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Letter FROM THE EDITORS

"If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary."
The Federalist Papers, No. 51 (1788).

So wrote James Madison, the principal architect of the U.S. Constitution, to explain the divisions of power in government "essential to the preservation of liberty." We can surely extend this basic insight into human nature to the vital, if more prosaic, topic of the present issue of the Bulletin: corruption, in all its many forms, public and private. We need institutions to enforce agreed upon norms of conduct, but at the same time we need norms and institutions that protect against government misconduct and overreach. The articles in this issue of the Bulletin explore this dilemma in different ways.

In "The FCPA at 50," **Andrew Wise*** gives us a wide-ranging overview of legal trends that affect one of the most important and powerful anti-corruption tools – the Foreign Corrupt Practices Act (FCPA). Andrew describes the tension between successes at the corporate level, with companies acknowledging corrupt payments and adopting internal controls, and the mixed results when the government has prosecuted individuals. The article also highlights broader legal developments that may tend to work against these very internal controls and limit government efforts to prosecute individuals and companies on the basis of expansive readings of statutes.

In her article, "Buying Influence or Supporting Democracy," **Judith de Boer*** addresses an issue that we cannot shake in democratic systems with electoral politics: when does a contribution to a candidate or a political party turn into a bribe? In a free society citizens can (and should) support candidates and parties which provide legitimate constituent services, and with which the donors are in agreement on issues. But we also know this can cross the line into buying influence. Judith addresses these challenging issues in the context of a high-profile case in the Netherlands in which individual donors to a political party were charged with, and acquitted of, corruption.

In "The James Stone Case: Overcoming legal challenges to the return of corrupt funds from Luxembourg to Peru," Oscar Solórzano discusses the ongoing legacy of corruption linked to Peru's former dictator, Alberto Fujimori, and the struggle by the Peruvian justice system to recover assets associated with corrupt activities from his administration. Drawing on Basel Institute's experience assisting Peruvian authorities, Solorzano examines the asset recovery case involving Peru and Luxembourg. The case highlights the challenges victim states face when attempting to recover the proceeds of corruption from international financial centers, and offers valuable lessons for both victim states and countries holding assets linked to historical corruption.

In "Israel's War Against Terror Financing – What Have We Learned Since October 7," **Hadar Israeli*** and Eran Elharar discuss one of the many effects of the devastating attack on Israel by Hamas terrorists on October 7, 2023 – a recognition of the vital importance of using legal mechanisms in Israel to fight the financing of terror organizations. The article describes some of the challenges Israel's government authorities face in this effort, including terror organizations' use of not-for-profit organizations and informal money-transfer and banking systems to conceal the funding of their activities.

In “Corruption of Foreign Public Officials and Influence Peddling: Recent Developments in Italian Law and Case Law”, **Roberto Pisano**,* **Ernesto Gregory Valenti*** and Sara Capogna discuss the extensive debate generated by the introduction of the offence of influence peddling in the Italian Criminal Code. In the context of two of Italy’s most recent (and most famous) corruption cases, Eni-Algeria and Eni-Nigeria, they explore the challenges that arise from this offense, particularly the ambiguity surrounding the intermediary’s role, the definition of “influence,” and the risks that arise from the criminalization of legitimate social and professional interactions that are integral to decision-making processes and fiduciary relationships.

The article by **Dorothy Siron***, “Shadows of Integrity: Unravelling Corruption in Hong Kong’s Legal Landscape,” looks at the evolution of Hong Kong’s legal framework for combatting bribery and corruption and the role of the Independent Commission Against Corruption (“ICAC”). While some challenges persist, the framework provides a robust model that can serve as a blueprint for other jurisdictions.

These rich and diverse articles have only scratched the surface of the phenomenon of public and private corruption – a phenomenon that will always be with us, but one that requires vigilance if it is not to spread and encroach further on legitimate private and public activities. In future issues of the Bulletin we will no doubt have additional contributions that shed light on the problem of corruption. It is a subject great and continuing importance to the Academy and its fellows.

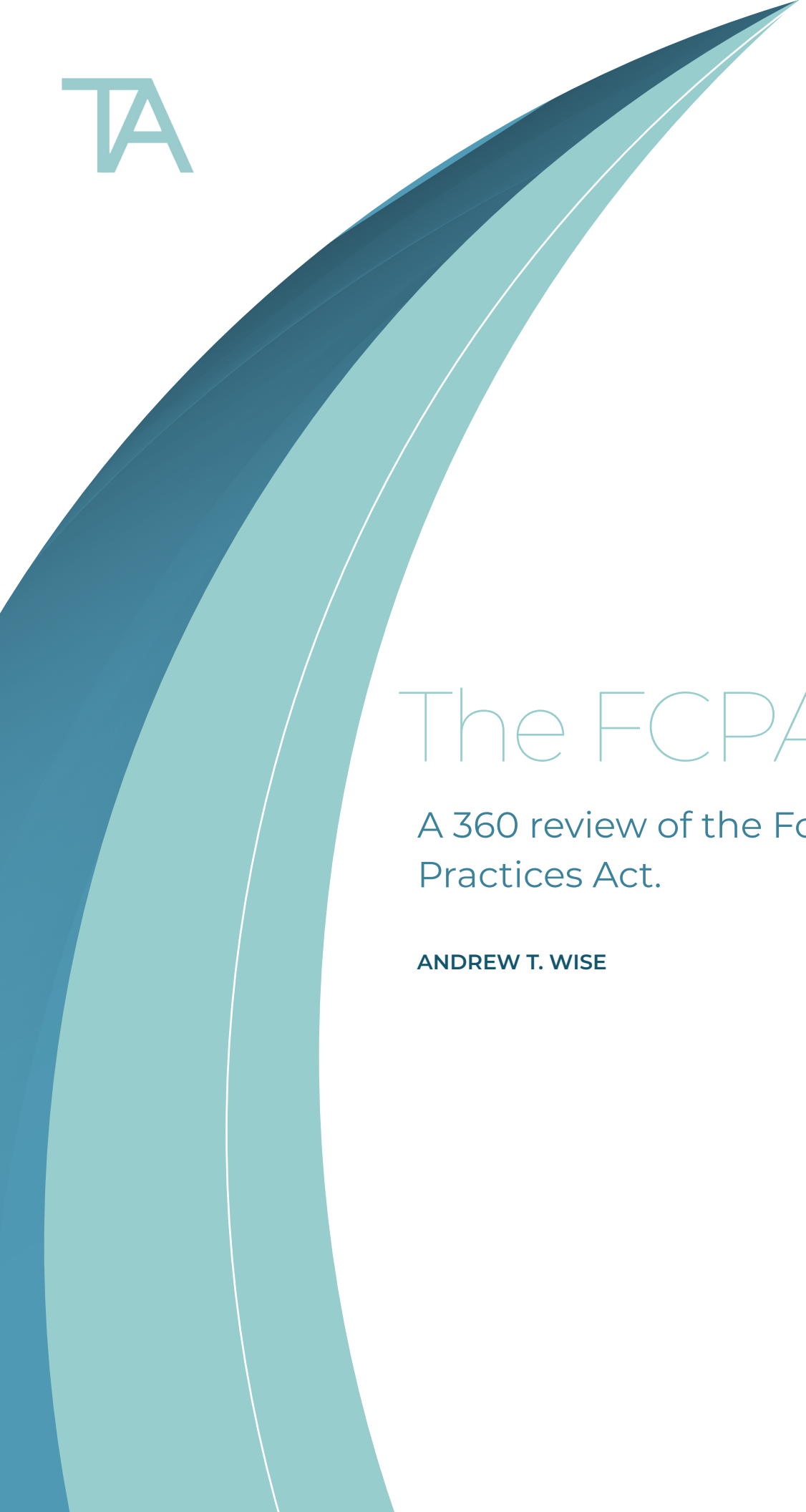
**** Fellows of The Academy***

Jonathan S. Sack* | *Editor*

We hope you enjoy this issue of

The Academy Bulletin.

Maria Nizzero* | *Editor*



The FCPA at 50

A 360 review of the Foreign Corrupt Practices Act.

ANDREW T. WISE

Introduction

The Foreign Corrupt Practices Act of 1977 (FCPA) is at something of a crossroads as it approaches its golden anniversary. Since its passage, and especially in the last 20 years, the FCPA has been the impetus for multi-national companies to overhaul their corporate compliance programs. The threat of criminal enforcement (through the Department of Justice) and civil enforcement (through the Securities and Exchange Commission) has pushed companies to investigate potential wrongdoing by employees and, in many instances, to self-report findings in the hope of leniency.

Alongside these developments in companies, enforcement actions from the DOJ and SEC have produced mixed results. In cases against individual defendants, some of the government's expansive readings of the statute have been rejected by courts. Likewise, in fraud and other white-collar cases, the US Supreme Court seems increasingly skeptical of federal prosecutor's wide-ranging use of arguably vague statutory language.

In another important development, corporate internal investigations are now being scrutinized more closely, and attorney work product is being exposed to discovery due to the cooperation incentives offered in DOJ corporate leniency programs. DOJ has also given incentives to whistleblowers to report perceived misconduct. Yet, questions follow as to whether whistleblower bounties undermine the very compliance programs that DOJ policy has encouraged.

In this article I discuss these cross-currents to provide a picture of the FCPA as it nears its 50th birthday.

GUIDANCE ON THE REACH OF THE FCPA AND CONFLICTING COURT CASES

In November 2012, DOJ and SEC published the first edition of *A Resource Guide to the U.S. Foreign Corrupt Practices Act*. The Resource Guide was updated in July 2020 and has served as a comprehensive statement of the US enforcement agencies' view on critical questions regarding the FCPA. These questions include the jurisdictional reach of the FCPA's anti-bribery

and accounting provisions, the types of payments that constitute "corrupt" payments versus permissible ones, the application of successor liability in the mergers and acquisitions context, and the definition of key terms, including "foreign official" and "agent".

Upon publication, the Resource Guide was treated by many as the dispositive source on many key FCPA-related legal issues and thus found broad application in negotiations between DOJ and corporate or individual targets of FCPA investigations. The first edition of the Resource Guide in particular contained few citations to judicial opinions because many of the agencies' positions had yet to be challenged in court proceedings. Instead, many of the footnotes referred to negotiated resolutions, which is how most FCPA matters to that point had ended. Courts' only role in those resolutions, by and large, had been to approve the terms of resolutions when they resulted in deferred prosecution agreements.

After the first edition of the Resource Guide, DOJ increased its focus on individual culpability in corporate white-collar cases. That focus was most clearly expressed in the 2015 memorandum by then Deputy Attorney General Sally Yates, titled "Individual Accountability for Corporate Wrongdoing". The "Yates Memo" detailed steps DOJ prosecutors should consider to hold individuals accountable. The Yates Memo roughly coincided with an increase in the number of cases brought against individual employees following resolutions with those individuals' employers. A key result of these new cases was that issues the Resource Guide presented as settled became the subject of legal challenge. Individual defendants, unlike their corporate employers, had good reason to fight rather than settle; these defendants faced imprisonment, not just pecuniary and reputation harms.

