic and International Crime (SØIK) worked with international organisations in two foreign bribery cases and was considering signing MOUs with the World Bank and other multilateral development banks.

Box 39. Norway Case Study: Norconsult Tanzania (2012)

Norconsult is a Norwegian engineering and consulting company. In 2003, the Norconsult and two foreign companies entered into a contract with the Dar Es Salaam Water and Sewerage Authority (DAWASA), a local agency in Tanzania to upgrade the city's water and sewage system. The Norwegian National Authority for the Investigation and Prosecution of Economic and Environmental Crime, ØKOKRIM, believes that a total of approximately USD 200 000 was paid in bribes from September 2003 to July 2006.

The payments stopped after a World Bank investigation revealed the bribing of officials at DAWASA in return for securing a USD 6.4 million World Bank-financed contract. The bribe payments were disguised as "commercial expenses".

INT referred its investigative findings on fraud and corruption related to the World Bank projects to ØKOKRIM. Following the referral from the World Bank, ØKOKRIM served a penalty notice on the company in the amount of NOK 4 million (USD 700 000) in 2009, which the company refused to accept. In 2011, ØKOKRIM indicted three employees of the company for contravention of Norway's foreign bribery legislation.

In October 2012, the Court of Appeal sanctioned two natural persons and Norconsult. Of the three natural persons prosecuted, one was acquitted, one was sentenced to 6 months imprisonment (of which 2 months conditional), and one was sentenced to 60 days conditional imprisonment. Norconsult was sentenced to a NOK 4 million fine by the Court of Appeal but was subsequently acquitted by the Supreme Court in June 2013. The acquittal was not based on the facts of the case but essentially due to the length of the criminal proceedings (seven years since the last criminal act), the fact that the company had taken remedial actions to prevent bribery in the future and the fact that the employee involved had been convicted to jail-sentence.

In February 2014, the Sanctions Board at the World Bank decided to debar Norconsult for six months for involvement in "corrupt practices" related to the water and sanitation project in Tanzania.

Source: Norway Phase 3 Report and Phase 3 Follow-up Report; and Dagens Næringsliv (2013), "Norconsult frifunnet av Høyesterett", <https://www.dn.no/nyheter/politikk/Samfunn/2013/06/28/norconsult-frifunnet-av-hoyesterett>

In 2016, the Supreme Court of **Canada** (SCC) rendered an important decision about information sharing between the World Bank INT and domestic law enforcement authorities in foreign bribery cases. In this case, the World Bank had referred information to the Royal Canadian Mounted Police (RCMP) about foreign bribery allegations

¹⁶⁹ Netherlands, Phase 3 Report, para. 14.

involving SNC Lavalin in Bangladesh in the context of a USD 3 billion project over the Padma Bridge.¹⁷⁰ The SCC ruled that the fact that the World Bank INT referred information to the RCMP did not imply or constitute an express waiver of the World Bank's immunities. In the absence of a finding of an express waiver of immunity on the part of the World Bank, the Bank's anti-corruption staff could not be compelled to appear in court in Canada to provide information about the whistleblowers who first alerted them about the foreign bribery allegations. Access to the World Bank records that were being sought was similarly denied. By refusing to lift the INT's staff and records' immunity, the SCC has shielded the role that the World Bank and other multilateral development banks play in the detection of foreign bribery through their referrals to domestic law enforcement authorities.

In addition to the World Bank, other international organisations have referred foreign bribery cases to domestic law enforcement authorities. This is the case of the European Anti-Fraud Office (OLAF). Cases originating from a referral by OLAF are one of the priorities of Belgian prosecutors. At least five Belgian cases of bribery of foreign public officials originated from an OLAF report.¹⁷¹

Box 40. Belgium Case Study: EU cereals subsidies (2013)

The case was referred to the Belgian authorities by OLAF and concerns the bribery of a Dutch European official by non-Belgian companies and nationals for the provision of information covered by professional secrecy relating to the fixing of prices for cereals on the European market. The total amount of bribes in the case (travel, luxury goods, property and transfers of cash) was estimated, in the court's judgment, at EUR 850 000, and the total amount of advantages obtained by the companies in question was approximately EUR 22 million.

Belgium exercised its territorial jurisdiction in relation to the offence of bribery of foreign officials (the European official was based in Brussels). The investigations were conducted by the Central Office for the Repression of Corruption (Office central pour la répression de la corruption, OCRC) in 2003 and the Brussels Court of First Instance handed down a conviction on 27 June 2012. On 6 May 2013 the Brussels Court of Appeal upheld the initial conviction of the two foreign companies for bribery of the European public official. Of the eight non-Belgian individuals prosecuted for foreign bribery in this case, four were acquitted; one received a suspended conviction; and three individuals were sentenced to suspended prison sentences of 12 to 18 months and fines of EUR 2 500 to 7 500.

Source: Belgium, Phase 3 report

4. Detection through international cooperation in multijurisdictional cases

The ever growing number of multijurisdictional cases and recent trend of jointly concluded cases among Convention Parties increases the importance that international cooperation can play in uncovering evidence of foreign bribery. In 2006, 5% of the bribery schemes listed on the DOJ and SEC websites explicitly thanked foreign law enforcement authorities. This figure has increased to 50% in 2016 (OECD, 2017a). The recent coordinated resolution of the Odebrecht foreign bribery cases between Brazil, Switzerland and the United States is a case in point of coordinated enforcement of the Anti-Bribery Convention.

