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The Verdict

Round-up of corporate crime developments across CMS

Summer 2017

Czech spotlight

Four significant changes to Anti-Corruption laws

Extension of corporate criminal liability

The Czech Republic first recognised that legal entities could be criminally liable in the 2012 Act on Criminal Liability of Legal Entities and Proceedings against Them (the "**Act**"). For such liability to arise, the governing body, the executive of the legal entity or an employee must have committed at least one of the crimes listed in the Act. On 1 December 2016, an amendment to the Act came into force, increasing the number of crimes that can be committed by legal entities from 83 to approximately 200. Some noteworthy examples of newly imputable crimes are a violation of obligations of trust, damage to a creditor, favouring creditors and causing bankruptcy.

The amendment also contains a new defence for legal entities, not only in respect of their employees, but also persons in a leading or governing role. Provided that the legal entity can prove it had "*undertaken all the effort that can be reasonably required*" to prevent a crime being committed, and the crime was committed by a person in a governing or leading role in the company, or an employee while exercising his/her tasks, the entity will avoid liability. This is in keeping with similar concepts in other countries, such as the corporate offence in the UK Bribery Act, where corporates can avoid liability for failing to prevent bribery if they can show they had in place adequate anti-bribery procedures.

The Supreme State Prosecutor Office has published guidelines with examples of possible measures that could be adopted by legal entities in order to prevent crimes being committed, including internal regulations, training, ethical codes, anti-bribery and corruption programmes and appointing a corporate ombudsman. It is not necessary for a legal entity to adopt all of these measures, but it is essential for companies to implement the measures that are reasonably required, then control and assess their impact.

Premeditation of Tax Evasion

On 1 July 2016, an amendment to the Criminal Procedural Code and Criminal Act came into force, introducing criminal liability for the premeditation of avoidance of taxes, fees and similar mandatory payments ("**Tax Evasion**"). The premeditation (i.e. the deliberate creation of conditions for committing a crime) of Tax Evasion is now listed as punishable provided that the evasion amounts to a minimum of CZK 5,000,000 (EUR 185,000). The amendment has also further extended the scope of Tax Evasion by making it possible to initiate criminal proceedings where an offender premeditates, attempts or commits Tax Evasion in connection with an organised group operating in several states.

Temporary suspension of criminal prosecution

The 1 July 2016 amendment of the Criminal Procedural Code also enables a police authority to decide temporarily to suspend the criminal prosecution of a suspect if the suspect provided or promised to provide a bribe solely because he or she was requested to do so, then notifies the authorities willingly and offers full and truthful testimony about the crime in both preliminary and court proceedings. Should the suspect fail to comply with his/her undertaking to assist the police, or if new facts emerge, the police can recommence the prosecution at a later date.

A new criminal sanction

On 18 March 2017, a new sanction was introduced into Czech anti-corruption law, namely confiscation of a person's property. A court may impose this sanction if it concludes that the particular property originated from the proceeds of criminal activity.

CMS round-up

Belgium: New guilty plea procedure adopted

Over the past year, the Belgian public prosecutor has made regular use of the new "guilty plea" procedure, particularly in white collar crime proceedings. Since February 2016, the prosecutor (on its own initiative or at the request of the defendant or his lawyer) can offer an agreement allowing the defendant to "plead guilty". Through such an agreement, the public prosecutor proposes a sentence that is generally a lesser sentence than would otherwise be imposed, providing an incentive for the defendant to agree. The prosecutor may also propose that the sentence be suspended. By entering into the agreement, the defendant acknowledges his guilt and accepts the proposed sentence. If the Court approves the sentence, it will sentence the defendant pursuant to the agreement. The Court may refuse to approve the agreement if it considers that the legal conditions have not been met or the proposed sentence is not appropriate for certain reasons. Given that the guilty plea procedure can take place at any stage prior to a final judgment and given the (infamous) duration of Belgian criminal proceedings, the procedure should prove a useful way of simplifying the process in straightforward cases.