One example of this dynamic was litigation over whether the FCPA could reach a foreign national who took no action in the United States but allegedly aided and abetted or conspired with an individual or company subject to the FCPA (an "issuer or domestic concern"). The Resource Guide said yes and cited as support for that proposition the charging documents from two matters in which companies had entered deferred prosecution agreements with DOJ. [Resource Guide, first, at 12, fn. 60]. That answer was tested in the high-profile case of French power and transportation company Alstom.

After DOJ reached a resolution with Alstom related to bribes paid to win a lucrative energy contract in Indonesia, DOJ commenced a criminal prosecution in 2013 of Lawrence Hoskins, a former executive of the UK subsidiary of company, who was not a US citizen and whose actions did not take place in the US. DOJ's jurisdiction argument went as follows: Alstom's US-based subsidiary violated the FCPA, and Hoskins, even though he was not an agent of that subsidiary, was liable as a co-conspirator or accomplice to that subsidiary's FCPA violation.

Hoskins moved to dismiss the indictment, arguing that FCPA liability was limited to a defined set of persons that did not include a foreign national who did not enter the US in the course of the alleged scheme, and that the government could not avoid that definition by resorting to the conspiracy statute. The district court agreed, and the US Court of Appeals for the Second Circuit affirmed that part of its ruling. *United States v. Hoskins*, 902 F.3d 69 (2d Cir. 2018) After trial, the district court also rejected DOJ's theory on Hoskins' status as an *agent* of the US-based subsidiary, finding that the evidence did not satisfy the common law principles that defined that term, a ruling that the Second Circuit again affirmed. *United States v. Hoskins*, 44 F.4th 140, (2d Cir. 2022).

Outside of the FCPA context, the US Supreme Court has shown growing skepticism of expansive readings of US statutes. One manifestation of that skepticism is the rejection of extraterritorial application of US law. *See*, *Morrison v. Nat'l Australian Bank*, 561 U.S. 247 (2010) (applying the presumption against extraterritoriality to limit the extraterritorial jurisdiction of US courts); *RJR Nabisco, Inc. v. European Cmty.*, 579 U.S. 325 (2016) (limiting the extraterritorial reach of the RICO statute); *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013) (holding the Alien Tort Statute does not have extraterritorial application).

The Supreme Court has also rejected DOJ's construction of key elements of various domestic fraud and anti-corruption statutes. See, *US v McDonnell*, 579 U.S. 550 (2016) (narrowly defining "official act" in the context of domestic bribery), *Kelly v. US*, 140 S.Ct. 1565 (2020) (limiting reach of federal wire fraud and federal program fraud to schemes to obtain money or property); *Snyder v U.S.*, 603 U.S. _ (2024) (holding that 18 USC 666 did not prohibit gratuities to state and local government officials). Perhaps ominously for DOJ, in each of

those cases the Supreme Court rejected DOJ's arguments that prosecutors could be trusted to be reasonable and not enforce an arguably vague statute irresponsibly. In *Snyder*, for example, Justice Kavanaugh wrote the Court "cannot construe a criminal statute on the assumption that the Government will use it responsibly."

Against this backdrop, parties and counsel can fairly wonder which other legal principles that DOJ and SEC have considered settled might come under scrutiny as the agencies pursue FCPA and related actions against individuals.

COOPERATION INCENTIVES, INTERNAL INVESTIGATIONS, AND DISCOVERY

The Yates Memo, noted above, was one in a long line of DOJ guidance memoranda regarding the prosecution of corporations that started with then-Deputy Attorney General Eric Holder in 1999 and continued through subsequent Deputy AGs, including Larry Thompson (2003), Paul McNulty (2006), and Mark Filip (2008). These policy statements had a consistent theme: DOJ would consider a corporation's timely and voluntary disclosure of wrongdoing and willingness to cooperate in the investigation of its agents in evaluating whether to bring charges against the company.

Of course, corporations had incentives to investigate allegations of wrong-doing by their employees long before the Holder Memo – assessing and addressing risk created by employee misconduct, avoiding legal liability and reputational harm, and making employment decisions, among other considerations. The Supreme Court's decision in *Upjohn Co. v. United States*, 449 U.S. 383 (1981) recognized that communications between a company and its employees made for the purpose of internally investigating facts and rendering legal advice were protected by the attorney–client privilege.

The Thompson Memo (2003) changed the landscape by predicating corporate cooperation credit on a waiver of privilege -- an aggressive position that DOJ walked back in later guidance. Specifically, in 2008, DOJ required prosecutors to seek pre-approval before requesting waivers for attorney-client communications and attorney work-product and distinguished

between the approval process for legal advice and mental impressions on one hand and purely factual information on the other. By 2016, however, DOJ's position was that while legal advice was privileged, facts were not, and all relevant facts, including those learned through interviews protected by attorney-client privilege, needed to be disclosed in order to earn full cooperation credit.

As DOJ brought more individual prosecutions based on information shared by companies seeking cooperation credit, defense efforts to access internal investigation material proliferated. And DOJ's policies incentivizing corporate cooperation as a means of earning leniency have caused some judges to question whether investigations were truly "independent" and deserving of protection, or whether defendants had a right to compel production of investigation materials to use in their defense of DOJ charges.

In one recent case *United States v. Connolly*, 2019 WL 2120523, at *12 (S.D.N.Y. May 2, 2019), the district court found that DOJ had effectively "outsourced" its criminal investigation to a target company's outside counsel and noted that prosecutors are in a "uniquely coercive position *vis-à-vis* potential targets of criminal activity." The judge held that due to the extensive cooperation between DOJ and those outside counsel, statements made to those outside lawyers had been "compelled" by state action and therefore could not be used against the defendant without violating his Fifth Amendment rights.

In another case, *United States v. Coburn,* Civ. 2:19-cr-00120 (KM) (D.N.J.), the district court held extended hearings on the defendants' claim that the company essentially acted as an arm of DOJ by taking DOJ's input on who should be interviewed and what topics should be covered. While the defendants did not ultimately prevail on that argument, the judge found that the company's detailed description of investigation interviews to DOJ constituted a waiver of privilege and ordered production of outside counsel's work product to targets of the investigation. The arguments from *Connolly* and *Coburn* are certain to be repeated so long as DOJ conditions leniency on proactive cooperation and companies share investigation details in ways that fail to safeguard attorney-client privilege and work product protections.

The reasoning of the courts in *Connolly* and *Coburn* raises another important issue of particular interest to lawyers who conduct internal investigations: whether such investigations, when international in scope, would violate a country's blocking statutes. This subject was explored by Academy Fellow Frederick T. Davis in the Compliance and Enforcement Blog of the Program on Corporate Compliance and Enforcement of New York University School of Law. *See*, https://wp.nyu.edu/compliance_enforcement/2019/11/06/united-states-v-connolly-and-the-risk-that-outsourced-criminal-investigations-might-violate-foreign-blocking-statutes/.

Over the past 20 years, FCPA enforcement has been driven by corporate self-reporting; the biggest resolutions in terms of fines and penalties have all been negotiated settlements, mostly following a company's disclosure of facts developed through internal investigations. As litigants continue to challenge the protections traditionally afforded company investigations, and as judges continue to entertain arguments about DOJ pressure on companies, the landscape of internal investigation and self-disclosure will continue to shift and, inevitably, influence the nature and extent of future FCPA enforcement.

THE DEVELOPMENT OF COMPLIANCE PROGRAMS AND RECENT WHISTLEBLOWER GUIDANCE

Another important dynamic that bears watching is the emerging tension between DOJ guidance on the evaluation of corporate compliance programs and the explosive growth of whistleblower reward programs. These programs offer incentives to individuals to circumvent compliance programs in pursuit of financial bounties.

In 2017, the Fraud Section of DOJ published the first edition of a memorandum titled "Evaluation of Corporate Compliance Programs." It has since undergone numerous revisions and has served as a valuable resource for companies seeking to design and maintain effective anti-corruption compliance programs. The guidance covers a wide range of topics from program design, structure, and resourcing to continuous improvement, testing, and forward-looking risk assessment. DOJ has updated the guidance in light of new developments; for example, recent revisions have addressed the integration

of data analytics into compliance program design, the use of ephemeral messaging applications by company employees, and compensation clawbacks and consequence management systems. A foundational and consistent element of an effective compliance program has been the maintenance of confidential reporting structure through which employees could report suspected violations of law or a company's code of conduct and an investigation mechanism that would both safeguard against retaliation and allow for timely review of, and response to, findings of misconduct.

Responsible companies invested significant resources in designing, maintaining, and testing their reporting and investigations processes. As detailed in various benchmarking studies and presentations by leading Chief Compliance Officers, companies established ethics and compliance hotlines accessible to employees and business partners and publicized their existence on websites, posters in physical locations, and through trainings. Some engaged outside vendors, especially outside the US, to ensure accessibility and to assure employees of the independence and anonymity of the process. Protection of whistleblowers from harassment and retaliation and establishment of reliable and credible investigative procedures was a consistent element of DOJ guidance on effective compliance programs and companies devoted extensive time and resources to building up responsive systems.

Following the 2008 financial crisis, the SEC whistleblower program was created as part of the Dodd-Frank Act. The program was designed to encourage reporting of legal violations to the SEC by offering financial incentives and protections against retaliation. An individual who voluntarily reported original information that led to a successful enforcement action by the SEC and a fine of over $1 million was entitled under the program to 10 % to 30% of the fine as an award, and in the years after its adoption, the program paid out nearly $2 billion to whistleblowers, with an average award around $5 million.

DOJ had not maintained a similar whistleblower incentive program until 2024, when it announced a corporate whistleblower rewards pilot program intended to "supercharge" enforcement in key areas, including the FCPA. The pilot program, which was integrated into DOJ's existing Corporate Enforcement and Voluntary Self-Disclosure Policy, contained numerous definitional elements and qualification provisions similar to the SEC

whistleblower program. *See*, https://www.millerchevalier.com/publication/doj-announces-corporate-whistleblower-rewards-pilot-program-and-amends-corporate.

The pilot program provided some support to the internal reporting systems in which companies had so heavily invested. For example, making a prior report internally is a factor that can increase an award's amount. However, the pilot program also allows an employee to be eligible for an award if they make a report to the DOJ within 120 days of making an internal report. This provision significantly (and deliberately) increases the pressure on a company to self-report within that timeframe as well.

Further, while individuals who obtain information due to their roles as company directors, officers, or other fiduciaries are presumptively ineligible for a reward, they can become eligible if the company fails to act on information within 120 days, or if the whistleblower has a reasonable basis to believe immediate disclosure is necessary to avoid a set of enumerated harms, including the possibility that an individual is engaging in conduct that will impede an investigation. This broad exception language widens the list of eligible whistleblowers to a range of individuals who would ordinarily be at the heart of a company's compliance functions, and given the amount of a potential award, these exceptions are likely to be tested soon.

