THE ANTI-BRIBERY AND ANTI-CORRUPTION REVIEW

EIGHTH EDITION

Editor
Mark F Mendelsohn

THE LAWREVIEWS

THE ANTI-BRIBERY AND ANTI-CORRUPTION REVIEW

EIGHTH EDITION

Reproduced with permission from Law Business Research Ltd
This article was first published in November 2019
For further information please contact Nick.Barette@thelawreviews.co.uk

Editor
Mark F Mendelsohn

THE LAWREVIEWS

PUBLISHER
Tom Barnes

SENIOR BUSINESS DEVELOPMENT MANAGER
Nick Barette

BUSINESS DEVELOPMENT MANAGER
Joel Woods

SENIOR ACCOUNT MANAGERS
Pere Aspinall, Jack Bagnall

ACCOUNT MANAGERS
Olivia Budd, Katie Hodgetts, Reece Whelan

PRODUCT MARKETING EXECUTIVE
Rebecca Mogridge

RESEARCH LEAD
Kieran Hansen

EDITORIAL COORDINATOR
Gavin Jordan

HEAD OF PRODUCTION
Adam Myers

PRODUCTION EDITOR
Anna Andreoli

SUBEDITOR
Helen Sou

CHIEF EXECUTIVE OFFICER
Nick Brailey

Published in the United Kingdom
by Law Business Research Ltd, London
Meridian House, 34-35 Farringdon Street, London, EC2A 4HL, UK

www.TheLawReviews.co.uk

ISBN 978-1-83862-073-8

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

ACKNOWLEDGEMENTS

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

ANAGNOSTOPOULOS

ANTONIN LÉVY & ASSOCIÉS A.A.R.P.I.

AZB & PARTNERS

BAE, KIM & LEE LLC

BAKER & PARTNERS

BAKER MCKENZIE

BCL SOLICITORS LLP

BLAKE, CASSELS & GRAYDON LLP

ESTUDIO ECHECOPAR, MEMBER FIRM OF BAKER & MCKENZIE INTERNATIONAL

FERRERE

HERBERT SMITH FREEHILLS CIS LLP

JOHNSON WINTER & SLATTERY

JONES DAY

MONFRINI BITTON KLEIN

MORI HAMADA & MATSUMOTO

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

SHIBOLET & CO

SOŁTYSIŃSKI KAWECKI & SZLĘZAK

STETTER RECHTSANWÄLTE

STUDIO LEGALE PISANO

TRENCH ROSSI WATANABE ADVOGADOS

CONTENTS

PREFACE

The eighth edition of *The Anti-Bribery and Anti-Corruption Review* presents the views and observations of leading anti-corruption practitioners in jurisdictions spanning the globe, including new chapters covering Argentina, Brazil, Chile, Colombia, Mexico, Peru and Venezuela. The comprehensive scope of this edition of the Review mirrors the scope of global anti-corruption activity and developments.

Over the past year, countries across the globe continued to bolster their domestic anti-bribery and anti-corruption laws, but shifting international relations and global economic competition may be undermining international cooperation. This is most clearly reflected in tensions between China and the United States and in recent comments by the chairman of the US Securities and Exchange Commission (SEC) that called into question the extent to which international cooperation is real or perceived, and whether deliberately asymmetric enforcement is disadvantaging US companies.

In China there were several notable legislative developments that affect anti-bribery and anti-corruption enforcement. The Standing Committee of the National People's Congress adopted amendments to the country's Anti-Unfair Competition Law, which came into force in January 2018. The amendments specify the range of prohibited recipients of bribes, expand the definition of prohibited bribery to include bribery for the purpose of obtaining a competitive advantage, impose, with limited exceptions, vicarious liability on employers for bribery committed by employees and provide for increased penalties. China also amended its Criminal Procedure Law to codify rules encouraging cooperation in government investigations and to permit trials in absentia, including for bribery and corruption. The new Chinese Supervision Law creates commissions with authority to supervise public functionaries and to detain suspects for prolonged periods while investigating corruption cases.

India and Japan also passed legislation bolstering their anti-corruption laws. The Indian Prevention of Corruption (Amendment) Act criminalises giving an 'undue advantage' to a public official, establishes criminal liability for companies and creates a specific offence penalising corporate management. The Japanese government has introduced a plea bargaining system, which allows individuals and companies to negotiate reduced criminal sentences in exchange for providing information regarding third parties suspected of or charged with enumerated offences, including crimes of corruption.