France: Law requires mandatory compliance programmes

On 9 December 2016, the French Parliament adopted the "Sapin II" law, which provides for the setting up of an anti-corruption agency responsible for the prevention and detection of corruption in France, and sets out new measures designed to change the behaviour of companies. It requires certain large companies/groups of companies and public bodies to adopt compliance programmes designed to prevent and detect acts of corruption in France or abroad. The programmes must contain eight specific measures, including: (i) implementing a code of conduct; (ii) implementing an internal alert system for employees; and (iii) corruption risk mapping to analyse the company's exposure. The penalty for failure is a fine of up to EUR 1 million. The prosecutor may also now offer a public interest legal settlement, akin to a "deferred prosecution agreement", in which case the fine imposed may be higher – up to 30% of the company's turnover. Sapin II also requires companies with more than 50 employees to implement whistleblowing procedures for staff and establishes protections guaranteeing anonymity/ confidentiality for the whistleblower, the persons targeted by the alert and the information that is gathered.

Germany: Anti-money laundering directive transposed

On 17 May 2017, the German Parliament passed a law transposing the Fourth EU Anti-Money Laundering Directive. The law reduces the burden of establishing anti-money laundering measures on the non-financial sector, specifically "traders in goods" companies, who will only be required to perform "know your client" (KYC) checks for cash transactions above the threshold amount of EUR 10,000. Previously, all traders in goods had to perform KYC checks for all cash transactions or other transactions in suspicious cases, and were also required to establish formal risk-based safety measures such as internal controls or employee training. The German practice had always been considered an "over-transposition" of the Third EU Money Laundering Directive. With suspicious transaction reporting still deficient outside the financial sector in Germany, traders in goods remain obliged to perform KYC for suspicious transactions and to report suspicious activity to a re-designed financial intelligence unit, which will be moved from the federal police office to the federal customs office. Germany is not expected to meet the 26 June 2017 deadline for the establishment of a nation-wide transparency register, which will probably not be operational before 2018.

Italy: Scope of bribery offence extended

On 14 April 2017, a Decree on bribery in the private sector came into force, finally implementing a Council of the EU Decision of 2003. The first key change is the modification of the bribery offence, including: (i) extending the scope of the offence from commercial companies to any "private entity"; (ii) extending the scope to include bribery through intermediaries and recognising that individuals with executive functions are capable of bribing on behalf of a company ; (iii) expanding the range of behaviours relevant for the offence; (iv) eliminating the requirement for the bribery to cause "damage to the company"; and (v) providing for prosecution to be possible when a distortion in competition in the supply of goods and services derives from the criminal conduct. The law also introduced the crime of incitement of private-sector bribery.

Poland: Confiscation of assets rules adopted

In April 2017, a law came into force implementing new rules on the confiscation of assets connected with a crime. The changes include: (i) confiscation of the entire enterprise owned by an individual (not a legal entity), if used to commit a crime or hide the proceeds of a crime and (ii) compulsory company management by a manager appointed by the prosecutor or court, depending on the phase of the proceedings, as a new interim measure of securing, among other things, confiscation and sanctions that may be imposed on a corporate entity. Another significant change relates to a presumption that proceeds relating to assets obtained in the period from up to five years prior to committing the crime and until the ruling of the court of first instance convicting the perpetrator have criminal origins. This measure is possible in case of some more serious offences only, in particular if the perpetrator obtained a benefit from the crime equivalent to c.a. EUR 50,000, or participated in organised crime. The amendment also extended the ability to use evidence obtained via operational surveillance (e.g. police wire-tapping).

Portugal: Appeal of *Face Oculta* corruption case

In April 2017, the Appellate Court of Oporto issued its final award in the "*Face Oculta*" case, which was the first large scale corruption investigation in Portugal. The criminal investigation commenced nine years ago, the case underwent 180 court sessions and the trial lasted for three years. The case involved thirty four individual defendants, including well-known politicians and notorious businessmen, all of whom were convicted and imprisoned. CMS Lisbon advised two defendants - directors of a public utilities company – who were acquitted on appeal. However, thirty of the initial thirty four individual convictions were confirmed on appeal.