¹⁷⁰ World Bank Group v. Wallace, 2016 SCC 15, [2016] 1 S.C.R. 207

¹⁷¹ Belgium, Phase 3 Report, para. 14

Box 41. Brazil, Switzerland, United States Case Study: Odebrecht S.A. (2016)

On 21 December 2016, Brazil, Switzerland and the United States reached coordinated resolutions with Odebrecht S.A. and a subsidiary company (Braskem S.A.). In total, Odebrecht agreed to pay a combined total penalty of USD 2.6 billion, 80 % of which are to be paid to Brazil and 10 % each to the US and Switzerland. As part of the plea agreement concluded with the United States, the statement of facts outlines a complex bribery scheme in place from in or about 2001 through 2016, under which Odebrecht S.A. secured billions of dollars of infrastructure projects by paying bribes to government officials, politicians, and political parties in Brazil and abroad, including in Angola, Argentina, Colombia, the Dominican Republic, Ecuador, Guatemala, Mexico, Mozambique, Panama, Peru, and Venezuela.

Odebrecht S.A. admitted to paying more than USD 700 million in bribes, together with co-conspirators, and to having designated and operated a “Division of Structured Operations” within the company to facilitate the bribery scheme. The Division of Structured Operations established a network of offshore entities and bank accounts for the purpose of conducting layered financial transactions in order to disguise and conceal the improper payments.

The case was first detected by Brazilian authorities, who alerted the US authorities. The red flag indicators detected by the Brazilian authorities were the massive amounts of money paid into a complex structure of shell companies that were managed off-the-books and under the direction of the Division of Structured Operations. The information and evidence developed during the investigation conducted in Brazil enabled the US authorities to decide on the opening of their own independent investigation. In Switzerland, the investigation has been focusing on the bribery angle as well as on determining how the Swiss financial institutions were used to launder the bribe and its proceeds. The investigation was initiated based on reports of suspect banking transactions from the Money Laundering Reporting Office (MROS) establishing that various companies in the construction industry had paid bribes in order to secure contracts with Petrobras. Investigators were then able to trace the payments back to Odebrecht SA. The cooperation between the countries enabled swift and comprehensive resolutions in this matter.

Source: United States; Media Release from the Swiss Federal Council (www.admin.ch/gov/en/); Bloomberg (2016) “Swiss Banks Probed Over Brazil’s ‘Carwash’ Bribery Scandal”, <https://www.bloomberg.com/news/articles/2016-12-12/swiss-attorney-general-pivots-to-banks-in-brazil-bribe-scandal>

Following the trilateral settlement reached in December 2016 with the Brazilian, Swiss and US authorities, a regional network of prosecutors – referred to as “the Brasilia Agreement” – was created in January 2017 specifically to deal with the multijurisdictional ramifications of the Odebrecht case. The first meeting was organized in Brazil by the Brazilian Attorney General’s Office and attended by chief law enforcement officials from Argentina, Chile, Colombia, Ecuador, Mexico, Panama, Peru, Portugal, the Dominican Republic and Venezuela, where Odebrecht is alleged to have engaged in bribery of public officials to secure business contracts. It is worth noting that seven signatories are Convention Parties (i.e. Argentina, Brazil, Chile, Colombia, Mexico, Peru and Portugal). As a result, a Declaration was signed in Brasilia by prosecutors from the eleven countries (*Declaración de Brasilia sobre Cooperación Jurídica Internacional contra la Corrupción* or “the Brasilia Agreement”).¹⁷² Under this Agreement, prosecutors agreed to create joint investigative teams and to strengthen international cooperation to coordinate the investigations in Brazil and the other countries where Odebrecht engaged in bribery. Prosecutors can have access to information contained in the leniency agreement signed by Odebrecht with the Brazilian prosecutors and the collaboration agreements awarded to 78 former Odebrecht executives and

¹⁷² The Declaration is publicly available here (in Spanish): http://transparenciacolombia.org.co/wp-content/uploads/2017/02/odebrecht-fiscales-declaracion-conjunta-investigacion_LPRFIL20170217_0001.pdf

employees who are currently protected by a confidentiality clause. The clauses were due to expire in June 2017 and it is unclear whether the Agreement has been formally renewed, although cooperation appears to still be ongoing.¹⁷³ The information referred through under this cooperation is meant to be used to detect bribery instances in all countries involved, both regarding Odebrecht itself as well as the public officials who have received the bribes in the countries involved. International cooperation can thus foster detection of both active and passive bribery cases.

Another more established network which specifically aims to enhance the sharing of information and the conduct of joint investigations in multijurisdictional cross-border bribery cases is the **International Foreign Bribery Taskforce (IFBT)**. It was created in 2013 and brings together law enforcement authorities from Australia, Canada, the United Kingdom and the United States. Representatives from the four law enforcement agencies meet every year to exchange information on on-going investigations and share innovative investigative techniques. The IFBT also facilitates cooperation in multijurisdictional cases as it provides a platform for the four counterparts to determine which country is best suited to take the lead on particular multijurisdictional cases. It further enables the sharing of real time information as agencies have almost daily contacts with each other. Another element that facilitates informal cooperation is the secondment of investigators from one agency to the others. For example, both the FBI and the Australian Federal Police currently have investigators based in London working with the UK National Crime Agency and the SFO.¹⁷⁴ Since March 2016, the IFBT has assisted in the coordination of the multijurisdictional Unaoil bribery investigation allegedly involving 23 companies from Australia, Canada, the United Kingdom, and the United States.¹⁷⁵

These types of informal cooperation frameworks contribute to an evolving environment in international cooperation and provide another type of “multijurisdictional cooperation” in foreign bribery cases. This proves to be relevant to the detection of foreign bribery cases, especially where several countries have jurisdictions over part of an overall bribery scheme.

