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The Verdict

Round-up of corporate crime developments across CMS

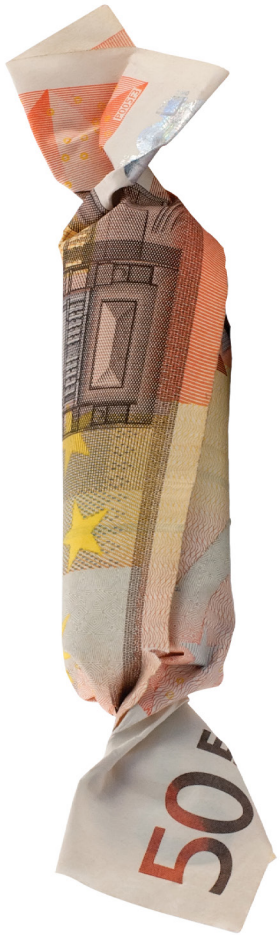
Spring/Summer 2020

Monaco spotlight

Overhaul of criminal sentencing in Monaco

Act n° 1.478 of 12 November 2019, constitutes a comprehensive reform of Monaco's criminal sentencing policy intended to modernize and simplify the sentencing process. It is already partially in force, with some key provisions coming into force in May 2020.

The main purpose of the Act is to increase judges' discretionary powers and provide them with the appropriate legal tools to ensure that sentences are proportionate to the seriousness of the offence and are tailored to convicts' specific medical, social and family situations and their criminal profiles. It also addresses convicts' need for reintegration into society, which is primordial in preventing repeat offences.



In order to meet these objectives, the Principality of Monaco has substantially amended numerous provisions of the Criminal Code and the Criminal Procedure Code, as well as other special laws and Sovereign Ordinances, the Civil Code and the Maritime Code.

The reform includes four significant amendments to the Criminal Code:

— Two new alternative sentences to imprisonment or fines are created: day-fines and community service. Day-fines may be imposed instead of imprisonment as a sum fixed by the Court to be paid by convicts daily to the Treasury for a set number of days. Community service may be imposed instead of both imprisonment and fines, requiring convicts to work in an approved structure for a period determined by the Court.

— New options in serving sentences are introduced: partial suspensions of the prison sentence, semi-liberty and external detention. These options enable convicts to benefit from day releases and work releases.

— A new penalty is created: the residency ban, namely the prohibition to settle, reside or enter the territory of the Principality of Monaco in any capacity whatsoever, for a duration determined by the Court.

— Imprisonment for minor offences classified as "contravention" is abolished.

Two major amendments to the Criminal Code of Procedure are noteworthy:

— The mechanism of having a penalty pronounced by a Criminal Court absorbed completely or partially by another more severe penalty pronounced by a different Criminal Court is clarified. The new wording of Article 347 allows for sentences imposed across different courts to run concurrently.

— In order to reduce the number of judgments by default pronounced in the absence of the accused, the legislator has created a presumption that summonses have been served when they are served at the last declared address. To ensure the effectiveness of this presumption, an obligation for the parties to declare their address at various stages of the criminal proceedings is introduced. Existing provisions pertaining to such judgements are also further clarified.

Legal practitioners are thrilled with the overhaul, but for now we are still at square one. Act n° 1.478 requires the government to issue a Sovereign Ordinance in order to lay down the rules of application for its provisions. To date, no such Sovereign Ordinance has been issued, which means that most provisions are not yet in force. The much-awaited Sovereign Ordinance will likely give rise to new litigation on the application of sentencing rules and on the execution of sentences.

CMS round-up

Czech Republic: Appointing an agent for accused legal entity

A person authorized to act on behalf of a legal entity under civil procedure rules is also authorized to act for that legal entity in criminal proceedings. An executive director may appoint an agent to act as and on behalf of the accused legal entity in criminal proceedings. However, there was some uncertainty whether this held true where the executive director was also accused in the same matter as the legal entity, as the Act on Criminal Liability of Legal Entities (the "**Act**") provides that in such a case the executive director cannot act in any criminal proceedings on behalf of the legal entity.