Russia: Anti-corruption law amended

Russia is widely assumed to have a high level of corruption (according to international studies and ratings) and a number of anti-corruption measures have been implemented over the past decade, most recently in 2016 and 2017. In July 2016, amendments to anti-corruption legislation were adopted extending criminal liability for assisting in bribery or acting as intermediary in bribery, which had previously only covered bribery of civil servants or state officials. In June 2017, amendments to a number of legislative acts came into force introducing a ban on public officials (as well as their spouses and minor children) opening and holding bank accounts and assets in banks abroad, as well as owning and using foreign financial instruments. In line with strict anti-corruption rules, the legislator has also recently obliged Russian legal entities to disclose information about their beneficial owners at the request of government authorities.

Serbia: Amendments to the Criminal Code and Seizure and Confiscation Law

On 23 November 2016, the Serbian Parliament adopted a series of anti-corruption laws, including amendments to the Criminal Code (the "**Code**"). The amendments, which largely came into force on 1 June 2017, bring the Code in line with EU, Council of Europe and UN standards. The key amendments include changes with respect to criminal offences against economic interests (i.e. white-collar crime), increasing the number of criminal offences in the Code to 29 (previously 25). Three existing offences have also been decriminalised (abuse of authority of a responsible person, issuing a cheque and use of payment cards without coverage, and misleading customers. In a further development, the Serbian Parliament also adopted amendments to the Law on Seizure and Confiscation of the Proceeds from Crime (the "**Seizure Law**"). The amendments are generally focused on making the procedure for seizure and confiscation more efficient (e.g. appeal has now become the only legal remedy available to the property owner). The Seizure Law will now also apply to, among others, criminal offences against economic interests, and introduces the possibility of confiscation of assets of the same value as the proceeds of crime if the proceeds themselves are not available. Finally, it extends the deadline for the public prosecutor to file a request for confiscation of assets to six months from the date of the final judgment.

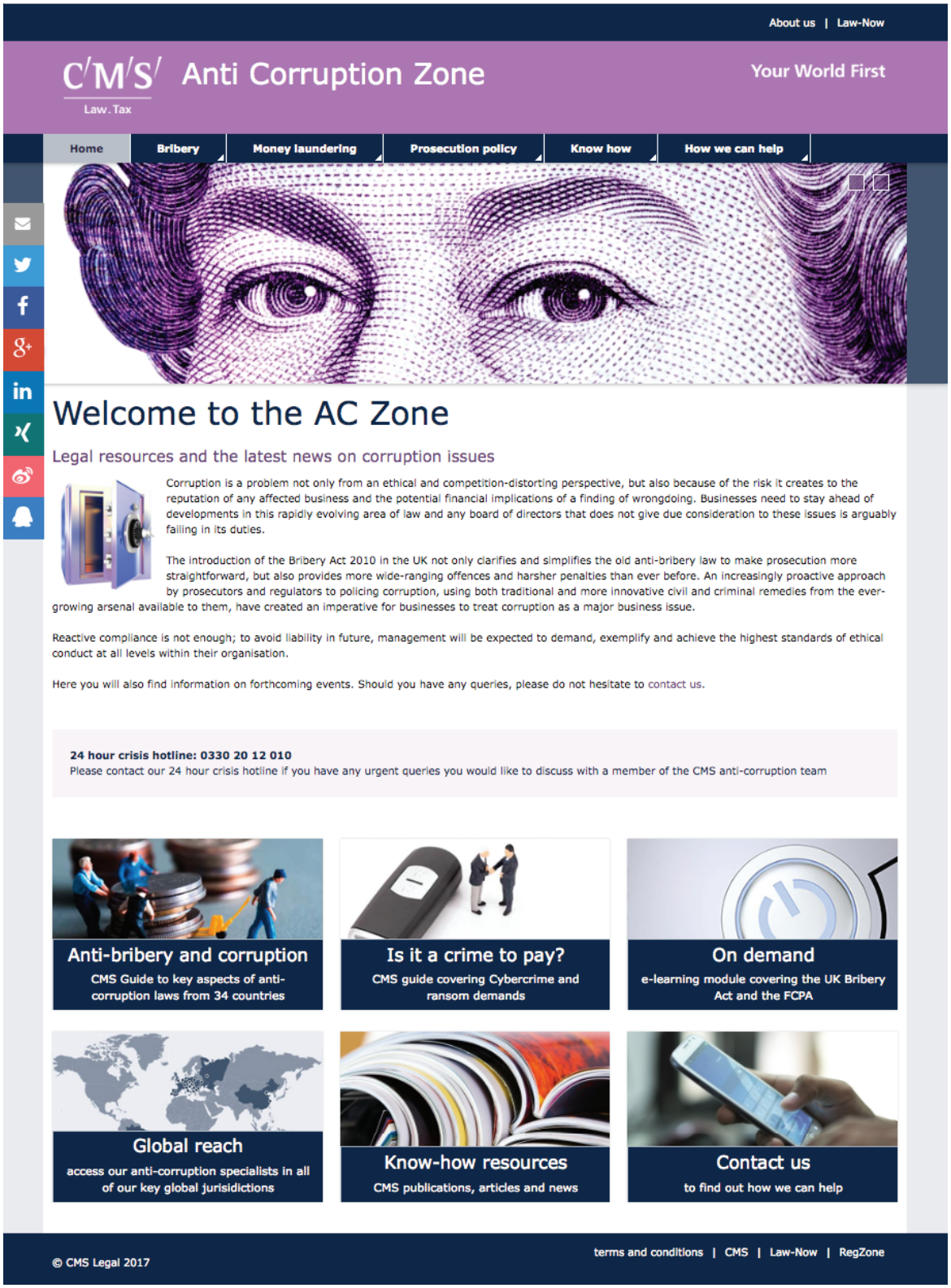
Switzerland: Court examines privilege in internal investigations