Conclusion

International cooperation plays a significant role in detecting foreign bribery cases as illustrated in this chapter. This is likely to further increase with the growing number of multijurisdictional cases and recent trend of jointly concluded cases among WGB members. Additional actors, including the international organisations, contribute to this trend by referring foreign bribery cases to national authorities for investigation and prosecution. WGB members should consider adopting a systematic approach of screening incoming requests with a view to detect the bribery committed by their nationals and companies. To this end, consideration could be given to developing guidelines for central authorities and the authorities executing the requests. The WGB members should further make full use of the platform provided by the WGB law enforcement meetings to foster both formal and informal co-operation in foreign bribery cases.

¹⁷³ Agência Brasil (February 2017), <http://agenciabrasil.ebc.com.br/politica/noticia/2017-02/mpf-firma-acordo-com-dez-paises-para-investigar-odebrecht>.

¹⁷⁴ UK Phase 4 Report and FCPA Blog (December 2016), www.fcpcb.com/blog/2016/12/7/bill-steinman-its-time-to-meet-the-international-foreign-bri.html.

¹⁷⁵ Huffington Post (March 2016), www.huffingtonpost.com/entry/fbi-justice-department-unaoil_us_56fca3bbe4b0a06d5804cbae.

Chapter 10

Professional advisers

Introduction

The assessment and review of books and records by internal and external auditors and accountants are activities that go deep into companies' financial businesses and have great potential for detection of criminal conducts, including foreign bribery. In-house counsel and private lawyers are also in key positions to identify and detect potential bribery in international business as well as uncover illicit proceeds of bribery. In addition, many of these professions—particularly the accounting and legal professions—are subject to reporting obligations under anti-money laundering legislation (see Chapter 6). Several recent initiatives have demonstrated that these professions are willing to recognise their potential role in preventing and detecting corruption, and are ready to “step up to the plate”. For instance, at the 2016 London Anti-corruption Summit, a group of leading firms in the professional services sector released a statement where they committed to collaborate and share experience with governments and other stakeholders to prevent corrupt funds reaching legitimate markets. The Communiqué which followed the Summit hailed the commitment and welcomed the further engagement of these companies to foster a culture which doesn't “tolerate corruption in any of its forms.”¹⁷⁶

This chapter explores the role of these professional advisers in the detection and reporting of foreign bribery, and identifies challenges but also good practices, bearing in mind that it is important not to create duplicative or conflicting reporting standards across crime types. It refers to the actual obligations that these professions have under the OECD instruments but also under anti-money laundering requirements issued by the FATF and transposed into domestic legislation. In cases where the professional consciously assists or supports the commission of the crime and could be considered as an accomplice, reporting to external law enforcement could be in the context of self-reporting or co-operation (see Chapters 1 and 3 respectively).

¹⁷⁶ See point 8 of the Anti-corruption Summit Communiqué, 12 May 2016: www.mofa.go.jp/mofaj/files/000156109.pdf and the Professional Services Leaders' Statement of Support for the London Anti-Corruption Summit: <https://www.ucl.ac.uk/laws/law-ethics/cel-news/documents/statement-london-anti-corruption-summit-4>.

1. Accountants and auditors

1.1 *Standards on detection and reporting by the accounting and auditing profession*

Accountants and auditors are in a position to provide reasonable assurances that the books and records of their clients, or their employers, accurately reflect the commercial reality of the company and that its internal accounting controls meet certain standards. OECD instruments aim to limit the risk for accountants and auditors to be used in the commission of foreign bribery with a set of targeted measures and tools, and to encourage them to report internally or externally.

Box 42. OECD standards on detection and reporting by accountants and auditors

Article 8 of the OECD Anti-Bribery Convention highlights the close link that exists between the obligations of companies to maintain accurate books and records and the detection of foreign bribery. It requires Parties to take the necessary measures to prohibit the creation of off-the-books accounts, the making of off-the-books or inadequately identified transactions, the recording of non-existent payments, the entry of liabilities with incorrect identification of their object, as well as the use of false documents. To this end, countries must provide for effective, proportionate and dissuasive civil, administrative or criminal penalties for such omissions and falsifications, when committed for the purpose of bribing foreign public officials or for hiding such bribery. Commentary 29 to the OECD Anti-Bribery Convention notes that “one immediate consequence of the implementation of this Convention by the Parties will be ... implications for the execution of professional responsibilities of auditors regarding indications of bribery of foreign public officials.”

Article 8 is complemented by the 2009 Anti-Bribery Recommendation which focuses on accounting and external audit requirements, as well as the importance of encouraging companies to develop, adopt and publish internal controls, ethics and compliance programmes. Section B of Recommendation X directly refers to the role of external auditors, providing for adequate standards to ensure their independence. It also asks countries to require external auditors to report suspected acts of foreign bribery internally to management or corporate monitoring bodies and consider requiring them to report to competent external authorities, such as law enforcement or regulatory authorities. The attention paid to external auditors reflects the particular role of these professional advisers, who assess all the documents and the statements of a company without being its employees, and have therefore a much higher independence and decision-making autonomy; all elements that place them in an important position to detect and report bribery. The Good Practice Guidance on Internal Controls, Ethic and Compliance, annexed to the 2009 Recommendation, provides guidance to companies to put in place effective measures and programmes to prevent or detect foreign bribery, such as “mandating one or more senior corporate officers with the oversight of ethics and compliance programmes and the duty to report matters directly to independent monitoring bodies such as internal audit committees.”