In January 2020, the Czech Constitutional Court held that the Act's statutory prohibition does not prevent the accused executive director from appointing an agent for the accused legal entity. It was held that this would represent a breach of a legal entity's constitutional right of defence, provided there was no risk that the executive director would appoint an agent to cause harm to the legal entity or to gain personal advantage in the criminal proceedings to the detriment of the legal entity.

France: First decisions of the Sanction Commission of the French Anti-Corruption Agency

In 2017, the French law for the prevention and detection of corruption, the "Sapin II" law, created the French Anti-Corruption Agency ("**AFA**") to monitor the implementation of legally mandated compliance programs.

Where a breach is found during inspections, the AFA's Director may give notice to the company to submit a written response within two months, following which the Director can issue a warning or refer the matter to the Sanction Commission (the "**Commission**"). The Commission may order the company to adapt its compliance procedures per its recommendations and impose a financial penalty of up to EUR 200,000 for individuals or EUR 1m for legal entities.

In June 2019,after it had notified a company of a number of breaches (in particular, the failure to draw up (i) a risk assessment; (ii) a compliant code of conduct; or (iii) a procedure for assessing third parties), the Director referred the first case to the Commission. On the facts of that case, the Commission considered that the alleged breaches were no longer ongoing at the date of the hearing and that there was therefore no need to issue an injunction or impose financial penalties.

In September 2019, the Director referred a second case to the Commission. While the Commission rejected the alleged breaches concerning risk assessment, it upheld those concerning the code of conduct, which did not contain all information required by law and was not accessible to the company's employees. The Commission also noted the absence of specific accounting control procedures, which would assist the prevention of corruption. On that basis, the Commission issued its first two injunctions and the company now has until September 2020 to remedy the code of conduct failings and until March 2021 to demonstrate effective accounting control procedures.

Germany: Money Laundering in the German real estate sector

Due to increased media and public attention, the real estate sector is currently the focus of money laundering supervisory authorities. A national risk assessment conducted by the Ministry of Finance, concluded that the sector was at high risk of abuse by organised crime.

Amendments to the German Money Laundering Act ("**GMLA**") in January 2020, have particularly impacted the real estate sector. The GMLA may also affect foreign business operators. Subsidiaries or branches of foreign companies within the financial sector are considered "obliged entities" under its regime. In addition, foreign business operators in the non-financial sector are advised to adapt their anti-money laundering management to GMLA standards to the extent they are involved in German real estate transactions.

EEA and non-EEA businesses that acquire title to German real estate and which are not already registered in an EEA transparency register, must register in the German transparency register.

Parties to transactions subject to real estate transfer tax must now disclose to the notary their full ownership and control structure up to the beneficial owner. A failure to disclose beneficial ownership triggers suspicious activity reporting mechanisms for the notary. The notary must check the information for consistency and submit it to the German Financial Intelligence Unit upon request. The notary may not notarise the transaction documents if the ownership information is inconsistent.

Rental agents also now fall within "obliged entities" where the rental requires a monthly base rent of EUR 10,000 or more. Accordingly, all customers, whether on-shore or off-shore, must disclose their identity and ultimate beneficial owners.

Italy: Highlights on Italian Criminal Tax Legislation

On 25 December 2019, the Tax Law Decree no. 124 of 26 October 2019 converted into Law no. 157 of 19 December 2019 (the "**Tax Decree**") entered into force. Section 39 of the Tax Decree significantly strengthened the Italian criminal tax regime.

The most relevant provisions are:

- more severe penalties for almost all crimes providing for imprisonment, including various fraudulent declaration offences, various related frauds and concealing or destroying accounting records;
- lower thresholds for criminal liability in relation to filing untrue tax returns;
- introduction of the so-called "extended" confiscation for certain offences; and
- inclusion of some tax offences among crimes contained in Legislative Decree no. 231/2001 – for example, (i) fraudulent declaration through the use of documents for non-existent operations (Sec. 2); (ii) fraudulent declaration through other artifices (Sec. 3); (iii) invoices or other documents issuance for non-existent operations (Sec. 8); (iv) concealing or destroying accounting documents (Sec. 10); and (v) fraudulent subtraction from tax payment (Sec. 11).