On 20 September 2016, the Swiss Federal Tribunal held that legal professional privilege did not prevent prosecutors from accessing documents produced by lawyers. Two law firms had been retained by a Swiss bank to carry out an investigation of suspected contraventions of laws by the bank's employees, and provide strategic legal advice on a defence for the bank. The firms interviewed the employees, made file notes and produced a report. When the federal prosecutor demanded disclosure of the documents, the bank asserted privilege. In considering legal advice privilege, the Tribunal held that the law firms had performed tasks as part of an "*outsourced compliance controlling process*". The fact that the internal investigation had been conducted by lawyers did not alter the nature of the tasks, which constituted non-legal work. The judgment has been controversially received, as the collation of facts and their legal analysis are often inseparable elements of one and the same mandate. It illustrates the importance of placing an internal investigation into the wider context of specific legal work, and carefully considering the format in which information collected by lawyers is presented to a client, given the risk of later disclosure to criminal investigation authorities.

UK: SFO overcomes privilege claim for internal investigaton documents

On 8 May 2017, in *Director of the SFO v ENRC*, the English High Court held that certain documents created by a company's legal advisers during an internal investigation were not protected by legal professional privilege and must be disclosed to the Serious Fraud Office ("**SFO**") (the prosecutor) as part of its criminal investigation. A law firm had conducted an internal investigation into allegations of corruption, creating interview notes and a draft report during a period of dialogue and an agreement to cooperate with the SFO as part of its self-reporting process. The judge found that as part of the basis of litigation privilege is the contemplation of adversarial proceedings, where a criminal prosecution was not reasonably contemplated (as opposed to an investigation by the authorities), litigation privilege could not apply. This was important as litigation privilege provides wide protection for lawyer work product, including documents relating to the litigation that go beyond merely giving or seeking legal advice. The judge also noted that it is harder to claim litigation privilege in the criminal context than in a civil one because the commencement of criminal proceedings requires a high threshold test to be met that does not exist in civil cases. In addition, where lawyers are instructed in a purely investigatory, 'fact-finding' role, their work product will not be covered by legal advice privilege as the work does not involve legal advice. So a mere record of an interview would not be protected. The company has stated it intends to appeal.

For further resources and the latest news on corruption issues, visit **CMS' Anti-Corruption Zone**: www.cms-lawnow.com/aczone



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