CONCLUSION

The ultimate impact of the whistleblower pilot program on FCPA compliance, reporting and enforcement will take some time to assess given the details of the program and the extended timeline for most FCPA investigations. The same is true for the other considerations discussed above: the legal interpretations arising from cases against individuals, and the challenges to and impact on corporate investigations and cooperation. The effects are fluid, and we will know more over time. All of these developments will influence the future of FCPA enforcement.

One final note: elections have consequences, though of course we usually do not know what they are until we have the benefit of hindsight. We can be sure that the new administration in Washington will leave its own mark on corporate enforcement, including enforcement under the FCPA.

AUTHOR

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Andrew T. Wise is a partner at Miller & Chevalier in Washington, D.C. He specializes in white-collar criminal and civil trials, with extensive experience representing multinational companies in fraud and anti-corruption investigations. Andrew has defended clients in complex cases involving the FCPA, fraud, bribery, and tax offenses, and he has conducted high-stakes internal investigations and compliance reviews for corporate clients.

Buying Influence or Supporting Democracy

In democratic systems, the line between endorsement and bribery can be faint.

JUDITH DE BOER

Introduction

Political donations are an integral part of democratic systems, allowing individuals and companies to support political movements that reflect their values and interests. Political donations are protected by Article 11 of the European Convention on Human Rights (ECHR), which guarantees the right to political participation and association. The Venice Commission, a European advisory body on constitutional law, also emphasizes that political donations are a fundamental aspect of democratic engagement (Microsoft Word - data0000199838.doc (coe.int)). With regard to private donations, the Commission states that it is appropriate for parties to seek private financial contributions. Legislation should require all political parties to be at least partly privately funded as an expression of minimum support. With the sources of funding prohibited by relevant legislation, all individuals should have the right to freely express their support for a political party of their choice through financial and in-kind contributions. However, reasonable limits may be imposed on the total amount of such contributions.

Without the possibility of private donations, political parties, especially smaller and local ones, would struggle to function and reach voters during election campaigns. In the Netherlands, political donations are regulated by the Act on the Financing of Political Parties (Wet financiering politieke partijen or Wfpp), which requires transparency but has traditionally left much unregulated. This autonomy regarding party donations was intended to preserve the freedom and democratic nature of political parties and their financing. However, the line between a legal political donation and a bribe can sometimes be blurred, especially when the donation has the potential to influence public officials.

Several large donations to political parties in the Netherlands have been publicly questioned in the media. For example, a Christian Democratic party received a €1.2 million donation from a businessperson ahead of the 2021 elections, followed by a notable change in its electoral platform that was highly favorable to the donor. Similarly, a Democratic party called D66 received €1 million from a prominent tech billionaire who had previously successfully lobbied for changes to the national education curriculum. The public question was whether this was a genuine donation or simply a thank you or gift for past favors.

The issue is not limited to these examples. VVD, the People's Party for Freedom and Democracy, offers access to exclusive events where donors, who contribute €1,000 each, can engage in private dialogue with top politicians. This raises the question of whether this is simply networking, or a way for wealthy donors to gain political influence. Meanwhile, in 2018, local VVD branches received around €300,000 in anonymous donations from business-focused sponsor clubs, which later led to public scrutiny, especially given the close ties between party officials and the business community.

These cases have never led to a criminal investigation into bribery. However, there has been an increasing focus on unlawful influence in relation to party donations. This has led to changes in the law. As of January 2023, the Netherlands introduced a national donation cap of €100,000 per donor to prevent the appearance or risk of undue influence on national politics. While this cap addresses concerns about influence at the national level, there is as yet no limit at the municipal level. A draft law would impose a €20,000 limit on local donations, but it is still under discussion. These rules reflect growing concerns about whether large donations give wealthy individuals disproportionate influence over political decisions.

The key question, however, is: when does this right to contribute to a political party that supports one's values and (financial) interests become a criminal offence such as bribery? This article examines when political donations cross the line from legitimate political support to corrupt activity, as dealt with in recent case law.

POLITICAL DONATIONS IN QUESTION

In recent rulings by the Appeal Court in The Hague(Wethouders vrijgesproken van omkoping en veroordeeld voor schending geheimhoudingsplicht (rechtspraak.nl)), the Court examined whether political donations to the local political party "Hart voor Den Haag" amounted to bribery. These rulings followed a 2023 lower court decision (Vrijspraak voor Richard de Mos in corruptiezaak (rechtspraak.nl)), where all defendants, including my clients, were acquitted of bribery.

This case attracted considerable attention. Also, in light of the larger donations mentioned in the introduction, it was striking that in this case the total donations amounted to €100,000, spread over five businessmen. In this case, these businessmen had made political donations to 'Hart voor Den Haag' to support its campaign for the 2018 municipal elections. This means that at the time there was no legal limit on the amount of donations. Moreover, these donations would fall well below the new cap for national parties that were introduced in the law in 2023, and for most of the defendants their donations would even fall below the proposed laws for local parties. The donations were therefore generally considered perfectly legal. The donations funded promotional activities such as website development and campaign videos. All donations were invested directly in the party and not a single cent went into the pockets of the party leaders, who became council members after they won the 2018 elections and became the largest party.

The prosecution alleged that the donations were part of a broader scheme to secure preferential treatment in municipal decisions. The public prosecutor argued that these donations were not simple political support but rather bribes intended to influence public officials for the businessmen's benefit. In this view, the businessmen's relationship with the public officials amounted to unlawful gain. On the indictment in appeal, it stated that the donations were made with the specific intent to get preferential treatment and for the two public officials it stated that the reasonably should have known that these donations were made to get a preferential treatment.

The defense, however, painted a different picture, arguing that the donations were genuine expressions of political support for the party and its agenda, rather than attempts to bribe public officials. Importantly, it was pointed out that there was no explicit or implicit agreement between the businessmen and the politicians to exchange donations for political favors. Moreover, there was no link between the donations and their political involvement within the party, and they were legally allowed to donate to a party that generally had their interests at heart, and that shouldn't prevent them from being active in the political arena and within the party, or even lobbying for certain causes. Donating should not exclude someone from the political playing field.

Moreover, the defense criticized the prosecution for selectively presenting evidence by removing the broader context of informal conversations and

jokes in an attempt to establish the intent behind the donations. The defense's contention that the prosecution misrepresented the evidence highlights a critical point in corruption cases: the need for accurate, complete context to assess intent, and the understanding that informal communications are subject to multiple interpretations and that the prosecution should consider all perspectives. In this case, informal communications were presented as evidence of corrupt intent when they could have been interpreted as enthusiasm for the political party rather than an expectation of political favors.

WHEN DOES A POLITICAL DONATION BECOME A GIFT TO A PUBLIC OFFICIAL?

Political bribery is criminalized under two different articles of the Dutch Criminal Code (DCC). Anyone who gives a gift, makes a promise, or provides or offers a service to a current, former, or prospective public official with the intention of influencing or rewarding them for doing or refraining from doing something in the performance of their duties is punishable under Article 177 DCC. The public official is punishable for accepting or soliciting such a gift, promise or service if he knows or should reasonably suspect that it is intended to influence or reward actions related to his current or former duties (Article 363 DCC). In this context, one of the questions in this case was whether and under what circumstances a donation to a political party could be considered a gift to a public official.

The Court of Appeal of The Hague confirmed in 2024 that a donation to a political party can be considered a gift to a public official. The Court of Appeal stated that a gift made for a third party can also be considered a gift to a public official. It emphasized that this includes any gift, promise or service that has value to the public official. This could be something as small as a modest sum of money or a minor promise or service. Thus, a payment made directly to a political party may be considered a gift to a public official if it has value to that official. But when does a party donation have value for a politician?

The donations made in this case were made in connection with the municipal elections and were used to promote the party. The payments were either made directly to the party or payments were made to, for instance, a website designer. According to the case file, the public officials in this case

were actively involved in the party's election campaign in 2017 and 2018 and supervised the party's promotional efforts. Both were also responsible for the budget related to these promotional activities.

In addition, they sought to secure as many votes as possible for the party in the elections, with the aim of maximizing its influence on municipal policy and decision-making. As high-ranking candidates on the party list, they had a good chance of being elected to the city council and possibly becoming city councilors, depending on the election results and coalition negotiations.

In light of these facts, the payments made to the party were of value to the officials, concluded by the Court. As such, these payments can be classified as gifts to a public official within the meaning of the Dutch Criminal Code. This shows that a donation to a political party can easily be considered a gift to a public official, thus fulfilling the first requirement for determining bribery.

CORRUPT INTENT: THE KEY LEGAL ELEMENT

The focus of this case is on the intent behind the political contributions. In the case of the businessmen, the court had to determine whether the contributions or gifts were made with the intent to create a "special relationship" or preferential treatment. This was the charge in the formal accusation. For the public official, it was required that, at the time the gift was accepted or solicited, the public official knew or reasonably suspected that the gift was given, offered, or promised to induce him or her to act or refrain from acting in his or her official capacity, or that the gift was given, offered, or promised as a reward for acts or omissions in his or her current or former official capacity.

Therefore, there needs to be a casual relationship between the gift(s) and a benefit the donor intends to. The evidence can be based on all the circumstances, including nature, frequency and timing of the gifts, their appearance and the facts and circumstances surrounding them.

In terms of frequency, the Court found in this case that the amounts were relatively limited in relation to the total amount spent on the party's promotional expenses. The nature of the donations was also taken into

account and the court noted that the defendants had argued and stated that these donations were made purely to promote the party. Thus, the nature of the donations also appeared to be purely for political support and not for preferential treatment. In addition, the court considered that the donations were made in the run-up to the municipal elections, at a time when the two officials were members of the municipal council, but not city councilors.

The court found it plausible that the businessmen made the donations to support the political party. The court concluded that although the businessmen gained influence within the party through participation in an advisory board and informal discussions after the donations were made, this did not automatically demonstrate corrupt intent or a causal link. The appeals court ruled that participation in such discussions and advice is a legitimate part of the democratic process. Political influence, particularly through participation in policy discussions, is not inherently corrupt, especially since all sectors of society, including business interests, have a right to be heard. Such influence and participation are consistent with a democratic process in which all sectors have the opportunity to be heard, the Court of Appeal noted. The court also concluded that there was no convincing evidence that, at the time the gifts were made, the defendant intended to establish a "special relationship" with the officials or sought preferential treatment. Nor could it be shown that the gifts were made as a result of or in connection with such an intent, even considering all the surrounding circumstances.

Regarding the public officials, the court added that the donations were intended for the party, and they did not have discretion over the use of the funds. Moreover, there was no evidence that it had been stated, written, or agreed that the council members, aldermen, or the party should or would take specific actions in exchange for the donations. Nor were the donations promised in the context of a business meeting concerning real estate interests or in connection with a specific request for official action that might have required the defendant to be aware of an expectation of reciprocity.

The court emphasized the need for careful interpretation of the communication, taking into account the possibility of an alternative reading as suggested by the defense. The evaluation of the communication must consider the timing, the participants, and the broader context.

This case illustrates that in the absence of a concrete quid pro quo between a gift and a specific favor, the political arena remains delicate, as the line between legitimate influence and a party donation can be difficult to define. Although this case does not provide very concrete guidance on when political contributions can be considered a bribe in relation to, for instance lobbying activities, it does show bribery cases are highly factual. All remains dependent on the specific circumstances of the case, the communication at hand and the nature, amount, and moments in which the donations were made.