In Europe, the Italian parliament approved what is known as the 'bribe destroyer' law aimed at combating corruption in Italy's public sector. Among other things, the law increases the powers of prosecutors to investigate allegations of bribery, provides for increased penalties for individuals and increased sanctions for companies convicted for corruption and eases the statute of limitations for corruption cases. In Ukraine, as part of a US$3.9 billion loan programme with the International Monetary Fund aimed at prosecuting corruption

and insulating court decisions from political pressure or bribery, former President Petro Poroshenko announced the launch of a special court to try corruption cases. The United Kingdom's Serious Fraud Office published guidance on corporate cooperation describing the steps a company can take if it wants to cooperate with prosecutors in an investigation, but the guidance is silent on the specific benefits of cooperation and does not guarantee any leniency for cooperative conduct. In addition, the European Parliament adopted a proposal for a Europe-wide whistle-blower directive aimed at defining the areas of EU law eligible for whistle-blowing and who qualifies for whistle-blower protections.

Despite these significant developments in national legislation around the world, SEC Chair Jay Clayton recently lamented that, although the SEC has 'vigorously enforced' the FCPA, it has done so 'largely alone' and 'other countries may be incentivized to play, and . . . are in fact playing, strategies that take advantage of [the SEC's] laudable efforts'. Similar sentiments may be behind the Foreign Extortion Prevention Act, proposed legislation introduced in the US Congress that would allow the DOJ to indict officials for demanding bribes to fulfil, neglect or violate their official duties.

Separately, on 1 November 2018, then-US Attorney General Jeff Sessions announced a new 'China Initiative,' to counter perceived national security threats to the United States from China. The China Initiative specifies 10 goals, including identifying FCPA cases involving Chinese companies that compete with American businesses. Prior to the announcement of the China Initiative, China adopted the Law on International Criminal Judicial Assistance, which prohibits individuals and entities in China from assisting foreign countries in criminal investigations absent governmental authorisation.

Notwithstanding Chairman Clayton's remarks and the DOJ's China Initiative, senior DOJ officials have continued to affirm their commitment to international cooperation. The significant resolution, announced in March 2019, of the DOJ and SEC enforcement actions against Mobile TeleSystems PJSC, the Russian telecommunications provider, for grand corruption in Uzbekistan, relied on extensive international cooperation between US enforcement agencies and authorities in 13 different European countries, though notably not Russia or Uzbekistan. Likewise, the announcement this past June of a resolution with Technip FMC PLC, a London-headquartered provider of oil and gas technology services, relied on cooperation between the DOJ and Brazilian authorities, along with six European countries. Admittedly, however, both settlements have been years in the making and may not be an indication of the DOJ's current views on international cooperation. Even so, elsewhere in the world, most notably in the prosecution of bribery throughout Latin America, international cooperation remains a central feature of anti-corruption enforcement.

Given the numerous recent changes in domestic legal regimes, and the uncertainty in international relations, this book and the wealth of learning that it contains from around the world, will help guide practitioners and their clients when navigating the perils of corruption in foreign and transnational business, and in related internal and government investigations. I am grateful to all of the contributors for their support in producing this highly informative volume.

Mark F Mendelsohn
Paul, Weiss, Rifkind, Wharton & Garrison LLP
Washington, DC
October 2019

Chapter 22

RUSSIA

Alexei Panich and Sergei Eremin[1]

I INTRODUCTION

Although Russia was ranked 135 out of 180 countries on Transparency International's 2016 Corruption Perceptions Index,[2] sharing the spot with such countries as Mexico, Papua New Guinea and Paraguay[3], in its Third Round Evaluation Report published on 21 November 2016,[4] the Group of States against Corruption (GRECO) considered Russian anti-corruption law to be fairly robust, as anti-bribery legislation has undergone significant development over the past years and continues to improve. However, levels of corruption and financial abuse remain abnormally high. GRECO in its fourth evaluation report acknowledged that 'there are a number of strong safeguards already in place, but, at the same time, some critical issues need urgent attention'.[5]

Russia is a member of all the main international organisations and conventions on countering corruption and makes efforts to implement all recommendations and comply with international standards. For instance, significant amendments are being introduced into national legislation aimed at combating bribery and corruption. The Supreme Court (the highest criminal justice body in Russia) redrafted its binding commentary on public and commercial bribery. Even the president and other state officials stipulate that combating corruption is the core goal of the government in the coming years: in June 2018 President Putin approved a National Plan to Counter Corruption for 2018–2020, providing a list of measures aimed at further improving the institutional framework for countering corruption in Russian subjects. In December 2018, the government submitted to the State Duma a package of draft laws aimed at ensuring the uniformity of anti-corruption requirements.

However, actual enforcement levels do not indicate a strong trend of the government cracking down on corruption.

Separately, information on particular criminal cases is only available to a limited extent. Unlike the rulings of arbitrazh courts, which consider commercial disputes, the rulings of general jurisdiction courts dealing with criminal proceedings are not generally available on legal databases, which makes researching this topic somewhat more difficult.

1 Alexei Panich is a partner and Sergei Eremin is a senior associate at Herbert Smith Freehills CIS LLP.

2 www.transparency.org/news/feature/corruption_perceptions_index_2016#table.