In addition to OECD standards for accountants and auditors, the International Audit and Assurance Standards Board (IAASB) has developed professional standards on the duties of auditors.¹⁷⁷ Auditors and accountants may consider their duty to be limited to a strict interpretation of the International Standards on Auditing (ISA), namely detecting fraud and material misstatements. Some may consider detection of bribe payments to fall

¹⁷⁷ ISA 250A (para. 18) requires auditors to identify material misstatement of financial statements due to non-compliance with laws and regulations. ISA 240 (para. 5) requires an auditor to obtain —reasonable assurance that the financial statements taken as a whole are free from material misstatement, whether caused by fraud or error.

outside the scope of these duties; others may not be aware of the constitutive elements of foreign bribery and the need to detect and report it. While external auditors have clear reporting obligations under the AML reporting framework (see Chapter 6), foreign bribery-related reporting obligations are less clear. There have been no foreign bribery cases concluded to date detected through accountants or auditors reporting directly to law enforcement. Of the 22% of cases that were detected through companies self-reporting to law enforcement authorities, 22% of self-reports followed an internal audit. Accountants and associates (including advisors) of the public official were respectively used in 1% and 2% of cases reviewed under the Foreign Bribery Report. In some countries, auditors and accountants are bound by professional regulations on confidentiality and professional secrecy, which may conflict with any statutory reporting obligations. The lack of private sector whistleblower protection legislation (see Chapter 2) may also influence reporting rates by accountants and auditors. The 2009 Anti-Bribery Recommendation B.X(v) requests member countries to ensure that auditors making such reports reasonably and in good faith are protected from legal action.

1.2. Encouraging detection and reporting by accountants and auditors

Measures by WGB member countries to improve the detection of foreign bribery by professional advisers are mainly linked to internal and/or external reporting obligations established by law, as well as to the provision of training courses which inform professionals about the characteristics of international corruption and their duty to report crimes. Sixteen out of the 41 States Parties to the OECD Anti-Bribery Convention that have undergone Phase 2 and Phase 3 evaluations to date require accountants and auditors to disclose suspected foreign bribery to external law enforcement authorities. In three of these countries, the reporting is not directly to law enforcement, but takes place through a communication to the Financial Services Agency or Financial Investigation Unit (FIU).¹⁷⁸ Spain's Phase 3 Report noted the need for further guidance for auditors on reporting obligations when the foreign bribery reporting requirement coexists with another requirement for auditors to report any suspicion of money laundering to the FIU.¹⁷⁹ Five countries have an obligation to report at first internally and then to authorities, in case of inactivity or involvement in the crime of the management board.¹⁸⁰ Concerning internal reporting of suspected foreign bribery to management, only four countries have no express legal obligation for auditors and/or accountants to declare internally a case of foreign bribery.¹⁸¹ Even in these four countries, professionals would generally be obliged to make such a declaration in accordance with international professional standards and professional codes of conduct.

¹⁷⁸ Japan, Luxembourg (reports to FIU in the context of AML obligations) and Spain.

¹⁷⁹ Spain, Phase 3 Report, para. 140.

¹⁸⁰ Finland, South Africa, Turkey, United Kingdom, and the United States. South Africa foresees a first communication to the Independent Regulatory Board for Auditors (IRBA).

¹⁸¹ Colombia, France, Ireland, Sweden.

Country practice: Encouraging foreign bribery detection by auditors

Netherlands	At a national level, in 2017 the Royal Netherlands Institute of Chartered Accountants (NBA) designated training on “fraud-risks” as compulsory for audits and obtaining professional education points, and published a new anti-corruption guide. The aim of this initiative is to ensure that public accountants focus on this subject during audits and other interactions with clients. Exact numbers are not known yet, but the number of bribery-related reports by accountants to the Dutch FIU appears to be increasing.
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Only 15 WGB members have undertaken activities to raise awareness of accountants and auditors with respect to combating foreign bribery.¹⁸² These activities mainly involve courses and seminars focused on their reporting obligations and information or schemes that can trigger detection of international corruption. Thirty-three WGB members¹⁸³ that have undergone Phase 3 evaluations received recommendations to improve detection and reporting of foreign bribery by accountants and auditors. The WGB mainly focused on national obligations to report internally and/or externally a suspected case of foreign bribery, and requirements on companies to submit to external audit. The provision of training to external auditors on the red flags to identify potential foreign bribery and on the framework for reporting to authorities can be instrumental in helping bring foreign bribery cases to the attention of law enforcement, as exemplified in the Ecopetrol case in Colombia.

Box 43. Colombia Case Study: Ecopetrol S.A. (2010)

This case involves the bribery of a former official of the Colombian state-owned enterprise Ecopetrol S.A, who was in charge of the approval and the assigning of contracts by Ecopetrol S.A. He received bribes from three former executives of PetroTiger Ltd (PetroTiger is a privately held British Virgin Islands company with operations in Colombia and offices in New Jersey) in order to obtain approval to enter into an oil-related services contract.

In 2010, the Board of Directors of PetroTiger Ltd, started noticing a series of inconsistencies in the financial and operational results of the company. This led the Board of Directors to conduct an in depth restructuring process and order an external audit by an external auditing firm. Prior to this audit, the auditing company had received training from the Colombian Secretariat of Transparency on the scope and aim of the Anti- Bribery Convention, particularly with respect to the role of accountants in combating foreign bribery.

This external audit identified a series of undocumented transactions performed from one of the companies' bank accounts in the United States. It revealed that between the period of June 2009 and February 2010 three ex-executives participated in the payment of bribes on behalf of PetroTiger Ltd. to an official of the Colombian state-owned company Ecopetrol S.A. These payments later involved the wife's official, who at the time was a stylist and the owner of a spa in Bucaramanga, Colombia. In 2010, PetroTiger transferred several payments to the wife's official, under the guise of business consulting services for the firm (these activities were actually never performed by the official's wife). In order to secure this oil services contract – worth approximately USD 39.6 million – the ex-executives of PetroTiger Ltd. paid an amount of around USD 333 500.