PREFERENTIAL TREATMENT: WHAT DOES IT MEAN?

Under Dutch law, for a gift to be considered a bribe, there must be proof of intent to induce a public official to act under his public duty. These acts do not have to interfere with any public interest. According to case law of the Supreme Court in the Netherlands, the intent to get a preferential relationship, can be enough for such an act. It keeps on interesting me what this means in the political domain.

In politics, the concept of preferential treatment is complex. Politicians regularly engage with various groups, including businesses, and consider their views when making decisions. As the defense argued in this case, this is not only legal but also necessary for a functioning democracy. Political parties often advocate for the interests of specific groups or social movements because they rely on their support. Should people with a specific interest be excluded from making political party donations?

Engagement between political parties and people, business and interest groups are a fundamental part of the democratic process. These relationships allow different segments of society to have their concerns heard and to influence policymaking in a legitimate manner. Politicians, in turn, must be responsive to the interests of their supporters, as these groups often form part of their voter base. This type of interaction is not inherently corrupt; rather, it reflects the natural dynamics of political representation, where parties align themselves with particular constituencies or sectors, also when these people make donations.

The challenge arises in determining when such an engagement crosses the line into bribery, for instance when a donation is made. But of course, you want a politician to act according to your interests, thus what is a preferential treatment in that respect if you do not seek a specific quid pro quo? It is not unusual for supporters to seek influence over policies that align with their interests. However, this does not automatically imply that a 'preferential' relationship is corrupt, given this fine line, in my opinion political corruption cases, which are soley based on party donation should have evidence of a specific quid pro quo, where donations or support are given in exchange for specific actions or favors from public officials, a preferential treatment should not be used to prevent political engagement even if it is for your own (financial) interest.

CONCLUSION

The 2024 appellate decisions in this case underscore the importance of intent, proximity, and context in cases involving political contributions and potential bribery. For legal practitioners, these rulings highlight the challenges of distinguishing between lawful political contributions and political influence, and the fact-specific nature of these cases.

In addition, these rulings reflect the balance between political freedom and anti-corruption enforcement. In this case, the main political party was excluded from the coalition as a result of the proceedings, which had an extremely negative impact on democracy. In political bribery cases involving political donations, no matter which side you are on, democracy is at stake, and it remains a balancing act to uphold democratic values.

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The James Stone Case

Peru's fight to recover assets.

OSCAR SOLÓRZANO

Introduction

On 14 September 2024, Peru's former dictator Alberto Fujimori passed away. His corrupt legacy, however, is far from over. More than 20 years after Fujimori left power, criminal proceedings are still ongoing, and the Peruvian justice system continues its work to recover a significant amount of assets linked to acts of corruption perpetrated during his administration.

Drawing on the author's experience in providing technical assistance to the Peruvian authorities, this brief case study focuses on one such asset recovery case between Peru and Luxembourg involving a businessman named James Stone. It provides insight into some of the challenges that some States face in recovering proceeds of corruption from international financial centers, despite the binding rules and soft laws adopted in recent years. It looks at both the mutual legal assistance (MLA) process and the legal defenses raised by the account holder – who admitted to the corrupt dealings and has since fled to the United States. The case offers important lessons for States either holding or seeking to recover assets linked to historical acts of corruption.

CRIMINAL ORGANIZATIONS: THE ROLE OF JAMES STONE

James Stone Cohen, a Peruvian–U.S. citizen, was a member of a group of businessmen who pleaded guilty to having been an intermediary in a sophisticated corruption scheme involving the acquisition of airplanes, weapons, and military equipment during the Fujimori regime. Stone and the other members of the group also admitted to facilitating the incorporation of offshore structures and establishing banking relationships in Panama, Switzerland, and Luxembourg, where the illicit commissions – amounting to millions of dollars – were hidden.

In a plea agreement with the Peruvian justice system in October 2005, Stone explained the modus operandi of the criminal organization and the way in which the illicit commissions were paid into international bank accounts. For his collaboration, Stone received a lenient suspended sentence of four years' imprisonment as a primary accomplice to the crimes of unfair collusion and criminal organization, a fine of USD 50,000, and the

obligation to repatriate the accounts he held abroad (two in Switzerland and one in Luxembourg). He was also ordered to pay a civil reparation of USD 1.2 million to the Peruvian State.

Stone fled the country in 2017 after the court authorized him to travel to the U.S. for health reasons. As a result of his failure to return to the country, the various criminal proceedings against him still pending in Peru have been reserved (suspended) until he is located, for which an international arrest warrant has been issued.

Stone reappeared in the media in 2022, when in the context of the global Pandora Papers project, the International Consortium of Investigative Journalists revealed the existence of Lovindale Estates Corp., an offshore legal structure that he managed with his mother and siblings at the time the acts of corruption took place, and which was unknown to the Peruvian authorities. The report revealed that Stone was living in luxury in Miami and that in recent years he had developed a series of very profitable businesses in Peru and in the U.S.

REPATRIATION OF ACCOUNTS

The 2005 plea agreement between Stone and the Peruvian justice system specified that Stone must take “all necessary actions” to repatriate three bank accounts through international cooperation. Failure to do so would result in the revocation of the collaboration agreement.

Two accounts, account 226290 of Leumi-le Israel Bank and account 16.715 of Fibi Bank, were in Switzerland, both in the name of Elena Group Ltd., a legal structure controlled by Stone and his group of accomplices. The Peruvian authorities repatriated USD 13.8 million from the two Swiss accounts through waivers or transfer orders issued by the account holder (Stone) to the recipient financial institutions. This was achieved swiftly thanks to efficient international cooperation with Switzerland, supported by a pre-existing international cooperation agreement in criminal matters between the two countries.

In Luxembourg, account 152279 with Union Bancaire Privée de Luxembourg (formerly Discount Bank) was held in the name of Stone and his wife. The funds in this account also originated from Elena Group Ltd. and amounted to just over USD 1 million when it was seized in 2004. The collaboration agreement with the Peruvian justice system established beyond reasonable doubt the illicit nature of the account and ordered Stone to take positive and specific actions (such as issuing waivers) to make effective the repatriation of the funds.

This account, however, could not be repatriated in 2005. Mutual legal assistance documents from that time show that Switzerland was asked to repatriate the account, probably because it was initially frozen by Switzerland. Faced with the impossibility of repatriating an account that was not in its territory, the Swiss authorities responded negatively. Due to other obstacles, including Stone's lack of cooperation, the repatriation of this account fell into oblivion.

It was not until 2017 that the account reappeared in the Peruvian judicial system in the context of an investigation initiated by the specialized prosecutor's office for non-conviction-based forfeiture in Lima. Despite the long passage of time, it was decided to seek the enforcement of the original 2005 collaboration agreement instead of initiating a new non-conviction-based confiscation procedure when the investigation had been definitively closed. Following the declaration by Peruvian Judge Eduardo Torres that the agreement was still valid, Peru requested its enforcement in Luxembourg in 2018.

A series of legal disputes initiated by Stone succeeded in delaying the matter of repatriation of account n.º 152279 for nearly six years. Finally, at a public hearing on 2 May 2024, the Luxembourg District Court declared enforceable in Luxembourg the Peruvian decision ordering the confiscation of the account. It stated that the 2 of May 2024 exequatur ruling "entails the transfer to the State of the Grand Duchy of Luxembourg of ownership of the confiscated funds, with accrued and future interest, in the above-mentioned account, unless otherwise agreed with the requesting State or unless an arrangement is reached between the Luxembourg Government and the Government of the requesting State".

The Peruvian authorities have recently been informed that Stone has appealed the exequatur ruling of Mai 2024.

INTERNATIONAL COOPERATION

The international enforcement of judgments in Luxembourg (exequatur proceedings) is carried out in accordance with articles 659 to 668 of the Code of Criminal Procedure of Luxembourg (CPPL). It is a model of direct enforcement of foreign judgments involving two judicial instances which, through adversarial proceedings, seek to enforce the foreign judgment without re-litigating the facts underlying the proceedings in the State of origin.

The judge of the exequatur is bound by the findings of fact made by the authorities in the requesting State (art. 666 CPPL). For this reason, it was not possible for the asset holder (James Stone) to attack the merits of the case. In particular, it was not possible to review the Peruvian authorities' determination of the illicit nature of the assets under dispute.

There were however still three challenges to overcome: issues around dual criminality, appeals on the basis of human rights and due process, and the alleged expiry of the judgement given the length of time that had passed.

DUAL CRIMINALITY

The formal and substantive conditions for the admission of the request for judicial cooperation are, however, thoroughly analyzed in Luxembourg. One issue relates to the principle of dual criminality, which requires that the conduct prosecuted in the State of origin is also a criminal offence in Luxembourg.

The Luxembourg judges held that the facts described in Peru's request for mutual legal assistance corresponded in the Criminal Code of Luxembourg (CCL) to facts that could be classified as criminal organization (art. 324bis and 324ter CCL), active and passive corruption (art. 246 et seq. CCL) and embezzlement (art. 240 CCL). In other words, the facts upheld against Stone by the Peruvian authorities would have given rise to criminal prosecution if they had been committed in Luxembourg.

Similarly, under art. 31(2)(1) CCL, special confiscation applies to property which constitutes the proceeds or any pecuniary advantage derived from an offence. It follows that the assets under dispute would be liable to confiscation under Luxembourg law in similar circumstances.

HUMAN RIGHTS AND DUE PROCESS

Stone fought an extensive legal battle in the Luxembourg courts between 2018 and 2024, using the two ordinary judicial instances provided for in the exequatur proceedings.

Among the different arguments put forward by Stone's defense in Luxembourg, it is worth noting those that sought to discredit the Peruvian proceedings over deficits with regard to international standards of human rights and due process. As it is customary in international asset recovery proceedings that do not review the merits of the case, Stone's defense argued that there had been various irregularities related to notice, procedural defenses and other deficits in the fair trial rules of the domestic proceedings. Often these arguments are raised to label the domestic proceedings as abusive in relation to human rights, knowing that this would paralyze the exequatur in the requested State.

Close coordination between the authorities of both countries was instrumental in determining the Peruvian authorities' compliance with the rules of fair trial and other international standards. Key elements, such as the notification of judicial acts or the characteristics of the local proceedings, could be quickly clarified in coordination meetings held in the framework of international judicial cooperation.

These coordination meetings were highly relevant as Peru was not a party to the exequatur proceedings in Luxembourg. Therefore, the Luxembourg magistrate – the executing authority representing the Peruvian interests – required as many elements as possible from the Peruvian proceedings in order to effectively defend the position of Peru.

ALLEGED EXPIRY OF THE JUDGEMENT

Another striking aspect of Stone's defense is the argument claiming that the right of Peru to confiscate and repatriate the account, as ordered in the plea agreement of 2005, had expired. According to Stone, this right had lapsed due to the passage of time and the inactivity of the Peruvian authorities since 2005. The discussion took place initially in two instances in the Peruvian courts, in which Stone's Peruvian lawyers attacked the decision requesting the enforcement of the confiscation and repatriation of the account. The same argument was raised in the Luxembourg execution proceedings.