3 According to the latest published Transparency International's Corruption Perceptions Index of 2018, Russia is ranked 138 out of 180 countries in terms of the levels of public sector corruption.

4 https://rm.coe.int/16806cc128.

5 https://rm.coe.int/fourth-evaluation-round-corruption-prevention-in-respect-of-members-of/1680794c4f.

II DOMESTIC BRIBERY: LEGAL FRAMEWORK

i Overview of the main legislation

Russian anti-bribery legislation comprises the following statutes:

a the Criminal Code of 1996;
b the Anti-Corruption Law of 2008;
c the Law on control over the spending of the state authorities of 2012;
d the Law banning certain categories of individuals from having foreign bank accounts of 2013;
e the Administrative Code of 2001; and
f the Anti-Money Laundering Law of 2001, as amended.

The 2008 Anti-Corruption Law sets out the general principles for fighting corruption. It provides a legal definition of 'corruption', which comprises active and passive bribery (including commercial bribery), misuse of public authority and other abuses of rights by an individual aimed at gaining monetary or other benefits contrary to state or public interests. This Law provides a general framework while leaving particular sanctions for corrupt activities to other pieces of legislation referred to above. One of the core ideas of this Law is transparency and control over gains made by public officials. The Law obliges certain state and municipal officials to disclose their property, income and financial obligations as well as those of their spouse and children who are minors. A separate duty exists to disclose any attempts to engage them in corruption. The Law also obliges them to disclose any conflicts between their personal interests and the public interest that may be affected.

The 2008 Anti-Corruption Law also imposes certain restrictions on the activities of officials such as receiving gifts or entertainment in connection with their official position, carrying on business activities, taking on any paid work except for teaching, science or arts, receiving remuneration for publications and presentations made in their capacity as an official, etc.

Bribery and money laundering offences are punishable under the Criminal Code. However, unlike in many other countries, in Russia only individuals can be criminally liable – legal entities cannot be. Both receiving and giving a bribe are punishable. The law provides for severe criminal sanctions (imprisonment, etc.) for individuals found guilty of these crimes.

Bribery within Russia is punishable irrespective of the nationality of the individuals involved. If bribery is committed by a Russian national outside Russia, he or she will be subject to liability under the Russian Criminal Code if there is no relevant foreign court sentence in relation to the crime. The same applies to foreign nationals who commit a crime of corruption outside Russia against the Russian state or against Russian nationals in the context of commercial bribery.

The Law on Control over the Spending of State Authorities of 2012 was widely announced as a novel anti-corruption measure aimed at reporting the earnings and spending of certain officials. While certain state and municipal officials are required to report their income, property and financial obligations (see above), not all of them are currently required to report their spending as well. This list includes high-ranking officials; for instance, officials appointed by the President, members of the board of directors of the Central Bank and officials designated by them, the Attorney General, high-ranking officials in state corporations, and judges. The reporting should cover not only the officials themselves, but also their spouses and minor children (recent amendments introduced in 2018 imposed reporting obligations on former officials as well). Although widely advertised, this Law does

not appear to be workable because of poor enforcement. As the Law only entered into force on 1 January 2017, limited jurisprudence is available: regional courts of general jurisdiction have resolved only 19 relevant cases, with 12 of these resulting in convictions.[6] Moreover, the Law does not capture the spending of officials' adult children and other relatives.

Another heavily promoted piece of legislation that was enacted in 2013 prohibits certain state and municipal officials, their spouses and minor children from opening and having accounts (deposits), keeping cash and valuables in foreign banks located outside the territory of Russia, and owning or using foreign financial instruments. The specified officials were required to close existing accounts (deposits) and cease any prohibited activity within three months of the law coming into force. The ban does not apply to officials who permanently hold public office outside the territory of Russia. So far, the only visible effect of this law was that several senators (members of the Federation Council, the upper chamber of the Russian parliament) retired or disposed of their offshore businesses.

In addition to criminal liability, the Civil Code of 1996 prohibits gifts exceeding 3,000 roubles being made to state officials and gifts between legal entities, and imposes civil law sanctions for violation of the above prohibitions. Special legislation (for instance, the Law on State Civil Service) provides for ways to deal with gifts received by governmental and other qualifying officials. Notably, irrespective of their value, gifts aimed at achieving corrupt goals are prohibited and may constitute criminal bribery. Whether the corrupt goal exists is a judgment that requires legal analysis on a case-by-case basis. For example, a gift provided to an official at the registration chamber with a view to facilitating the production of documents may be regarded as a bribe as the connection is pretty clear. The same gift to a high-level official on his or her birthday is unlikely to be regarded as a bribe unless it is evidently connected with his or her 'assistance' in a tender for a multimillion dollar contract.