Source: Colombia

¹⁸² Australia, Bulgaria, Finland, France, Iceland, Latvia, Netherlands, New Zealand, Norway, Poland, Portugal, Sweden, Switzerland, United Kingdom, and United States.

¹⁸³ Argentina, Australia, Austria, Belgium, Brazil, Bulgaria, Canada, Chile, Czech Republic, Denmark, Estonia, Finland, Germany, Greece, Ireland, Israel, Italy, Japan, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Slovenia, South Africa, Spain, Switzerland, Turkey, United Kingdom, and United States.

Self-regulation can also play a very important part in boosting awareness and detection by these professionals. The role of accountants and auditors in the fight against corruption has been recently recognised by international professional organisations. The International Federation of Accountants (IFAC) considers professional accountants as “one group among a number of vital actors in the economy, including business leaders, governments, and the financial sector, which are key to tackling corruption”¹⁸⁴ and has committed to “an increased determination and great deal of constructive work in the global fight against corruption.”¹⁸⁵

In July 2016, the International Ethics Standards Board for Accountants (IESBA)¹⁸⁶ issued its new standard, “Responding to Non-Compliance with Laws and Regulations,”¹⁸⁷ which sets out a first-of-its-kind framework to guide professional accountants on actions to take in the public interest when they become aware of non-compliance with laws and regulations, including those relating to fraud, corruption and bribery. This standard is based on a public interest remit, where professional accountants may disclose illegal acts even where not required by law, if it is in the public interest to do so, and especially where there is an imminent threat to stakeholders. The standard is explicitly intended to provide a pathway to disclosure of serious identified or suspected illegal acts to an appropriate authority in the appropriate circumstances, without the ethical duty of confidentiality standing in the way. It will become effective on 15 July 2017.

The framework includes guidance on appropriate lines of response to suspected illegal acts, such as reporting to management to seek that they address the matter, deter further illegal acts, and disclose to an appropriate authority where required by law or necessary in the public interest. Where the response by management is not appropriate, the standard indicates that the accountant may consider further actions, such as disclosing the matter to an appropriate authority (this term is not further defined) even if not required by law, or withdrawing from the engagement and the professional relationship. The framework specifically states that an accountant may determine that disclosure to an appropriate authority is warranted where the entity is engaged in bribery. In exceptional circumstances, the standard indicates that the accountant may consider whether to immediately disclose the matter to an appropriate authority if imminent breach of a law or regulation that would cause substantial harm to stakeholders.

¹⁸⁴ Faye Choudhury, Chief Executive Officer of IFAC, reported in the publication “*The Accountancy Profession – Playing A Positive Role In Tackling Corruption*”, IFAC, February 2017, www.ifac.org/system/files/publications/files/IFAC-The-Accountancy-Profession-Playing-a-Positive-Role-in-Tackling-Corruption.pdf.

¹⁸⁵ *Ibidem*.

¹⁸⁶ The International Ethics Standards Board for Accountants (IESBA) is an independent standard-setting board that develops and issues, in the public interest, high-quality ethical standards and other pronouncements for professional accountants worldwide. Through its activities, the IESBA develops the *Code of Ethics for Professional Accountants*, which establishes ethical requirements for professional accountants.

¹⁸⁷ For a summary of the standard, see www.iaasb.org/system/files/publications/files/IESBA-Responding-to-NOCLAR-At-a-Glance.pdf.

Box 44. How the public withdrawal of an external auditor triggered an investigation: Addax Petroleum case (Switzerland; 2017)

In early 2017, Geneva authorities opened an investigation into the Chinese Geneva-based gas and oil company Addax Petroleum over insufficiently documented payments to Nigeria worth USD 100 million. The company was suspected of having bribed public officials of the African country in the course of its oil exploitation activities, violating art. 322 septies of the Swiss Penal Code which criminalises foreign bribery. Addax Petroleum's premises and two employees' domiciles were searched between February and April 2017.

Allegations of bribery emerged in January 2017 after Deloitte resigned as Addax's auditor saying in a public statement that it couldn't obtain "satisfactory explanations" for USD 80 million paid to an engineering company for Nigerian construction projects in 2015. Deloitte said that amount appeared excessive for the work performed "and their purpose and timing raise issues which have not been resolved." In its filing Deloitte also flagged other Addax payments from 2015 exceeding USD 20 million, made to "legal advisers" in Nigeria and the U.S from bank accounts in Nigeria and the Isle of Man, a British crown dependency. The auditing firm said it started investigating after it "received a number of whistleblowing allegations from within and outside Addax, some of which allege that such payments have been made to bribe foreign government officials and that certain amounts have been embezzled by certain members of management within Addax Petroleum Group."

Although recognising neither the bribery nor any responsibility of the company, Addax Petroleum admitted the lack of documentation regarding the investigated transfers and agreed with the Geneva Public Prosecutor Office to pay a sum of CHF 31.000.000 (USD 32 million) to the State of Geneva as "reparation" for any possible damage caused". The company also took measures to improve its systems for preserving the documentation required for payments, to ensure that any payment will be sufficiently and properly documented in the future, and indicated having updated the trainings of its employees concerning foreign bribery. Pursuant to art. 53 of the Swiss Penal Code, the Public Prosecutor considered the damage "repaired" and dismissed the case.

Media report that U.S. SEC and Justice Department have opened investigations over the same facts, alleging that part of the illicit payments were transferred through banks in New York and California.