Stone's defense argued that the 2005 effective collaboration agreement – which ordered the repatriation of the accounts within 40 days – was final, and that Peru's inaction "extinguished" or invalidated its ability to recover the account. To reinforce the argument, Stone argued that in 2009 a Peruvian court had granted him "rehabilitation" and the resulting erasure of his criminal record, rendering any attempt to confiscate the account legally unfounded.

In response to Stone's appeal, the Superior Court of Lima ruled in 2020 that the effective collaboration judgment was final and that it was not possible to invalidate a judgment that has become *res judicata*. The Court observed that any subsequent act ordered by the Peruvian authorities to comply with the collaboration agreement was not subject to appeal as they were not new or independent decisions. It stated, for example, that international judicial cooperation seeking the enforcement of Peruvian confiscation decisions abroad is of an administrative nature, for which there are no legal avenues for opposition in the Peruvian Code of Criminal Procedure. The Court therefore concluded that the decision should be enforced.

Additionally, in relation to the alleged lapsed right of the Peruvian State to recover the account, the Court pointed out that one reason the confiscation was not carried out at the time was the behavior of Stone himself, whose defense filed repeated appeals that delayed the process of recovering the account. Finally, the Court noted that collaboration agreement compelled Stone to carry out positive actions to repatriate the account, such as signing waivers or transfer orders addressed to the recipient banks. However, Stone had remained silent and inactive for more than a decade, probably hoping

that the seizure of his account would fall into oblivion and expire in the Luxembourg proceedings as well.

SUMMING UP

This case exemplifies some of the obstacles involved in the return of proceeds of corruption from foreign financial centers to requesting States. In particular, it highlights:

- That without experience or resources to engage in lengthy international cooperation to recover assets, requesting States may simply give up when faced with obstacles. As a result, corrupt funds that could and should be repatriated may remain in the ownership of the criminals who stole them until, for example, the statute of limitations prevents States from recovering them.
- That corrupt individuals tend to dispose of powerful defense teams that can delay asset recovery proceedings for years and use up significant public resources in the ongoing judicial wranglings.
- That States seeking to recover illicit assets from abroad must take all possible measures to ensure the alignment of laws and practices with international standards of human rights and due process, to prevent legal appeals based on such arguments.
- That close coordination between the authorities of the requested and requesting States is absolutely key to the success of any international asset recovery effort. In this case, it helped to efficiently clarify issues of law and procedure that might otherwise have paralyzed proceedings and left the ill-gotten assets in the hands of the corrupt individual.

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Israel's War Against Terror Financing

The daunting task of staunching the flow of funding.

HADAR ISRAELI

ERAN ELHARAR

Introduction

Israel has faced bloodshed for many years, even before its establishment as a state. However, on October 7, a critical turning point occurred. On that day, the Israeli public experienced its deepest fears of fragility in the Middle East. The violence, including murder, rape, and abuse, that took place on October 7 targeted victims solely because of their Israeli identity. These harrowing events also served as a wake-up call, revealing how Israel had allowed Hamas and surrounding terrorist organizations to grow into formidable threats.

While Israel has long engaged in military and intelligence operations, it became clear that insufficient efforts had been made to curb terror financing by means of legal tools against money laundering. The realization emerged: "It's the funding, stupid!". Terrorism cannot survive without financial support. It seems so obvious now that one can ask how action was not taken sooner.

On October 18, 2023, the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) imposed sanctions on ten key members, operatives, and financial facilitators of the Hamas terrorist group. These individuals are based in Gaza, as well as in countries such as Sudan, Türkiye, Algeria, and Qatar. Hamas was designated as a Foreign Terrorist Organization by the United States as early as 1997. Yet, in pursuit of containment and the hope that Hamas would focus on governing Gaza rather than engaging in terror, Israel indirectly facilitated the circumvention of sanctions imposed on Hamas by allowing the transfer of cash-filled suitcases from Qatar into the Gaza Strip.

October 7th served as a wake-up call for the Israeli authorities to launch a full-scale war on the methods of terrorist financing. The Israeli Money Laundering and Terror Financing Prohibition Authority ("IMPA") has redirected much of its resources to collecting intelligence regarding the financing of terrorist organizations. According to the IMPA's 2023 report, 25% of the criminal activities the IMPA dealt with were related to terror financing, compared to 9% in 2022.

Likewise, Israel significantly intensified its efforts, cooperating closely with allied nations. Within the first week of the war, Israel, along with financial intelligence units from the Netherlands, Germany, and the U.S., established an operational

task force to combat terror financing (Task Financing Terrorism Counter Force - CTFTI Israel). This task force, which now includes financial intelligence units from 17 countries worldwide, aims to consolidate and strengthen efforts to disrupt the flow of funds to Hamas, Hezbollah, and other terrorist groups. As part of this global initiative, Israel collaborates with foreign counterparts to collect up-to-date, relevant, and precise financial intelligence. In appropriate cases, the task force assists law enforcement and security agencies—both in Israel and globally—in freezing or blocking financial accounts and other activities suspected of fundraising for terrorist organizations.

This article discusses Israel's legal framework for addressing terror finance and how it can be applied to the actual financing of a terror organization.

LEGAL FRAMEWORK AND CHALLENGES: KEY TYPOLOGIES AND METHODS OF TERROR FINANCING

Israel's legal framework in countering terror financing aligns with the standards set by the Financial Action Task Force (FATF). The legislation imposes obligations related to preventing terror financing and the proliferation of weapons of mass destruction. Unlike the fight against money laundering, where the focus is on the origin of funds, combating terror financing centers on tracing transfer channels and funding paths to prevent the money from reaching its intended destination. The funds used for terror financing may have either legitimate sources, such as business activities, donations, and state funding, or illegitimate ones, such as drug trafficking and smuggling. In cases where terror financing is conducted using illegal funds, the fight against terror financing also relies on the legal infrastructure designed to combat money laundering.

One of the key typologies of terror financing that Israel faces is the misuse of non-profit organizations (NPOs) for terror purposes, as highlighted in an IMPA report, *'Abuse of Non-Profit Organizations for the Purpose of Terror Financing,'* from May 2023. In the past two years, there has been a significant rise in terror financing inquiries, with 16.5% linked to activities by NPOs.

In a media interview, the IMPA's Chair, Adv. Ilit Osterwicz-Levy, explained that Hamas exploits international sympathy for Gaza residents, using crowdfunding via platforms like Telegram, X (formerly Twitter), Facebook, Instagram, and TikTok, under the guise of humanitarian aid. These campaigns, however, fund terror organizations or their affiliates.

According to Osterwicz-Levy, addressing the exploitation of NPOs as fronts for terrorism is a significant challenge. These organizations present themselves as charities but divert funds to terrorism instead of their stated missions, often leaving donors unaware that their contributions support such activities. The main difficulty lies in distinguishing genuine humanitarian fundraising from those financing terrorism. Only through financial intelligence—tracking where funds are raised and how they are used—can the necessary clarity be achieved.

Nonprofit organizations (NPOs) have several characteristics that make them vulnerable to exploitation by terrorist organizations. These include their frequent reliance on cash transactions, operations in conflict zones, donor anonymity, and the involvement of volunteers, which can provide opportunities for terrorists to infiltrate or operate under the guise of humanitarian work. Terrorist groups may exploit NPOs by falsifying bank documents, reporting fictitious projects, forging or inflating invoices, and manipulating tenders.

A notable example is the Turkish Cooperation and Coordination Agency (TIKA). Mohammed Murtaja, the head of TIKA's Gaza office, was arrested by the Shin Bet (Israeli security Agency) for diverting funds intended for humanitarian aid to support Hamas' military wing. By adding Hamas military wing operatives to lists of individuals in need, Murtaja ensured they received financial assistance and food supplies, thereby facilitating terrorist activities under the pretense of charity work.

CONCEALING FUNDS THROUGH TRADITIONAL MEANS: HAWALA

Terrorist organizations are adaptive and highly creative when it comes to concealing methods of fund transfers. One traditional method, widely favored

by terrorist organizations such as Hamas, is the Hawala system. Hawala is a traditional money transfer method in the Muslim world, functioning as an informal banking system that allows money to be transferred from person to person through a complex network of money brokers. Today, powerful terrorist organizations worldwide use this method to move funds around the world.

Terrorist organizations frequently use Hawala to transfer funds to their operatives and to funnel money raised for the organization. This method allows funds to be received in a different part of the world without actual money transfers, but rather through balancing books between two money changers (financial service providers). For example, when a customer in country X wants to send money to a party in country Y, the funds do not physically move between the money changers within the financial system. Instead, the money changer in country Y hands over the money to the recipient in his country and offsets the sum in an internal accounting table managed with the money changer in country X. Periodically, or when the debt exceeds a pre-defined threshold, the two money changers will settle the balance, usually without revealing the identities of the final beneficiaries involved in the transactions.

According to the FATF report, "The Role of Hawala and Other Similar Service Providers in Money Laundering and Terrorist Financing" (2013), several indicators can be used to detect suspicious activity related to Hawala operations. These include the extensive use of collective accounts, regular transfers of money to international locations such as Dubai, and the routing of funds through Dubai to other destinations via the Hawala channel. Additionally, many hybrid Hawala transactions are funneled through major international hubs like Dubai. Another key indicator is the usage of third-party accounts, often unrelated to the hawaladar or sender, to disguise transactions and evade detection by authorities.

The fight against money changers does not end in offices, but often involves active measures. According to publications on the IDF Spokesperson's website, in recent months, Israel has conducted strikes against five money changers involved with Hamas's military wing and two currency exchange offices in Gaza. One of the most prominent figures targeted and eliminated was Sabhi Fuwareena, a key terrorist operative. Together with his brother, he ran the Al-Masat money exchange office, which transferred tens of millions of dollars to Hamas's military wing.

THE EVOLUTION OF HAMAS IN USING CRYPTOCURRENCY TO CONCEAL FINANCIAL TRANSFERS

Ironically, one of the IDF's assassinations accelerated Hamas's evolution. In 2019, the IDF assassinated Hamas operative Hamid Ahmad Khudari, who was the main financial agent for Iran in Gaza and closely associated with Yahya Sinwar. Following the assassination, the IDF stated, "Iran will have to find a new financier in Gaza." And they did—this time, a businessman named Zuhair Shamallakh, who managed what appeared to be a legitimate money exchange business called "Al-Mutahadon".

Fearing the same fate as Khudari, Shamallakh decided to change his strategy, making it much harder to identify the financial pipeline from Tehran to Gaza and, more importantly, more difficult to trace him. He shifted to digital currencies right at the peak of the crypto boom during the COVID-19 pandemic.

Initially, Hamas used cryptocurrency solely to receive small-scale donations, but by 2020, crypto had become the almost exclusive method for large-scale transfers between Iran and Gaza-based terrorist organizations. This complicated the pursuit of Hamas's funding methods, which was already a challenging task.