The Administrative Code also provides for administrative liability (fines, injunctions, etc.) for certain misdemeanours (e.g., failure to comply with certain anti-money laundering legislative requirements (see subsection iv, below)).

Disciplinary measures may also apply to civil servants accused of corrupt practices.

ii Definition of 'public official'

'Public officials' who may be criminally prosecuted for receiving bribes include, generally, persons who act as representatives of governmental bodies or have administrative or organisational power in governmental bodies, municipal bodies, state and municipal institutions, the army, state corporations and state companies, state and municipal unitary enterprises, joint-stock companies the controlling interest in which belongs to the Russian state, a Russian subject or a municipal body. Receiving a bribe is also punishable for individuals occupying 'state positions' (i.e., those established by the Russian Constitution, federal constitutional laws and federal laws for performance of the functions of governmental bodies). A similar provision relates to individuals occupying 'Federation subject positions'. Municipal servants may be subject to criminal prosecution for bribery only in specific cases.

Unlike the Criminal Code, which gives a descriptive definition of a public official, anti-corruption legislation pursues regulatory goals and consequently provides an exact list

6 'Review of case law on applications by the prosecutor's office of the confiscation of property for the benefit of the Russian Federation in respect of which evidence of its acquisition with legitimate income has not been submitted in accordance with anti-corruption legislation' by the Presidium of the Supreme Court of Russian Federation, dated 30 June 2017.

of persons deemed public officials. We note, however, that both definitions intersect to a significant extent. Under anti-corruption legislation, the term 'public officials' includes any elected or appointed official or employee in any Russian government body in the executive, legislative or judicial branches at any level of government as well as officials who perform municipal services. In the case of non-municipal officials, pursuant to the State Service Law, the Russian government maintains a listing of the categories of employees who are considered civil servants subject to that law. In specific cases the employees of state corporations, public companies and certain other non-commercial state organisations (the Central Bank and governmental funds) should also be considered as public officials.

iii Public and commercial bribery

The Criminal Code distinguishes between bribes to state officials and bribes to officers of commercial entities (public and commercial bribery). The difference is in the identity of the person receiving the bribe. In the case of commercial bribery, the recipient is a person performing management functions in a commercial or other corporate entity, such as a CEO, board member, or a person otherwise performing organisational or management functions in such entities.

The Criminal Code provides a wide range of sanctions depending on elements of the crime and the amount of the bribe, however in this chapter we will focus only on the maximum sanctions for each crime.

iv Sanctions

The commission of a crime incurs a penalty set out in the Criminal Code. Sanctions vary depending on the gravity of the crime. Court may exercise discretion in applying a penalty within the limits set by the Criminal Code.

Apart from penalties, the Criminal Code provides for the imposition of other penal measures if certain conditions are met. One such measure is confiscation. Money, benefits or property obtained through crime are confiscated if one of the listed crimes is committed (e.g., receipt of a bribe); if these items are used to finance certain crimes (e.g., terrorism); or if the assets in question belonging to the accused are used as a means to commit a crime. When a corruption-related crime is committed, money, benefits or property conferred as a bribe are to be confiscated even if the accused is exempt from liability because of special circumstances (which are discussed in more detail below).[7] As from 2018, public officials whose employment has been terminated because of loss of credibility as a result of committing corruption-related offences are listed in a public register available on the internet.[8]

Public bribery

Receiving bribes

The maximum sanctions for public officials receiving a bribe are as follows:

a a fine of up to 5 million roubles or of the amount equivalent to income for a period of up to five years, or up to 100 times the amount of the bribe; and

b imprisonment for up to 15 years.

7 Paragraph 10 of the Resolution of the Plenum of the Supreme Court of the Russian Federation of 14 June 2018 No. 17 on Some Issues Related to the Application of Property Confiscation in Criminal Proceedings.

8 https://gossluzhba.gov.ru/reestr.

These sanctions may be combined with disqualification for up to 15 years and may also include correctional work for up to two years and compulsory work for up to five years.

Giving bribes

The maximum sanction for giving bribes are as follows:

a a fine of up to 4 million roubles or of the amount equivalent to income for a period of up to four years, or up to 90 times the amount of the bribe; and

b imprisonment for up to 15 years.

These sanctions may be combined together or with disqualification for up to 10 years and may also include correctional work for up to two years and compulsory work for up to three years.

The giver of a bribe will be released from liability if he or she voluntarily reported the bribe to the authorities or if the bribe was extorted by the official and if he or she actively assists with case clearance or the investigation (or both).

The CEO of a company on whose behalf a bribe has been paid will only be criminally liable if he or she was personally involved in giving or concealing the bribe. The CEO will not suffer any criminal liability if he or she was not aware of the bribe.

Bribery intermediation

Bribery intermediation was introduced as a separate crime and is defined as direct delivery of a bribe to the receiver at the request of either the giver or receiver of a bribe, or assistance to the giver or receiver in the negotiation or performance of the agreement between them to give and receive a bribe. A proposal or promise of intermediation is also punishable.