Sources: Ministère public de Genève, Bloomberg; Le Temps

Recently, accountants and auditors have been investigated and prosecuted for failing to detect and report suspected bribery in cases where the company is ultimately sanctioned for bribery of foreign public officials. This new enforcement trend shows that the profession may have no choice but to report in order to avoid being sanctioned for negligence or complicity. In addition to the December 2013 settlement with KPMG in relation to the Ballast Nedam case, the Netherlands is reportedly investigating another accounting firm for its role in a foreign bribery scheme. Media reports similar investigations in the United Kingdom.¹⁸⁸

¹⁸⁸ The UK Financial Reporting Council is reportedly investigating KPMG over its audits of Rolls-Royce's accounts during a period in which the British engineering company has admitted it committed a string of bribery and corruption offences (www.ft.com/content/b95bfe1a-309a-11e7-9555-23ef563ecf9a). In April 2017, the Dutch financial market regulator (AFM) decided to investigate PwC for alleged complicity in bribery by a client, a subsidiary of SHV Holdings, the Netherlands' largest family-owned multinational (www.afm.nl/nl-nl/professionals/nieuws/2017/apr/aftreden-koolstra).

Box 45. Netherlands Case Study: KPMG / Ballast Nedam (2013)

In December 2013, auditing firm KPMG and three former auditors (partners) of that company were the subject of a criminal investigation conducted by the FIOD, and headed by the National Public Prosecutor's Office for Serious Fraud and Environmental Crime, for helping its client, the Dutch construction company Ballast Nedam, disguise suspicious bribe payments between 2000 and 2003.

According to the Dutch Public Prosecution Service, "the audit carried out by KPMG was deliberately done in such a way that it was possible for payments made by Ballast Nedam to international agents and the parallel administration kept in that regard to be concealed. KPMG failed to respond adequately to the signals it picked up in this regard. KPMG did not sufficiently address compliance with the due care and integrity requirements."

As a result of this investigation, and due to the cooperation of KPMG in the investigation, a settlement was reached with the firm, under which KPMG agreed to pay a EUR 7 million fine, comprising a EUR 3.5 million fine and EUR 3.5 million confiscation measure. In addition, KPMG strengthened its compliance policy through preventative and repressive measures. The preventative measures serve, for example, to identify problems at an early stage and avoid misunderstandings. The repressive measures range from reallocating tasks to severance of the employment contract. The Public Prosecution Service noted these measures and took them into consideration in the out-of-court settlement offer. The measures were further communicated to the Netherlands Authority for the Financial Markets (AFM). The AFM will include compliance with these measures in its supervision of KPMG. The investigation against three suspects, former auditors, is being continued.

Source: *Netherlands Phase 3 Written Follow-Up Report (2015)*; *Openbaar Ministerie website*: <https://www.om.nl/actueel/nieuwsberichten/@32396/kpmg-treft-schikking/>.

2. The legal profession

2.1 *The role of lawyers in detecting and reporting foreign bribery and related offences*

OECD anti-bribery instruments do not specifically address the role of lawyers in preventing or detecting foreign bribery. Nevertheless, country evaluations conducted under the Anti-Bribery Convention, and related on-site visits, systematically include the legal profession, in recognition of the role they can play in advising companies, and in potentially detecting foreign bribery. By the very nature of their professional functions, such as the setting up of corporations, trusts and partnerships, as well as sometimes conducting internal investigations, and designing and overseeing compliance programmes, private legal practitioners risk being unwillingly associated with financial crimes, including foreign bribery. For the same reason, lawyers also have a significant potential role in the detection of foreign bribery.

The legal profession is giving increasingly serious consideration to the issue of balancing lawyers' competing duties of client confidentiality with their duties of honesty to tribunals and others. In particular, the issue of whether lawyers may serve as whistleblowers against their former clients, especially when doing so results in the disclosure of confidential client information, is being considered. In this respect, studies highlight the need for lawyers to determine which jurisdiction's professional responsibility law applies, and to determine whether disclosure is permissive, mandatory

or precluded under the applicable ethics rules.¹⁸⁹ Both ethical studies and courts caution that the disclosure of client confidential information in exchange for a government bounty raises significant ethical issues for lawyers. In the 2015 *Danon v. Vanguard Group Inc.* case, the New York Supreme Court reinforces these opinions and stands to admonish attorneys against pursuing whistleblower bounties, when doing so reveals confidential materials beyond what is reasonably necessary to prevent client crime or fraud. According to the most recent US case law, lawyers are therefore subject to strict professional requirements, which preclude reporting suspected bribery by a client to law enforcement authorities, unless there are grounds for applying the exceptions to the general rule of confidentiality, as provided for by many legal systems.

Box 46. United States Case Study: Tesler / KBR Joint Venture (2012)

In February 2009, British solicitor Jeffrey Tesler was indicted and charged with one count of conspiracy to violate the FCPA and ten counts of violating the FCPA for his participation in a decade-long scheme to bribe Nigerian government officials to obtain engineering, procurement and construction (EPC) contracts. Tesler, a United Kingdom citizen, was extradited in March 2011, from the United Kingdom to the United States.

Houston-based business KBR, Technip S.A., Snamprogetti Netherlands B.V. and a Japanese engineering and construction company were part of a four-company joint venture that was awarded four EPC contracts between 1995 and 2004 to build natural gas processing facilities in Nigeria. Tesler admitted that from approximately 1994 through June 2004, he and his co-conspirators agreed to pay bribes to Nigerian government officials, including top-level executive branch officials, in order to obtain and retain the EPC contracts. The joint venture hired Tesler as a consultant to pay bribes to high-level Nigerian government officials. During the course of the bribery scheme, the joint venture paid approximately USD 132 million in consulting fees to a Gibraltar corporation controlled by Tesler. Tesler admitted that he used the consulting fees he received from the joint venture, in part, to pay bribes to Nigerian government officials. Because of Tesler's bribes the companies were estimated to have won approximately USD 6 billion in contracts between 1995 and 2004

In 2012, Tesler was sentenced to 21 months in prison, followed by two years of supervised release, fined USD 25,000, and ordered to forfeit USD 149 million.