According to terror financing experts, Hamas's military wing was one of the earliest adopters of cryptocurrencies. Since 2021, Israel has tracked payments of tens of millions of dollars from Iran to Shamallakh's Al-Mutahadon exchange, intended for weapons procurement and salary payments. The National Bureau for Counter Terror Financing of Israel (NBCTF) has issued at least seven orders in the past three years to seize crypto assets from three exchanges in Gaza. According to an investigation by The Wall Street Journal, digital wallets identified by the NBCTF as linked to Hamas and the Islamic Jihad have reportedly received over $130 million.

A key platform Hamas used for transferring funds via crypto was Binance, the world's largest cryptocurrency exchange. One of the NBCTF's earliest orders against Shamallakh's exchange targeted 47 accounts on Binance. Binance's involvement in transferring funds to terrorist organizations may

have become the last straw for the U.S. government, which intensified its pressure on the crypto industry leaders over the past two years.

On November 21, 2023, Binance pleaded guilty to violating U.S. anti-money laundering laws and failing to implement adequate compliance measures. As part of a settlement with the U.S. Department of Justice and other agencies, Binance agreed to pay $4.3 billion in penalties, one of the largest fines ever imposed on a cryptocurrency platform. Binance's CEO and founder, Changpeng Zhao, admitted liability, resigned from his role, and agreed to pay a personal fine of $50 million. He was also sentenced to four months in prison in April 2024. "Binance turned a blind eye to its legal obligations in the pursuit of profit. Its willful failures allowed money to flow to terrorists, cybercriminals, and child abusers through its platform," said Secretary of the Treasury Janet L. Yellen. "Today's historic penalties and monitorship to ensure compliance with U.S. law and regulations mark a milestone for the virtual currency industry. Any institution, wherever located, that wants to reap the benefits of the U.S. financial system must also play by the rules that keep us all safe from terrorists, foreign adversaries, and crime or face the consequences."

The penalties imposed on Binance, both on the company and its leadership, are the largest in history, underscoring that October 7 marked a turning point in the U.S.'s stance toward the entire crypto industry. A few weeks after October 7, over 100 American lawmakers signed a letter expressing concerns over the "serious national security threats" posed using crypto in terror financing. "The world watched in horror as Hamas carried out brutal acts of terror against Israel," stated Senator Sherrod Brown, a Democrat from Ohio and chair of the Senate Banking Committee. "This committee has repeatedly warned about crypto and its role in illegal financing—including funding terrorists. When law enforcement agencies attempt to track or block crypto funds, it becomes a game of whack-a-mole. They stop one transaction, and the criminals move to another platform with a different alias. We must be far more aggressive against them because this cannot continue."

In April, Hamas announced that it would cease its fundraising efforts in Bitcoin, but that doesn't mean it stopped using crypto. As Senator Brown warned, Hamas simply switched to another platform: Tron, the new favorite among Iran-supported terrorist organizations, from Hamas to Hezbollah.

This rapidly growing crypto network is faster, cheaper than Bitcoin, and even harder to track.

A few weeks after October 7, Israel announced the largest crypto account seizure to date, freezing around 600 accounts connected to an exchange in Gaza. However, this is merely a drop in the ocean, as Hamas's economic operations remain vast and diverse.

CONCLUSION

The fight against terror financing is constant, requiring close cooperation among financial institutions, effective information sharing, and a commitment to adapt to emerging technologies. Israel's battle against terror financing has entered a crucial stage, shaped by the lessons of October 7. This challenge demands not just military and intelligence responses but also legal and financial strategies. By strengthening international cooperation, tightening legal frameworks, and adapting to technological changes, Israel and its allies can disrupt the financial networks that fuel terrorism, contributing to a safer world.

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Corruption of Foreign Public Officials

The inevitable risks when legitimate fiduciary relationships are criminalized.

ROBERTO PISANO

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SARA CAPOGNA

Introduction

Over the past decade, the Public Prosecutors' Office of Milan has been particularly active in investigating and prosecuting high-profile cases involving both Italian and foreign multinationals and their senior executives for alleged corruption of high-ranking foreign public officials, including foreign heads of state, ministers of energy and of petroleum and attorneys general.

The most significant cases are undoubtedly those known as *Eni Algeria* No. 25303/2010 RGNR and *Eni-Shell Nigeria* No. 54772/2013 RGNR. In these proceedings, investigations began in 2011 (for Algeria) and in 2013 (for Nigeria), followed by prosecutions in 2015 and 2017 respectively. The cases were subsequently tried before the Court of First Instance and the Court of Appeals of Milan. Ultimately, they were adjudicated – also with rulings from the Italian Court of Cassation – in December 2020 for Algeria and May 2024 for Nigeria.

A brief analysis of these cases, which concluded with an acquittal on the merits, now final and binding, for all defendants, underscores some unique features of the Italian legal framework and approach to foreign corruption. These include the recently amended offense of influence peddling, particularly in terms of enforcement.

THE ENI ALGERIA AND ENI-SHELL NIGERIA CASES: THE OUTCOME OF A DECADE OF INVESTIGATING AND PROSECUTING ALLEGED CORRUPTION OF FOREIGN PUBLIC OFFICIALS

1. The Italian legal framework and the Prosecutors' allegations In both the Algeria and Nigeria cases, the primary criminal offense alleged and subsequently charged by the Italian Prosecutors was that of "*corruption for an act contrary to official duties*", as provided by art. 319 of the Italian Criminal Code ("ICC") in force at the time. According to this provision, "*the public official who, in exchange for omitting or delaying (or having omitted or delayed) an act of his office, or for performing (or having performed) an act conflicting with the duties of his office, receives for himself or for a third*

party money or other things of value, or accepts a promise of such things, is punished with imprisonment" from six to ten years.

The indictments also referenced two additional criminal provisions: art. 321 ICC, which extends the punishment pursuant to art. 319 ICC (directed only to public officials) to a private briber, and art. 322 *bis* ICC (para. 2, no. 2), which extends to foreign public officials the offense originally dictated only for domestic officials (commonly referred to as "international corruption").

In essence, in both the Algeria and Nigeria cases, the Italian Prosecutors alleged that the top managers of these companies had entered into a corrupt agreement with foreign public officials. According to these allegations, the bribers purportedly promised to pay, and did pay, considerable sums of money to foreign public officials through third-party intermediaries, in exchange for actions contrary to their official duties.

2. The Eni Algeria case

In the *Eni Algeria case*, charges were brought against Eni S.p.A. and its subsidiary (at the time) Saipem S.p.A., along with their respective CEOs, other managers of both companies and Saipem's agent in Algeria. The charges related to the adjudication by Eni-Saipem of seven tenders/ contracts in Algeria between 2007 and 2010 for over EUR 8 billion, as well as the acquisition by Eni in 2008 of the concession for the exploitation of the Algerian oilfield "MLE" (Menzel Ledjmet East). The charges also involved agency commissions allegedly paid by Saipem to its agent over the years in question, for a value of about EUR 198 million. The payments were allegedly subsequently channelled (at least in part) to the Algerian Minister of Energy and to representatives of the Algerian State-owned company Sonatrach, who were in charge of the tenders, in exchange for the violation of tenders' adjudication procedures.

The investigations began in 2011 and involved extensive evidence collection in various jurisdictions by the Public Prosecutors' Office of Milan, including Algeria, the United States, Switzerland, United Arab Emirates (UAE), Lebanon, Hong Kong, and Singapore: dozens of witnesses were interviewed, a significant number of banking documents were obtained through letters of request to the various states, and freezing orders for considerable sums were enforced. Pre-trial custody orders were also issued against some of the

defendants, several of the alleged key-elements of the accusations widely reported by the press in advance of the trial.

The trial before the Milan Court of First Instance began in 2016 and ended in September 2018. While the court acquitted Eni S.p.A. and its managers, Saipem S.p.A., its managers and agents were convicted, with sentences ranging from four years and one month's imprisonment to five years and five months' imprisonment, plus the confiscation of EUR 198 million as proceeds of crime and other fines for Saipem.

Appellate proceedings commenced in 2019 before the Milan Court of Appeals and were concluded in January 2020 with the acquittal of all the defendants for not having committed the crime (judgment no. 286 of January 15, 2020, with grounds issued on April 15, 2020). The acquittals were finally confirmed by the Court of Cassation in December 2020.

3. The Eni-Shell Nigeria case

The same charges of international corruption were brought against Eni S.p.A. and Shell Plc, along with Eni's CEO, Shell's executive director, other managers of both companies, the former Nigerian Minister of Petroleum, and other international agents and consultants. The charges were in connection with the purchase by the Nigerian subsidiaries of Eni and Shell of an oil prospecting license for the Nigerian oilfield "OPL 245" in April 2011 for a total of USD 1.3 billion. Of this amount, USD 1.092 billion were destined to the seller of the license, the Nigerian company Malabu, and USD 207.96 million were allocated to the Federal Government of Nigeria as a so-called "signature bonus". The charges also concerned the alleged payment of a large part of the sums above, about USD 800 million, to high-ranking Nigerian public officials who had approved the transaction, including the Nigerian President, Minister of Petroleum and Attorney General. The alleged payments were made in exchange for the officials' purported performance of acts contrary to their official duties, specifically the signing of the so-called "resolution agreements" with the Eni and Shell groups and the company Malabu in April 2011, which effectively transferred the license to Eni and Shell.

The investigations began in 2013 and involved extensive acquisition of evidence by the Public Prosecutors' Office of Milan in various jurisdictions, including Nigeria, USA, United Kingdom, the Netherlands, Switzerland, on an

even larger scale than the in Algeria case. Similarly, investigations involved interviews by the Public Prosecutors' Office of Milan of dozens of witnesses, the collection of a considerable number of banking documents from foreign countries, and various search and seizure operations, phone tapping and freezing orders for considerable amounts. As in the *Algeria* case, many of the alleged key elements of the accusations were widely reported by the press in advance of the trial.

The trial against most of the defendants ("main trial") began in 2018, and concluded in March 2021 before the Milan Court of First Instance with the acquittal of Eni and Shell and all of their respective managers, on the grounds that they had not committed the crime of international corruption (judgment no. 3055 of March 17, 2021, with grounds issued on June 9, 2021). In a spin-off of the same case in September 2018, two businessmen who had opted for the "fast track trial" were sentenced to four years' imprisonment, and assets for over USD 110 million were confiscated. However, they were subsequently acquitted in June 2021 by the Milan Court of Appeal for not having committed the crime of international corruption (judgment no. 4960 of June 24, 2021, with grounds issued on September 22, 2021). With respect to the main trial, the Milan Court of Appeal confirmed the acquittal of the defendants in July 2022, and in May 2024 the Court of Cassation rejected a civil action for damages filed by the Nigerian Government against the same defendants.