The maximum sanctions are as follows:

a a fine of up to 3 million roubles or of the amount equivalent to income for a period of up to three years, or up to 80 times the amount of the bribe; and

b imprisonment for up to 12 years.

These sanctions may be combined with disqualification for up to seven years.

An intermediary would be released from liability if he or she actively helped to discover or prevent the crime, and voluntarily notified the authorities of the fact that he or she had acted as an intermediary for the bribery.

Minor public bribery

Like bribery intermediation, minor public bribery was recently introduced as a separate crime and is defined as giving or receiving a bribe personally or through an intermediary for a maximum amount of 10,000 roubles. A person found guilty of minor public bribery may be fined up to 200,000 roubles or of the amount equivalent to income of up to three months or sentenced to correctional work for up to one year or limitation of freedom for up to two years, or imprisonment for up to one year.

A person who has a criminal record for bribery or bribery intermediation is sanctioned more severely for minor bribery and may be fined up to 1 million roubles or of the amount equivalent to income for a period up to one year, or sentenced to correctional work for up to three years or limitation of freedom for up to four years, or imprisonment for up to three years.

A donor of a small bribe would be released from liability if he or she voluntarily reported the bribe to the authorities or if the bribe was extorted by the official and if he or she actively assists with case clearance or the investigation (or both).

Exemptions and defences

There is, however, an exemption under which a present to an official will not constitute a bribe. Providing common gifts (e.g., flowers, sweets, perfume) would not constitute a violation, and should be analysed in connection with the above-mentioned express allowance in the Civil Code for gifts of up to 3,000 roubles. In the absence of corrupt intent, and below the 3,000 roubles threshold, a gift or entertainment will fall within this exception. There is no 'facilitating payments' exception in Russian law.

A person that has committed public bribery has two available defences under the Criminal Code. The first defence, which applies if he or she is assisting with the prosecution of the bribery, constitutes proving that the public official insisted on receiving the bribe as a condition for the commission of a certain act (or for inaction). The second defence, which applies before initiation of criminal proceedings, constitutes the person who has given the bribe voluntarily reporting it to the authorities promptly after having given it. The first defence is most likely to arise where a facilitation payment has been made, since the situation may be connected with a refusal to perform a routine action rather than any illegal actions of the official.

Commercial bribery

Giver of the bribe

The maximum sanctions for the giver of a bribe are as follows:

a a fine of up to 2.5 million roubles or of the amount equivalent to income for a period of up to two and a half years or up to 70 times the amount of the bribe; and

b imprisonment for up to eight years.

These sanctions may be combined with disqualification for up to five years and may also include correctional work for up to two years and limitation of freedom for up to two years.

Receiver of the bribe

The maximum sanctions for the recipient are as follows:

a a fine of up to 5 million roubles or of the amount equivalent to income for a period of up to five years or up to 90 times of the bribe; and

b imprisonment for up to 12 years.

These sanctions may be combined with disqualification for up to six years.

Commercial bribery intermediation

The maximum sanctions for bribery are as follows:

a a fine of up to 1 million roubles or of the amount equivalent to income for a period of up to three years or up to 70 times the amount of the bribe; and

b imprisonment for up to seven years.

These sanctions may be combined with disqualification for up to six years.

Minor commercial bribery

Minor commercial bribery has been also recently introduced in the Criminal Code and its threshold is the same as for minor public bribery. A person guilty of minor commercial bribery may be fined up to 150,000 roubles or of the amount equivalent to income for a period of up to three months, or sentenced to compulsory work for up to 200 hours or correctional work for up to one year or limitation of freedom for up to one year.

As in cases of minor public bribery, if a person has a criminal record for commercial bribery or commercial bribery intermediation then sanctions are more severe: a fine of up to 500,000 roubles or of the amount equivalent to income for a period of up to six months or correctional work for up to one year or limitation of freedom for up to two years, or imprisonment for up to one year.

Defences

A person that has committed commercial bribery, including minor commercial bribery, has a defence if he or she actively helped discover or prevent the crime, and either he or she voluntarily reported the bribery to the authorities or the bribe was extorted by the official. An intermediary would also be entitled to a similar defence.

Bribery provocation

Criminal liability for bribery provocation has recently been introduced to the Criminal Code. It may arise, for example, for a person who attempts to bribe a public official or an official in a commercial organisation without their knowledge or consent with the purpose of artificially producing evidence of bribery or blackmail as a result of collaborating with law enforcement authorities trying to conduct an investigative action of doubtful legality.

Administrative liability

The Administrative Code imposes monetary sanctions on both public officials and private parties for a wide variety of minor offences that may fall under the umbrella of corrupt activities. Examples include bribing voters, customs violations, various types of non-performance of duties by public officials, failure to follow court and administrative orders, the use of false information, and public health violations. Furthermore, an offender can be subject to procedural provisional measures such as arrest, arrest of assets, and temporary prohibition of a legal entity's activities.