Companies may therefore be subject to fines up to 500 quotas and which can be increased by up to a third in the most serious cases, disqualification penalties in relation to public contracts and other benefits as well as bans on advertising, seizure of criminal proceeds/profits and publication of the conviction.

Peru: Project of Guidelines for the Implementation of Prevention Models

A new regulation issued under Law No. 30424 (the "**Law**") has introduced corporate criminal liability for specific crimes committed by or on behalf of the corporate, including corruption and money laundering offences. Corporates may avoid criminal sanctions by implementing effective compliance programs. The new regulation notes that these programs would be evaluated by the Securities Market Regulator (Superintendencia de Mercado de Valores, ("**SMV**")), who would issue a technical report at the request of a criminal prosecutor, which would serve as expert evidence in the course of any criminal investigation against the company.

By Resolution N° 021-2019-SMV/01, published on 30 September 2019, the SMV has issued a draft of the guidelines for implementing such compliance programs, to assist corporates in developing programs that will comply with the requirements. These guidelines are especially focused on measures that ought to be implemented and actions that need to be taken into consideration by companies when implementing their programs. The guidelines will also assist the SMV in their assessment of a company's compliance program.

The draft is currently the subject of a public consultation.

Russia: Constitutional Reform in Russia

In January 2020, President Putin introduced a constitutional reform in Russia. Various amendments to the Russian Constitution of 1993 have been introduced and adopted by the Russian Parliament. There are several changes aimed at preventing corruption amongst Russian top officials. Though the amendments to the Constitution need to be approved by referendum, which was originally scheduled for 22 April 2020 until COVID-19 caused postponement, there are no doubts that the amendments will be voted for once the referendum is held.

The amendments will introduce restrictions applicable to all Russian top officials, deputies of both houses of the Russian Parliament, regional governors and judges. For example, they will be prohibited from holding certain types of property outside of Russia (e.g. immovable property and bank accounts, although the list may be extended). The restrictions are also applicable to family members of the officials.

In 2019, 30,991 corruption cases were registered and investigated in Russia. The total estimated damage of those crimes was around EUR 700m. Around EUR 330m of monetary assets, property and valuables were seized, confiscated and sold. As of 2019, any proceeds from corruption crimes are transferred to the State Pension Fund of Russia.

Slovakia: Further amendments to the special rules on registration of UBOs in Slovakia

The Act on Register of Public Sector Partners was introduced in Slovakia in 2017 (the "**Act**"). Persons who receive public proceeds or who enter into contracts with authorities (subject to the terms of the Act) must register their ultimate beneficial owners ("**UBOs**").

Amendments to the Act were adopted in September 2019 and the definition of "public sector partner" was clarified. Other amendments include the requirement that annual verification of the registration of UBOs must be completed no later than 28 February each year. Another important change is that, when dealing with any breach of the Act, the court must take into account the gravity of the breach when deciding which sanction to impose.

The Act is perceived as a tool for dealing with corruption in Slovakia. Several companies have already been impacted by the Act, because they had issues with the identification of their UBOs. This has included a local water supply company in Bratislava, where court proceedings verifying the UBOs have revealed that although the majority shareholder is the City of Bratislava, the ultimate minority shareholder is an individual who owns the company providing maintenance services to the local water supply company.

United Kingdom: The High Court discharges 3 UWOs following challenge by respondents

On 8 April 2020, in NCA v Andrew Baker, Villa Magna Foundation and others [2020] EWHC 822, the High Court discharged three Unexplained Wealth Orders ("**UWOs**") and related interim freezing orders obtained against three London residential properties reportedly worth GBP 80m. This is the first time that the authorities have had UWOs discharged on review.

The National Crime Agency ("**NCA**") sought the UWOs against the legal and beneficial owners of the properties on the basis of their suspicion that the properties were acquired via complex offshore corporate structures by a former senior Kazakh public official as a means of laundering proceeds of unlawful conduct. In discharging the UWOs, the judge ruled that the NCA's underlying assumptions that he was the source of the funds used to acquire the properties were "*unreliable*", and that there was "*cogent evidence*" and "*extensive information*" as to how the respondents came to own the properties, which demonstrated that the source of funds for the acquisitions were legitimate and unconnected. The judge also noted that use of complex offshore corporate structures was not, on its own, a ground for believing they had some wrongful purpose; there must be some additional evidential basis for such a belief. The NCA have said they intend to appeal.