4. The final assessment of the Italian courts

In both the Algeria and Nigeria cases, the Italian courts upheld the consolidated interpretation of case law, also applicable to domestic corruption, according to which "*it is indispensable to obtain compelling evidence, beyond reasonable doubt, of the conclusion of a corrupt agreement, which represents the essence of the criminal offence of proper corruption, both domestic and international*" (see *inter alia* Court of Cassation, Section IV, judgment no. 41768 of June 22, 2017. The courts therefore found that there was no evidence to support the allegation that the managers and businessmen had entered into a corrupt agreement with the foreign public officials. They also concurred that there was no evidence of unlawful payments being made to the foreign officials or of those officials performing acts contrary to their duties.

It is precisely in these 'grey areas', highlighted especially in the Algeria case, where *compelling evidence, beyond reasonable doubt* in domestic or international transactions involving a third party (intermediary) is lacking, that influence peddling falls within scope of consideration, as this article will discuss below.

INFLUENCE PEDDLING: A CRITICAL CHALLENGE IN THE FIGHT AGAINST CORRUPTION

Influence peddling, or "trafficking in influence", has become a significant issue in the fight against corruption, both in Italy and internationally.
In the Italian legal system, the crime of trafficking in unlawful influence, as outlined by art. 346 *bis* ICC, is a relatively recent one, having been introduced only twelve years ago. However, it has already undergone several amendments, reflecting both the complexity of the norm and its central role in modern day society.

The problem that the Italian legislature sought to address with the introduction of the crime in 2012 is not insignificant. Influence peddling is not merely one of the many offenses that can be perpetrated against the public administration; it is also a critical issue in modern business models. It brings into question the inherent nature and boundaries of the activity (i.e. lobbying or representing interests in public decision-making processes), the role of those who engage in such activities, and – most importantly for the purpose of this article – what conduct should be targeted by the criminal legal system. While exploiting personal connections with public officials to gain undue advantages and undermining transparency, fairness, and trust in the public administration are quite clearly the objective of criminal sanctions, the challenge for lawmakers lies in addressing the "underworld" that surrounds this practice. That is a "slippery" environment populated by so-called "fixers", facilitators, or business brokers, who routinely interfere in public decision-making processes from a privileged position, using methods that lack transparency.

Through this norm, the legislature faces the arduous task of regulating not only the potentially ambiguous (though not necessarily unlawful) activities of intermediaries, but also the grey area between corruption and trafficking

in influence. As the Milan Court of Appeals noted in the mentioned *Eni Algeria* case – which concerned actions that preceded the entry into force of the trafficking in unlawful influence offense – "*the mere payment of large sums of money to an intermediary is not enough to establish with certainty, in the absence of further evidence, the actual commission of a corrupt act*" (judgment no. 286 of January 15, 2020, with grounds issued on April 15, 2020).

1. The international perspective on the role of the intermediary

"Intermediaries" play a pivotal role in the crime of influence peddling. They act as a bridge between a private party and a public official, using personal or professional connections to potentially exert undue influence over public decisions or acts, offering a private party the opportunity to gain undue advantages, such as contracts, concessions, or other favors.

Art. 346 *bis* ICC provides for two requirements of "unlawfulness" in the structure of the crime:

- the gift and promise must be undue, i.e. not owed,
- the mediation must be unlawful, *contra ius*, i.e. instrumental in distorting the work of the public agent, exploiting the credit enjoyed by the intermediary.

For mediation to have a criminal connotation, it must not be justified by a professional activity conducted within the limits established by law and in accordance with ethical duties and obligations i.e. that of representatives of business or professional associations. It follows that the unlawfulness of the conduct was made to depend on provisions that do not attain to criminal law, which take on a defining function, helping to outline the conditions in which the conduct is considered lawful.

At the international level, the Organisation for Economic Co-operation and Development (OECD) – which has placed considerable emphasis on combating influence peddling as part of States' broader anti-corruption efforts – has expressed a similar view, arguing that intermediation in international business transactions is not in itself an unlawful activity. In the Final Report on "Typologies on the role of intermediaries in international business transactions", issued on October 9, 2009, the organisation's "Working Group

on Bribery in International Business Transactions" highlighted that "*since there is no generally accepted definition in the context of foreign bribery*", there is a need to "*examine some legitimate reasons why intermediaries are used*" (Chapter 1, paras. 6 and 7).

The OECD further explained that over the past few decades, while exploring opportunities in new markets, companies often encounter unfamiliar cultural, legal, financial, and accounting challenges. Intermediaries with local expertise can assist by providing services like legal advice, market research, and logistical support, and can help identify business opportunities. Even large multinationals may need intermediaries to act as local representatives, especially in countries where laws limit the number of foreign employees. In some cases, using intermediaries may be legally required for conducting business in certain markets (Chapter 1, paras. 9 and 10).

The OECD has therefore encouraged countries to adopt clear legal frameworks to target those grey areas where personal relationships and informal channels of communication can be exploited for illicit gain. In this context, art. 346 *bis* ICC aligns with the OECD's broader goals of reinforcing anti-corruption measures and ensuring that influence peddling is treated as a serious offense with adequate penalties.

2. The Italian legal framework

With Law 190/2012, Italy followed up on the international commitments under the 1999 "Criminal Law Convention on Corruption" and the 2003 "United Nations Convention against Corruption", introducing the crime of trafficking in unlawful influence under art. 346 *bis* ICC. This provision was later reformed by Law no. 3 of January 9, 2019 ("Law 3/2019"). Most recently, with Law no. 114 of August 9, 2024 ("Law 114/2024"), the lawmaker significantly revised art. 346 *bis* ICC, whose complex structure is outlined below.

- *Relationship with corruption:* The legal provision in question serves as a subsidiary offense to the crimes of corruption for the performance of duties (art. 318 ICC), proper bribery (art. 319 ICC), corruption in judicial acts (art. 319 *ter* ICC), and international corruption (art. 322 *bis* ICC) and therefore penalizes preparatory conduct leading to the commission of these crimes.

- *Conduct*: In its original 2012 formulation, the offense only consisted in the exploitation of existing relationships with a public official, thus clearly distinguishing it from the offense provided by art. 346 ICC (false influence-peddling), where the offender falsely claimed influence with a public official.

Following the 2019 reform, acts previously classified as "false influence-peddling" could now fall under the new art. 346 *bis* ICC, which no longer limited the punished conduct to *exploiting existing relationships*, but extended it to *boasting about alleged relationships* with a public official, a public service officer, or equivalent foreign subjects.

Law 114/2024 further amended the structure of the conduct that serves as a prerequisite for the payment and/or promise. The current version of art. 346 *bis* (1) ICC uses the phrase "*intentionally exploiting existing relationships with a public official or public service officer* …". Therefore, the intermediary's relationship with the public official must be genuinely exploited and must actually exist, rather than merely being alleged. If the intermediary only claims the existence of the relationship, the act may, at most, constitute fraud, provided other requirements are met.

- *Money or other economic benefits*. The crime is committed by paying or promising to pay money or other economic benefits. The original 2012 version provided for the giving or promising of money or other economic advantages to the intermediary or third parties, while the 2019 version expanded the scope to include non-economic benefits (such as sexual services).

- *Price for the unlawful mediation*. In the "basic offense" under paragraph 1, *money or other economic benefit* are the price of the unlawful mediation with the public official, or compensation for the performance of its functions. The new art. 346 *bis* (5) ICC also provides for two aggravated circumstances, concerning the purpose of the payment and/or promise, namely if the act is committed "*in relation to the exercise of judicial activities*" or in view of compensating the public official for "*performing an act contrary to their official duties*".

- *Defining what constitutes "mediation"*. Art. 346 *bis* (2) ICC, as recently

amended, defines unlawful mediation as "*mediation to induce the public official or public service officer…to perform an act contrary to their duties that constitutes a crime and may result in an undue advantage*". Before Law 114/2024, case law had primarily defined what should be understood as mediation. For example, when a corrupt public official recruits and pays other public agents without the interference of an intermediary, the conduct could not constitute the crime of trafficking in unlawful influence (Court of Cassation, Section VI, judgment no. 16672 of February 7, 2023).

It should be noted that, in the absence of specific lobbying regulations, paid mediation is illegal if the agreement between the principal and the intermediary aims at committing a criminal offense likely to provide undue advantages to the principal. The mere use of a personal relationship between the intermediary and the public agent to achieve a lawful purpose does not constitute an offense (Court of Cassation, Section VI, judgment no. 1182 of January 13, 2022). In other words, the structure of the 'new' offense no longer requires that the agreement, and consequently the promise or payment, be aimed at the public official performing an act contrary to their official duties or omitting or delaying an official act. This scenario is now an aggravated offense under art. 346 *bis* (4) ICC, along with cases where "*the acts are committed in relation to the exercise of judicial activities*".

The definition in para. 2 of art. 346 *bis* ICC appears to be consistent with the most recent case law, which has held that the so-called "paid mediation" is *illegal because of the 'external' projection of the parties' relationship, of the ultimate objective of the 'influence' that was bought, in the sense that the mediation is unlawful if it is aimed at committing a criminal offense capable of producing advantages for the principal* (Court of Cassation, Section VI, judgment no. 1182 of January 13, 2022).

CONCLUSION

The introduction of the crime of influence peddling has generated extensive debate and criticism, particularly concerning the ambiguity surrounding the intermediary's role, the definition of "influence", and the evidentiary challenges involved. Proving a causal link between the payment of a sum of money and the actual influence exerted on a public official is often

complex. Additionally, the law may be perceived as overly broad, risking the criminalization of legitimate social and professional interactions that are integral to decision-making processes and fiduciary relationships.

Despite these challenges, influence peddling remains a critical tool in the fight against domestic and international corruption. It addresses less visible, yet equally harmful, forms of collusion that undermine transparency and the integrity of public administration.

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Shadows of Integrity

Hong Kong's Independent Commission Against Corruption is a model to model.

DOROTHY SIRON

Introduction

Corruption has been, and in some jurisdictions continues to be, a pervasive problem worldwide. Hong Kong, with its unique history as a British colony and its rapid post-war development, is no exception. During the 1960s and early 1970s, corruption in the city was systemic and entrenched in both the public and private sectors. The turning point came in 1974 with the establishment of the Independent Commission Against Corruption ("ICAC"), following public outrage over high-profile scandals, including the notorious case of Peter Godber, a senior police officer who amassed unexplained wealth over HK$4.3 million – six times his total net salary over two decades.

This article provides a review of Hong Kong's anti-corruption framework, with a particular focus on the ICAC's role in enforcement and the legal mechanisms provided under the Prevention of Bribery Ordinance ("POBO"). It looks at how the ICAC conducts investigations and key cases that demonstrate its effectiveness, emerging challenges, and explores the potential of future reforms in areas such as corporate liability and new technologies.

THE PREVENTION OF BRIBERY ORDINANCE ("POBO")

The POBO serves as Hong Kong's primary statute addressing bribery in both the public and private sectors. It criminalizes the solicitation, offering, or acceptance of any advantage by public servants and private agents alike. As an investigatory agency, the ICAC is empowered to enforce the POBO and has the operational discretion to investigate offenses, choose the means to carry out investigations, and allocate resources as necessary.
The POBO is divided into several sections, each addressing specific corrupt practice:

Section 3. Soliciting or accepting an advantage:
Makes it illegal for public officers to accept any advantage without the approval of the Chief Executive. The term "advantage" is broadly defined to include money, gifts, loans, and services, among other things. Offenses under this section must be prosecuted within two years from the date they arise, as stipulated in Section 31A.