As already mentioned, legal entities cannot be held criminally liable in Russia. To rectify this, in 2009 administrative liability was introduced in the form of a penalty that can be imposed on any legal entity found to have been involved in bribery. According to amendments in effect from January 2019, liability for these actions may be imposed on any legal entity even if they are committed in the interests of related entities, affiliated organisations, or subsidiaries.

A legal entity that benefits from a bribe given by its employee or an intermediary is subject to a fine that depends on the amount of the unlawful remuneration paid. The maximum sanction is a fine of up to 100 times the amount of the bribe, which cannot be less than 100 million roubles, plus seizure of the pay-off. In addition, the legal entity can be subject to an arrest of assets.

A legal entity has two available defences, which are generally similar to those set out in the Criminal Code. Exemption from liability would be granted to the legal entity that had committed the offence if it helped to uncover the offence, contributed to its administrative investigation and resolution; or if extortion had taken place in relation to the legal entity.

III ENFORCEMENT: DOMESTIC BRIBERY

As mentioned in Section I, information on criminal cases in Russia is only available to a limited extent.

Until a court ruling on the matter is issued, the case materials may be covered by investigation privilege. Information relating to investigations and any findings are required to be kept secret except in a limited number of circumstances. Unauthorised disclosure of such information would give rise to criminal liability.

The non-disclosure obligations apply to all persons involved in the investigation process (members of law enforcement agencies, suspects, victims, witnesses, etc.). The officials of the relevant investigating authority will notify other participants involved in the investigation that disclosure of any such information will incur criminal liability. The latter must acknowledge this notification in writing. Similarly, tipping-off in relation to anti-money laundering investigations is prohibited. Banks, credit institutions, accountants, lawyers, notaries and other persons may not disclose the fact that their client is being investigated. The above explains why very limited information may be publicly available at the investigatory stage.

After the case is considered by the court, a court ruling is published, but not necessarily in the aggregated databases. This adds difficulty to summarising the enforcement practices for these matters.

Occasionally the Supreme Court publishes its guidelines on various types of crimes. The latest guidelines on public and commercial bribery were published on 9 July 2013 and amended on 3 December 2013. Although largely reworded, they are more or less in line with the previous guidelines issued in 2000 and amended several times.

IV FOREIGN BRIBERY: LEGAL FRAMEWORK

Giving a bribe to a foreign public official or an official of an international public organisation is punishable in Russia under the Criminal Code in the same manner as giving a bribe to a Russian public official.

A foreign public official is any person appointed or elected to any position in a legislative, executive, administrative or judicial body of a foreign country, as well as any person performing public functions for any foreign state, including for a public body or public corporation (the Supreme Court gives the following examples: a minister, mayor, judge or prosecutor).

Officials of an international public organisation are defined much more narrowly: these are the members of parliamentary assemblies of the international organisations that Russia is a party to, or the individuals occupying judicial positions in any international court acknowledged by Russia.

Russian legal entities conducting illegal activities outside Russia are subject to administrative liability if the violation is directed against the interests of Russia or in cases stipulated by international treaties ratified by Russia. The same approach is applicable to

foreign legal entities that commit bribery acts counter to the interests of Russia. The provisions should not apply where the violating entity has already been brought to administrative or criminal liability by the foreign state.

V ASSOCIATED OFFENCES: FINANCIAL RECORD-KEEPING AND MONEY LAUNDERING

As mentioned in Section II.i, in Russia, a criminal prosecution may only be carried out against individuals and not companies. To that end, financial recording and internal compliance procedures would normally have nothing to do with the criminal prosecution of corruption and bribery. At the same time, if, for instance, the bribe is paid out of a company's funds, its management or other people involved in the payment could be accused of being complicit in the bribery.

The Anti-Money Laundering Law governs anti-money laundering activities and generally complies with international anti-money laundering standards, as confirmed by the Financial Action Task Force.

Pursuant to the Criminal Code, a money laundering offence is committed where financial operations and transactions involving property obtained by illegal means are entered into to make the possession, use and disposal of the property appear lawful. As such, where a company is in possession of the proceeds of a contract obtained by corruption, the possession is unlikely of itself to constitute money laundering (although corrupt individuals would be subject to criminal proceedings). However, where the proceeds are then used in subsequent transactions, the transactions would be deemed to be money laundering.

VI ENFORCEMENT: FOREIGN BRIBERY AND ASSOCIATED OFFENCES

In recent years, Russian investigatory authorities have not reported any successful foreign bribery investigations.

VII INTERNATIONAL ORGANISATIONS AND AGREEMENTS

As mentioned in Section I, Russia is a member of all the main international organisations and conventions aimed at countering corruption activities.