Source: US v Jeffrey Tesler, www.justice.gov/criminal-fraud/case/united-states-v-jeffrey-tesler-et-al-court-docket-number-09-cr-098.

In the context of anti-money laundering reporting obligations, lawyers—in some jurisdictions—are only required to report suspicious transactions under a limited set of circumstances (see Chapter 6 on anti-money laundering reporting),¹⁹⁰ and sometimes even contest this requirement. For instance, the Canadian Federation of Law Societies – the

¹⁸⁹ See NYCLA Committee on Professional Ethics, Formal Opinion n. 746 (October 7, 2013), and *Fair Lab. Practices Assocs. v. Quest Diagnostics*, United States District Court for the Southern District of New York, March 24, 2011.

¹⁹⁰ According to FATF Recommendation 2(d), lawyers are subject to AML requirements for a limited set of activities as follows: (i) buying and selling of real estate; (ii) managing of client money, securities or other assets; (iii) management of bank, savings or securities accounts; (iv) organisation of contributions for the creation, operation or management of companies; (v) creating, operating or management of legal persons or arrangements, and buying and selling of business entities (FATF Recommendation 2(d)). Therefore lawyers representing parties in the proceedings are clearly not required to report suspicious activities based on the general AML obligations.

umbrella organisation that oversees the 14 Canadian law societies – challenged the decision to include lawyers and Quebec notaries in the anti-money laundering regime until the matter was settled by the Supreme Court of Canada.¹⁹¹ The Supreme Court affirmed the importance of solicitor-client privilege for the legal profession and struck down as contrary to the Charter of Rights and Freedoms certain provisions because of the risk for lawyers of breaching solicitor-client privilege. The Supreme Court of Canada also affirmed the lawyer’s duty of commitment to the client’s cause as a rule of fundamental importance to the legal profession. However, the Canadian law societies continue to regulate financial reporting and misuse of funds for lawyers and notaries as a part of the overall governance regime and to support the implementation of the Corruption of Foreign Public Officials Act.

2.1. *Encouraging detection and reporting by lawyers*

Professional associations can play a key role in regulating and encouraging detection and reporting by lawyers. At a national level, bar associations in certain countries set standards or codes of ethics to be followed by their members. For example, Article 5 of the **Mexican** Bar Association’s Code of Ethics provides that bribery of a public official is a grave violation of lawyer’s professional ethics and requires lawyers who are aware of such violations to report them to the Bar Association. The Code does not, however, provide sanctions for non-compliance.¹⁹² However, not all jurisdictions require lawyers to join a legal organisation, nor is there a systematic requirement for lawyers to comply with ethical guidelines or to update their legal expertise, including on legal ethics, regularly.

Some efforts have been made at the national level, although essentially focusing on anti-money laundering reporting. For example, the **American** Bar Association (ABA) Model Rule 1.6 permits (but does not require) disclosure of confidential information, to the extent the lawyer reasonably believes necessary, in the following circumstances: (1) to prevent death or substantial bodily harm; (2) to prevent crime or fraud “that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer’s services”; (3) to prevent, mitigate or rectify financial injury from client crime/fraud “in furtherance of which the client has used the lawyer’s services”; (4) to secure legal advice about the lawyer’s own compliance with the ethics rules; (5) for the lawyer to defend his/herself against a claim relating to the representation; and (6) to comply with law or a court order. Exceptions (2) and (3) to Model Rule 1.6(b) were added in 2003 in the wake of the Enron and WorldCom financial scandals.

The **Canadian** Bar Association and the 14 Canadian law societies, backed by the work of the Federation of Law Societies, have also pursued various avenues to ensure that lawyers understand their obligations to prevent money laundering and terrorist financing from occurring. The Federation further developed model rules for the adoption by the law societies concerning the acceptance of cash in 2004 (no-cash rule) and client

¹⁹¹ *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7. In that case, the Federation of Law Societies of Canada brought a constitutional challenge to certain provisions of the Proceeds of Crime (Money Laundering) and Terrorist Financing Act, S.C. 2000, c. 17, ss. 5 (i), 5 (j), 62, 63, 63.1, 64 — Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations, SOR/2002-184, ss. 11.1, 33.3, 33.4, 33.5, 59.4.

¹⁹² Código de Ética, Barra Mexicana, Colegio de Abogados, www.bma.org.mx/assets/codigo-etica-profesional2.pdf.

identification and verification in 2009, as Model Rules to Fight Money Laundering and Terrorist Financing.¹⁹³

At an international level, the **International Bar Association** (IBA), the world's leading organisation of international legal practitioners, bar associations and law councils, launched the Anti-Corruption Strategy for the Legal Profession in 2010, in partnership with the OECD and UNODC. Under the strategy, it has completed surveys of anti-corruption awareness and policies in the global legal profession and conducted awareness-raising seminars around the globe.¹⁹⁴ The Strategy has highlighted a concerning lack of awareness of the international anti-corruption architecture among legal professionals. A 2010 Survey conducted in the context of the Strategy found that nearly 40% of respondents had never heard of the major international instruments that make up the international anti-corruption regulatory framework, such as the OECD Anti-Bribery Convention and the UN Convention against Corruption. Only 43% of respondents to the 2010 Survey realised that their bar associations provide some kind of anti-corruption guidance for legal practitioners and of these only a third said that such guidance specifically addresses the issue of international corruption. The 2013 IBA survey, conducted among in-house legal and compliance officers, showed that more than 80 % of respondents perceived external lawyers to pose a certain level of risk of bribery and corruption, and many respondents were not confident in their lawyers' anti-corruption knowledge and expect a higher degree of anticorruption knowledge and awareness (Figure 8). It also highlighted the inaction of national bar associations in providing anti-corruption guidance and training.¹⁹⁵ In response, the IBA published an Anti-Corruption Guide for Bar Associations (IBA, 2013b).