Section 4. Bribery:

Prohibits any person from offering an advantage to a public servant with the intent to influence their conduct in official duties. This applies to anyone attempting to influence a government officer's decisions or actions through corrupt means.

Section 9. Corrupt transactions with agents:

Extends anti-bribery provisions to the private sector, criminalizing the solicitation or acceptance of an advance by agents (such as employees) without the permission of their principal (such as their employer). This ensures that private enterprises are held to the same standards of integrity as public organizations.

Section 10. Possession of unexplained property:

Addresses unexplained wealth and requires public officers to justify any assets disproportionate to their known income. Failure to provide a satisfactory explanation may result in prosecution.

DEFINITION OF "ADVANTAGE"

Under the POBO, the term "advantage" is defined very broadly to include monetary payments, gifts, loans, contracts, services, and favors. Advantages valued at or above HK$2,000 are generally prohibited, even if offered by personal friends. What matters is that an inducement of some substance is being made (*HKSAR v Hui Russel and Another* [2009] HKCAR 326). Interestingly, "entertainment" is excluded from this definition, although excessive hospitality could still lead to prosecution if it is deemed to have been offered to influence a public officer's decision.

SCOPE

The POBO applies to both public servants and individuals in the private sector. Under Section 2(1), public servants include government employees, members of public bodies, and other officials holding positions of authority in publicly funded institutions.

Section 9 of the POBO extends the application of the POBO to commercial dealings where agents may be influenced to act against the interests of their principals. This was clarified by the landmark case *Secretary for Justice v Chan Chi Wan Stephen* (2017) 20 HKCFAR 98, which confirmed that an agent is guilty if their acceptance of an advantage is intended to influence their principal's business, thereby undermining the integrity of the relationship.

The POBO includes special provisions for the Chief Executive ("CE") of Hong Kong under Section 31AA. Corruption charges against the CE follow a separate process involving the Legislative Council and an investigation by the Chief Justice under Article 73 of the Basic Law (as seen in the Donald Tsang case outlined below).

Whilst "person" under Section 4 of the POBO includes groups of individuals (corporate or unincorporated), enforcement typically focuses on individual officers of private companies rather than the corporations themselves due to the difficulty in proving intent. As a result, companies involved in bribery or corruption are often penalized through fines or public reprimands due to corporate governance or internal control issues, rather than directly for the offenses. Meanwhile, the Court may bar a convicted individual from continuing employment with the company they were associated with at the time of their consideration on the basis of public interest pursuant to section 33A of the POBO.

Attempted bribery is punishable under Section 11 of the POBO, which covers incomplete or failed bribery attempts. Section 89 of the Criminal Procedure Ordinance (Chapter 221, the Laws of Hong Kong) also imposes liability on anyone who aids, abets, or procures the commission of an offense (which includes bribery).

PENALTIES

The penalties under the POBO are severe, reflecting Hong Kong's zero-tolerance to corruption. For public officers, violations of Section 3 or Section 4 can lead to fines of up to HK$500,000 and imprisonment for up to seven years. In cases involving large sums of money, the imprisonment term can extend to ten years. Although no tariff is specifically given by the court,

imprisonment is the norm and non-custodial sentence can only be justified under exceptional circumstances.

Additionally, the court may issue confiscation orders under Section 12AA, particularly in cases of unexplained wealth. The ICAC Commissioner can also make an *ex parte* application for a court-issued written notice requiring a suspect under investigation to surrender their travel documents.

For comprehensive accountability, these penalties apply both to the person accepting or soliciting the bribe, and to the individual or entity offering it.

COMMON LAW

Common Law supplements the statutory regime by addressing the offense of misconduct in public office. In *Sin Kam Wah v HKSAR* (2005) 8 HKCFAR 192, a public officer was found guilty of misconduct in public office, despite deriving no personal gain. The court held that willfully abusing one's office to benefit oneself or others constitutes a punishable offense. Similarly, in *HKSAR v Hui Rafael Junior* (2017) 20 HKCFAR 264, the court ruled that misconduct includes entering into arrangements that compromise a public officer's duty. However, whilst the common law offense of bribery continues to stand, the statutory provisions under the POBO have rendered it almost obsolete for practical purposes.

HIGH-PROFILE CASES AND LESSONS LEARNED

The ICAC's handling of high-profile cases highlights the complexity of enforcing anti-corruption laws. Notably, the former CE of Hong Kong, Donald Tsang, was charged by the ICAC and found guilty of one count of misconduct in public office in February 2017, having failed to disclose plans to rent a luxury penthouse for retirement from Bill Wong Cho-bau, who was in the process of applying a broadcasting licence for his media company. After the allegations of such preferential allocation surfaced in 2012, Tsang was later summoned to answer questions from an open inquiry by the Legislative Council. To review the frameworks and procedures for preventing and handling potential conflicts of interest concerning the CE, an Independent Review Committee was formed and chaired by the former Chief Justice.

In 2017, Tsang was sentenced to 20 months imprisonment, becoming the highest officeholder in Hong Kong history to be convicted and imprisoned (*HKSAR v Tsang Yam Kuen, Donald* [2017] HKCFI 640). His conviction was subsequently quashed on appeal, after finding the trial judge had failed to provide an adequate explanation of the elements constituting the offence of misconduct in public office to the jurors (*HKSAR v Tsang Yam Kuen, Donald* [2019] HKCFA 24).

In another case of *HKSAR v Hui Rafael Junior* (2017) 20 HKCFAR 264, charges were laid against the former Chief Secretary Rafael Hui, along with property tycoon Thomas Kwok of Sun Hung Kai Properties and two others, regarding secretive payments totaling HK$8.5 million made into Hui's bank account by Kwok via two co-appellants, in exchange of substantial commercial interest by getting involved in several major development projects that Hui was in charge with (right before he took office as Chief Secretary). The Court viewed that proof of specific act of the defendant done in favor of the briber is not required to constitute misconduct in public office, and this case sets a precedent that pre-office advantages received by a public officer may still amount to an abuse of public trust, which reinforces the principle that public officers must act with integrity and impartiality.

THE ROLE OF THE INDEPENDENT COMMISSION AGAINST CORRUPTION ("ICAC")

Established under the Independent Commission Against Corruption Ordinance (Chapter 204, the Laws of Hong Kong; "ICACO"), the ICAC is the primary enforcement body for anti-corruption laws in Hong Kong. It works independently from other branches of the government, as mandated by Article 57 of the Basic Law, with powers which include the authority to investigate suspicious financial transactions, inspect bank accounts, and compel individuals to provide information, as outlined under Part III.

The ICAC's powers extend beyond bribery, enabling it to investigate any associated crimes uncovered during a bribery investigation. Under Section 10(2) of the ICACO, the ICAC can arrest suspects without a warrant if another offense is reasonably suspected. Additionally, Section 12 of the ICACO requires the ICAC Commissioner to consider all received complaints of

corrupt practices and to carry out investigations (*Gregory Michael Hall v Commissioner of the ICAC* [1987] HKLR 210).

A hallmark of the ICAC is the confidentiality of its investigations. Under Section 30 of the POBO, it is a criminal offense for anyone to disclose the identity of a person under investigation. This safeguard ensures the integrity of investigations and prevents attempts of interference by individuals implicated in corruption cases. The principle of confidentiality is critical in ICAC's operations, as demonstrated in *HKSAR v Ng Man Yuen Avery [2019] HKCFI 1485*.

Additionally, under Section 14 of the POBO, the ICAC's investigatory powers include compelling witnesses to provide information and to answer questions, even if this may infringe upon their right to silence, which is otherwise protected under Hong Kong's Basic Law. Statements obtained under this provision can be used against the statement maker under Section 20 of the POBO, subject to the overarching principle that a fair trial shall be maintained (*A v The Commissioner of the ICAC* (2012) 15 HKCFAR 362).

In 2024, the ICAC has focused its efforts on industries with a high risk of corruption, such as construction, building management, and finance. A notable case involved the Three-Runway System Project at Hong Kong International Airport, where several public officers were charged with accepting bribes totaling HK$7.7 million (see ICAC - Press Releases). Similarly, investigations into the building management sector have led to the largest prosecution in ICAC history, where 23 individuals were indicted for conspiracy to defraud and bribery involving over HK$6.5 million (see ICAC - AR2023 – Operations Department.pdf). The ICAC has also increasingly been collaborating with other statutory bodies such as the Competition Commission, to investigate suspected corruption and bid-rigging activities in the building maintenance industry.

ICAC AND THE POBO: EXTRATERRITORIAL EFFECT

Hong Kong is a signatory to international anti-corruption treaties, such as the United Nations Convention against Corruption ("UNCAC"). This facilitates

cross-border cooperation between the ICAC and foreign law enforcement agencies. However, the extraterritorial application of the POBO itself is somewhat limited.

Section 4 of the POBO extends to bribery involving Hong Kong public servants irrespective of where the crime occurred. In contrast, Section 9 (private sector bribery) lacks explicit extraterritorial reach. Nonetheless, Hong Kong courts have ruled that foreign entities may still be prosecuted if a substantial portion of the bribe took place within Hong Kong. Furthermore, whilst bribing a foreign public official is not explicitly an offense under the POBO, depending on the circumstances, such conduct may be an offense contrary to Section 9(2) (*HKSAR v Lionel John Krieger* [2014] 3 HKLRD 404).

FUTURE CHALLENGES AND REFORMS

Hong Kong consistently ranks as one of the least corrupt jurisdictions globally, as evidenced by its 14th-place ranking in the 2023 Corruption Perceptions Index. However, the ICAC continues to face emerging challenges. For instance, the rise in popularity of decentralized finance such as Bitcoin and other cryptocurrencies presents new obstacles to anti-corruption enforcement. The ICAC has acknowledged the need to adapt its investigative techniques to address the difficulty to trace illicit money flows from anonymous and borderless transactions. Further law reform may be proposed in due course.

The ICAC has also announced plans to strengthen its enforcement efforts in high-risk industries, particularly in the financial and construction sectors. As part of this initiative, it introduced Integrity Risk Management toolkits for construction companies in their recruitment processes, with the intent to mitigate integrity risks and uphold professionalism.

In addition, the Hong Kong International Academy Against Corruption (HKIAAC) was recently established to focus on systematic training in various business sectors and academic exchange on anti-corruption laws and practices worldwide.

CONCLUSION

Hong Kong's legal framework for combating bribery and corruption is comprehensive, with the POBO serving as the primary statute alongside common law provisions. The ICAC plays a pivotal role in enforcing these laws, equipped with extensive powers to investigate, arrest, and prosecute offenders. Recent landmark cases and enforcement activities demonstrate Hong Kong's ongoing commitment to maintaining its reputation as a global leader in anti-corruption efforts.

While challenges remain, particularly in relation to cross-border issues and the up-and-coming decentralized finance, Hong Kong's anti-corruption regime offers a robust model for other jurisdictions.

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