On 9 May 2006, Russia ratified the UN Convention against Corruption (2003); on 4 October 2006 it ratified the Council of Europe Criminal Law Convention on Corruption; and on 1 February 2007 it became a member of GRECO.

Further, on 17 February 2012, Russia ratified the Organisation for Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997).

VIII LEGISLATIVE DEVELOPMENTS

On 9 January 2014, the Russian government issued a regulation relating to anti-corruption. According to the new regulation, public officials shall inform their employees of any gifts received in connection with their position. In light of the new regulation a possibility of interpretation exists whereby employees of state-owned legal entities would be subject to the same rules as public officials with respect to the prohibition on making gifts to them.

No clarification has yet been given as to the operation of this regulation. The practice shows so far that these could be state-owned federal state institutions incorporated to perform not-for-profit activities. The recent draft law covering amendments to several legislative acts, including the Anti-Corruption Law introduced to the State Duma, proposes a uniform approach to compliance with anti-corruption requirements for not only public officials, but also employees of both non-profit and for-profit state-owned legal entities. In addition, the draft provides a specific list of gifts that will be deemed acceptable for the mentioned persons.

The draft also broadens the disciplinary measures applied to individuals occupying state or federation subject positions who are accused of corrupt practices.

We note that Russian anti-corruption legislation continues to improve every year to fulfil the country's obligations under international agreements. However, the process takes time and the amendments proposed are not flawless. Following its rejection, a draft law introduced in 2016 on strengthening liability for corruption was split into two (which, as GRECO mentions, 'may cast doubts over the robustness of the legal framework'). Both drafts were subsequently introduced in July 2017, proposing amendments regarding criminal liability for corruption-related crimes. At the moment both drafts are still pending and have yet to pass their first reading in the State Duma (the lower chamber of the Russian parliament).

Among the more successful, a draft law regarding the period of administrative investigations in cases of unlawful remuneration on behalf of a legal entity should be mentioned. The draft proposes to extend the period from two to 12 months on the basis of a decision of the head of a higher-level prosecuting authority in cases related to the execution of a request for legal assistance sent to a foreign state. The draft has passed its first reading in the State Duma.

IX OTHER LAWS AFFECTING THE RESPONSE TO CORRUPTION

There are several issues that should be kept in mind with respect to the specifics of the Russian anti-corruption regime.

i Self-incrimination

Russian law recognises the privilege against self-incrimination in relation to all types of investigations in Russia. There is a right of silence for a suspect but no such right for a witness. If a witness avoids giving testimony without just cause, he or she may be compelled to attend court or meet with investigators to give evidence.

ii Advocates

As a general rule, in criminal investigations legal assistance is provided by qualified 'advocates'. Advocates are legal professionals admitted to advocacy practice upon passing the Bar exam. Communication between the advocate and his or her client is legally protected but to a much lesser extent than in certain Western jurisdictions where legal professional privilege applies. This legal protection covers all information connected with an advocate's legal assistance to the client. The advocate cannot be subject to interrogation concerning information he or she became aware of while providing legal assistance to his or her client. Documents and other materials received from the client in connection with providing legal assistance cannot be seized. Any lawyers who are not advocates do not enjoy any legal privilege with respect to the communications and documentation between them and their clients.

iii Plea-bargaining

Although there is no formal plea-bargaining under Russian law, the Criminal Code provides for an option for the suspect or accused to minimise his or her liability for the bribery (and generally for other crimes) he or she committed if one of the following conditions is met:

a the accused comes forward with a plea and actively contributes to the detection and investigation of the crime;

b the accused enters into a pretrial agreement on cooperation with the prosecutor; or

c the case against him or her is examined in a special procedure (i.e., when accused agrees with the charges against him or her and applies for a special procedure without full investigation of the crime).

Depending on the specific type of crime and the applicable options (from those mentioned above), the sentence of the accused may be between half and two-thirds of the sentence that would have been imposed in the absence of the abovementioned circumstances. It is, however, difficult to determine the length of the sentence in each case as this remains at the court's discretion.

iv Whistle-blowing

There is no general whistle-blowing obligation under Russian criminal law. However, such an obligation does exist under anti-money laundering legislation. Banks, lawyers, notaries, accounting organisations and certain other groups of persons are under an obligation to report to the regulator any transactions by their clients (without tipping their client off) that breach the anti-money laundering legislation and fall within certain categories, including:

a transactions involving 600,000 roubles or more;

b receipt of monetary funds in the amount of 100,000 roubles or more by Russian non-commercial entities from foreign states, international organisations, foreign companies, citizens of foreign states and stateless citizens, and expenditure of the same;

c receipt of cash by an individual with a payment card if the latter is issued by a foreign bank registered in the territory of a foreign state or administrative-territorial unit of a foreign state included in the list approved by the authorities;