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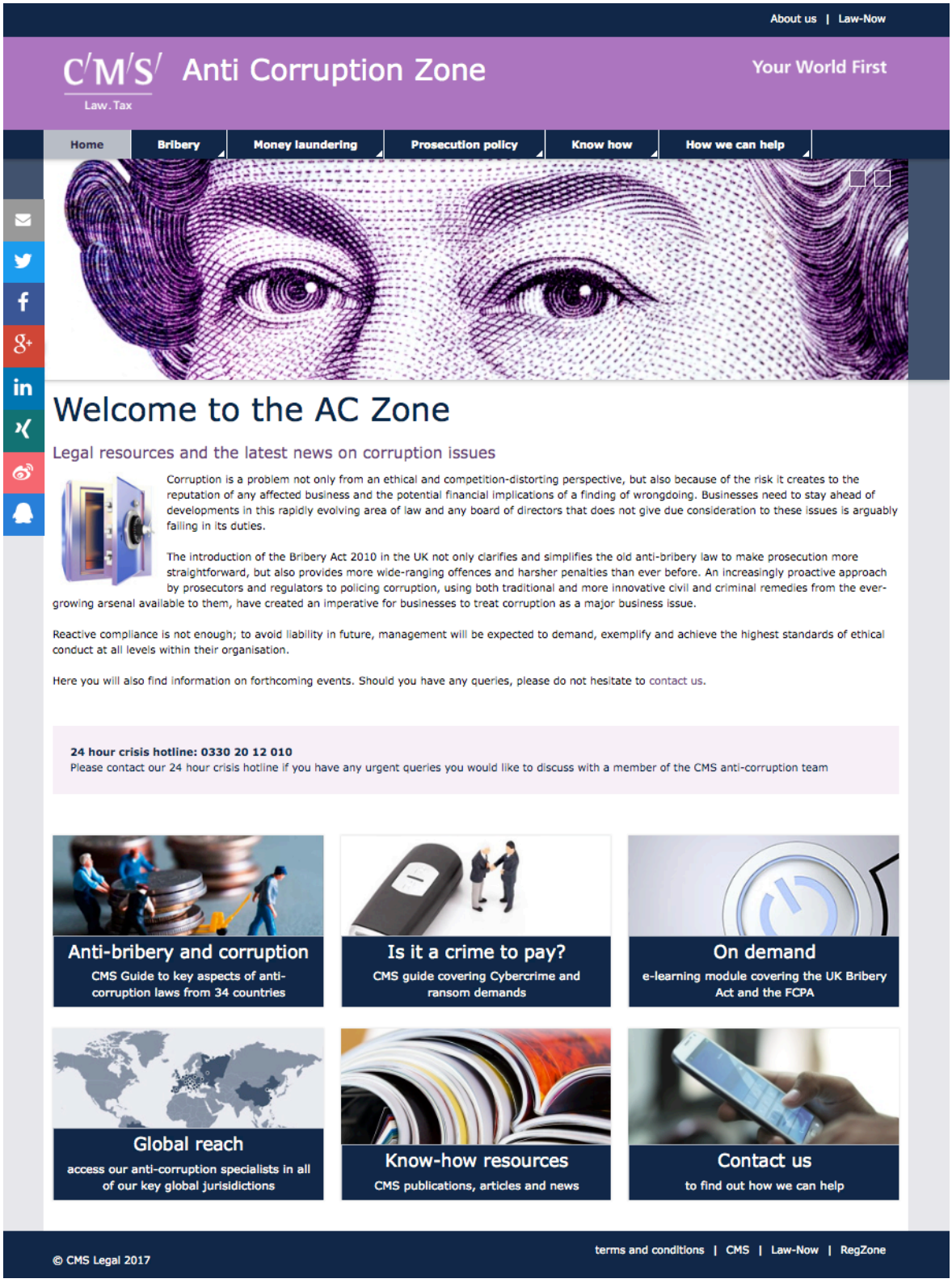

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