The Guidance suggests that bar associations create “an anti-corruption ‘helpline’ for bar association members to report instances of suspected corruption, or to seek advice in matters pertaining to corruption.” More recently, in December 2016, following the London Anti-Corruption Summit, a joint OECD-IBA Taskforce on the Role of Lawyers and International Commercial Structures was launched with the aim of developing professional conduct standards and practice guidance for lawyers involved in establishing and advising on international commercial structures.¹⁹⁶ The Strategy and Taskforce are more targeted initiatives drawing on the IBA's International Principles on Conduct for the Legal Profession. In particular, they are timely reminders of Principle 5, which states ‘A lawyer shall treat client interests as paramount *subject always to their being no conflict with the lawyers duties to the court and the interests of justice, to observe the law, and to maintain ethical standards*’ (emphasis added).

¹⁹³ See <http://flsc.ca/national-initiatives/model-rules-to-fight-money-laundering-and-terrorist-financing/>. The role of lawyers in fighting corruption is being discussed more widely by Canadian lawyers and law firms, as evidenced in this research publication, *The role of lawyers in the fight against corruption: A Summary Report*, www.trust.org/contentAsset/raw-data/af585d7d-6a7f-4c65-9b5c-3b5534118c74/file.

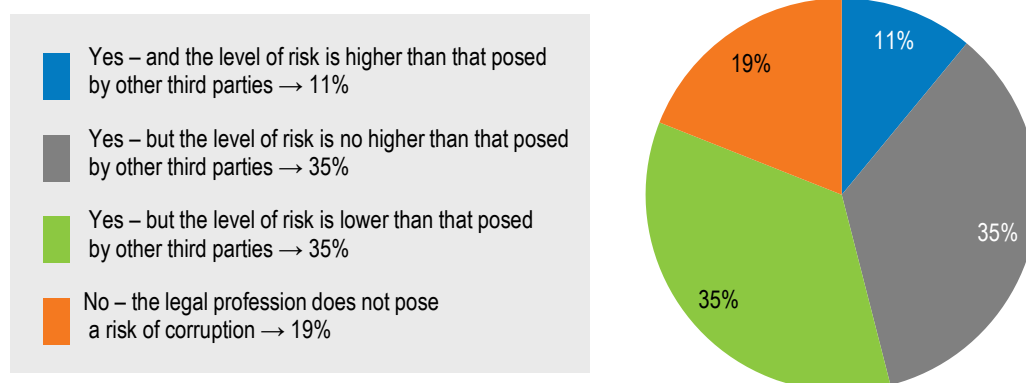
¹⁹⁴ The Anti-corruption Strategy for the Legal Profession is a joint project of the IBA, the OECD and UNODC which focuses on the role lawyers play in combating international corruption, with particular attention on the relevance of international compliance, www.anticorruptionstrategy.org/.

¹⁹⁵ See www.anticorruptionstrategy.org/AC_strategy_legal_profession_report.aspx.

¹⁹⁶ OECD and IBA join forces to develop practice guidance to equip lawyers in the fight against corruption (14/12/2016), www.oecd.org/corruption/oecd-and-iba-join-forces-to-develop-practice-guidance-to-equip-lawyers-in-fight-against-corruption.htm.

Figure 8. **Perceived risk of bribery and corruption when using external lawyers, percentage**

Question: According to your compliance standards, do external legal counsel pose a risk of bribery and corruption?



Source: IBA (2013a)

Conclusion

Because of their close relationships with companies and businesses, professional advisers such as accountants, auditors and members of the legal profession may be confronted with evidence of their clients' material violations of the law. Advisers can be instrumental in detecting foreign bribery and other corrupt acts, either directly (by identifying illicit conduct) or indirectly (such as where they uncover the illicit origin of assets). However, divergent considerations need to be reconciled to achieve a balance between the right to confidentiality between clients and their attorneys, accountants and auditors, and the public interest in having wrongful acts reported to the appropriate authorities. It is encouraging to note that advisers are becoming increasingly aware of the unique role they can play in preventing, detecting and reporting foreign bribery and other illegal activity. Associations have been proactive in developing guidelines to promote the reporting of illicit acts by professional advisers and to help professionals advise their clients on how to avoid wrongdoing. In order to support more effective and systematic detection and law enforcement in this area, countries should provide for, where necessary, and raise awareness of, reporting channels and should consider establishing mandatory reporting obligations. Countries should also take appropriate measures to ensure that training on anti-corruption issues is available to these professionals and that they are made aware of developments in this area, on an ongoing basis. Strong partnerships and ongoing dialogue between government agencies and professional associations are also essential.

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The detection of foreign bribery poses a constant challenge to law enforcement authorities as neither the bribe payer nor the bribe recipient has any interest in disclosing the offence. Contrary to many other offences, there is rarely an easily identifiable, direct victim willing to come forward. This study looks at primary detection sources which have been, or could be expected to be, at the origin of foreign bribery investigations. It reviews the good practices developed in different sectors and countries which have led to the successful detection of foreign bribery with a view to stepping up efforts against transnational bribery.

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