d crediting and debiting accounts in an amount of 10 million roubles or more of Russian companies, federal unitary enterprises and state corporations and companies, as well as public law companies that are of strategic importance for the military industrial sector and security of Russia, and companies under their control;

e crediting and debiting special accounts of a head contractor or a contractor performing a state defence order; the first crediting of such accounts from other special accounts of 600,000 roubles or more; and the second and subsequent crediting and debiting of the above-mentioned accounts of the legal entity performing the state defence order from or to other special accounts of 50 million roubles or more;

f real estate transactions involving 3 million roubles or more if as a result of the transaction title to the real estate property would be transferred to another person;

g transactions entered into by a person or a legal entity known to be involved in extremism or terrorism;

h transactions entered into by an individual or a legal entity included in the list of individuals or legal entities implicated in the proliferation of weapons of mass

destruction, or a legal entity directly or indirectly owned or controlled by such listed individuals and legal entities, or any individual or legal entity acting on behalf or on the instructions of such individuals and legal entities; and

i any other suspicious transactions that could reasonably be related to money laundering or terrorist financing.

Failure to comply with this obligation may trigger an administrative liability, namely a fine of up to 1 million roubles, or result in the company's activities being suspended for up to 90 days. It may also trigger the revocation of a licence to carry out banking operations. Companies would not have to report themselves for money laundering if they suspect a contract had been obtained by bribery where they were in possession of the proceeds of a crime. While a money laundering offence might be committed by a company if it subsequently used that sum, there would be no obligation on the company to report itself for money laundering. However, it might be prudent for a company to consider reporting the matter to the authorities. Furthermore, in the absence of a general 'whistle-blowing' obligation under Russian criminal law, the concealment of a gravest crime (if not promised in advance) constitutes a crime itself. If the concealment was promised in advance, it may constitute crime complicity. Recently, the failure to report crimes connected with terrorism and certain other crimes was introduced as a separate crime into the Criminal Code.

X COMPLIANCE

The workability of compliance programmes in Russia is not guaranteed, in particular with respect to criminal prosecutions. At the same time, they could serve well before the regulator and investigators in anti-money laundering proceedings.

The changes to anti-corruption legislation in 2013 tried to encourage Russian companies (which thus far have not adopted any anti-corruption compliance measures) to change their mindset, as new provisions came into effect setting forth various anti-corruption measures that may be used by companies. This stimulus hardly worked because of the non-mandatory 'may' form of wording used by the law. However, unlike many Russian companies, the Russian Ministry of Labour did pay attention to the new amendments and prepared best-practice guidelines, the 'Methodical Recommendations on Development and Implementation by Organisations of Measures for Preventing and Counteracting Corruption' (the Recommendations), amended as of 8 April 2014. Although the Recommendations are not binding, the actions of the Ministry hint that the government may in the near future start enforcing the anti-corruption provisions of the legislation with respect to compliance programmes.

XI OUTLOOK AND CONCLUSIONS

As can be seen from the above discussion, Russian anti-corruption and anti-bribery legislation has developed significantly over the past few years.

Currently, the effective enforcement of the existing legal framework is a significant challenge for the government. It remains to be seen how it will work in practice.

We expect more clarity on the matter in the coming years.

Appendix 1

ABOUT THE AUTHORS

ALEXEI PANICH

Herbert Smith Freehills CIS LLP

Alexei Panich is a partner at Herbert Smith Freehills, where he is an advocate and head of the dispute resolution and investigations practice in Moscow. He has been representing clients for more than 18 years in banking, commercial, construction, fraud and regulatory cases, as well as in bankruptcy proceedings. Alexei has extensive experience advising on complex Russian and international litigation and arbitration matters affecting the activities of both foreign investors and national Russian companies. Alexei advises clients on all types of investigations, including formal investigations arising in connection with the UK Bribery Act and the US Foreign Corrupt Practices Act (FCPA), and internal investigations, initiated by the company head office, into employees of Russian subsidiaries.

SERGEI EREMIN

Herbert Smith Freehills CIS LLP

Sergei Eremin is a Russian-qualified lawyer specialising in national and cross-border structuring, corporate and individual taxation, investigation and litigation. Sergei has significant experience in advising clients on anti-bribery and corruption issues, including with respect to the Foreign Corrupt Practices Act and the UK Bribery Act. Sergei has participated in numerous investigation projects and assisted clients in the development of their compliance systems. Sergei is active in dispute resolution and litigation.

HERBERT SMITH FREEHILLS CIS LLP

10 Ulitsa Nikolskaya
Moscow 109012
Russia
Tel: +7 495 363 6500/6515/6887
Fax: +7 495 363 6501
alexei.panich@hsf.com
sergei.eremin@hsf.com
www.herbertsmithfreehills.com

an LBR business

ISBN 978-1-83862-073-8