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The International Comparative Legal Guide to:

Business Crime 2016

6th Edition

A practical cross-border insight into business crime

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EDITORIAL

Welcome to the sixth edition of *The International Comparative Legal Guide to: Business Crime*.

This guide provides the international practitioner and in-house counsel with a comprehensive worldwide legal analysis of the laws and regulations of business crime.

It is divided into two main sections:

Seven general chapters. These are designed to provide readers with a comprehensive overview of key issues affecting business crime, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in business crime laws and regulations in 31 jurisdictions.

All chapters are written by leading business crime lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors, Gary DiBianco and Ryan Junck of Skadden, Arps, Slate, Meagher & Flom LLP, for their invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.co.uk.

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1 General Criminal Law Enforcement

1.1 What authorities can prosecute business crimes, and are there different enforcement authorities at the national and regional levels?

Only state prosecutors and victims (albeit to a very limited extent) can act as prosecutors before the Russian courts. However, the preliminary investigations can be conducted by a variety of state bodies, depending primarily on the subject matter of the alleged offence.

The competent authority for a preliminary investigation of a given crime shall be identified in accordance with article 151 of the Code of Criminal Procedure of the Russian Federation (hereinafter – the 'RF CPC'). The powers to investigate crimes are primarily vested in the Investigative Committee of the Russian Federation and the Ministry of Interior of the Russian Federation, although certain types of crimes can be investigated by other, more specialised agencies such as, *inter alia*, the Federal Security Service of the Russian Federation, the Federal Customs Service of the Russian Federation or the Federal Service for the Control over the Turnover of Drugs.

Administrative proceedings described in question 1.3 below can be conducted by various specialised state agencies.

The authorities responsible for prosecution and preliminary investigation (hereinafter – the 'Responsible authorities') are competent to act on a federal, as well as on a regional, level; in the latter case they normally act through their regional subdivisions. The distribution of powers between the central offices and the regional subdivisions of the responsible authorities is governed by their internal regulations.

1.2 If there are more than one set of enforcement agencies, please describe how decisions on which body will investigate and prosecute a matter are made.

The rare occasions where victims are allowed to prosecute crimes in court under article 246(3) of the RF CPC are defined in article 20 of the same Code. Such 'private prosecution' is only allowed for certain types of crimes enlisted in article 20 of the RF CPC, such as the calumny, which at times may have business implications.

In all the other cases the state prosecutor is provided by the Prosecutor's Office of the Russian Federation.

As to the preliminary investigation stage, it has been explained in the preceding paragraph that the competence of various responsible authorities is defined in article 151 of the RF CPC, with reference to specific articles of the Criminal Code of the Russian Federation (hereinafter – the 'RF CC'). Any possible conflicts of competence (for example when different crimes are to be investigated together) or disputes concerning the powers of preliminary investigation shall be resolved by the state prosecutor (article 151 (7), (8) of the RF CPC).

1.3 Is there any civil or administrative enforcement against business crimes? If so, what agencies enforce the laws civilly and which crimes do they combat?

The Russian tort law is based on the principle of *délit* general (article 1064 of the Civil Code of the Russian Federation; hereinafter – the 'RF CivC') which means that any crime also qualifies as a tort to the extent it causes any loss to others. Business crimes are no exception and frequently entail not only criminal but also civil liability. The procedure for civil recovery is described in more detail in question 8.1 below.

As for the administrative enforcement, it should be mentioned that the system of so-called 'administrative liability' operates in Russian law in parallel with the system of criminal liability. The offences that call for the 'administrative liability' (which shall be distinguished from crimes which can only be prosecuted through criminal proceedings) and the corresponding procedures are for the most part described in the Code of Administrative Offences of the Russian Federation (hereinafter – the 'RF CAO'). The term 'administrative' in this context reflects the fact that the 'administrative liability' is for the most part applied extra-judicially by the competent enforcement agencies (although sometimes they can only enforce their decisions via special court proceedings). Many of the offences penalised by the RF CAO can be described as 'business offences', but are less serious than their counterparts prohibited under the RF CC.

The remedies provided both by the RF CC and the RF CAO are punitive and the principle of *ne bis in idem* dictates that they can only be applied alternatively on the same charges.

The offences provided by the RF CAO (and some other special statutes) can often be prosecuted in special court proceedings (if only to enforce the remedies already applied administratively), which differ from the civil proceedings; the applicable remedies are those provided by the RF CAO and special statutes.

Sometimes specialised federal agencies are allowed to apply and enforce administratively special statutory remedies to expediently and efficiently combat the wrongdoings which fall within their respective competences. Thus the Federal Tax Service of the Russian Federation is empowered to collect arrears, penalties and

fines by means of direct instructions to the taxpayer's bank (if the taxpayer is a legal entity or an individual entrepreneur), and to impose fines and penalties and recover arrears from such taxpayers by means of directly enforceable decisions. The Federal Antitrust Service of the Russian Federation (hereinafter – the 'RF FAS') has its special antitrust proceedings which can result in binding decisions accompanied by binding orders enforceable by the court. Whatever remedies can be applied and enforced administratively are, of course, subject to subsequent judicial review.

It is not feasible to describe here all the judicial and extra-judicial proceedings associated with administrative enforcement of various rules and regulations. However, where it is particularly relevant, the administrative offences and the administrative proceedings will be compared to their criminal counterparts.

2 Organisation of the Courts

2.1 How are the criminal courts in Russia structured? Are there specialised criminal courts for particular crimes?

Criminal cases in the Russian Federation are tried by the courts of general jurisdiction. Within those courts there is a separate parallel two-level system of military justice (specialised in criminal cases involving military personnel). All courts of general jurisdiction are supervised by the Supreme Court of the Russian Federation.

The system of the courts of general jurisdiction has recently been reformed to implement the recommendations of the European Court of Human Rights and our own Constitutional Court. The main purpose of this reform was to introduce a clear and efficient system of appeal. The Soviet system, inherited by the Russian Federation, traditionally denied the concept of classical continental appeal (full re-trial of the case by the second instance court). That unrealistic approach caused serious distortions as the cassation stage – which in a classical European model is meant to address issues of law only – assumed to some extent the functions of second-hand factual enquiry. The inevitable third level of appeal was called supervision and was performed by senior regional courts or by the Supreme Court. Supervision was meant to be an extraordinary and discretionary remedy intended to prevent serious flaws and divergences in the system. In practice, however, it turned into a convoluted system operating with long delays and periods of uncertainty as to the final outcome of the case. While the latest reform introduced re-trial by an appellate court for all final, and some interim, judicial acts in the criminal proceedings, it has been criticised for sidestepping many serious procedural questions that such procedure is bound to raise. The new system effectively leaves factual enquiry to the discretion of the appellate court. Furthermore, it preserves the remnants of the old supervision review under the name of cassation, but adding another level of supervision at the top, which clearly overcomplicates the system. After the appeal review (or upon expiration of the 10-day deadline for lodging an appeal) the judicial act enters into force. The structure will be described briefly below.

The first level of this system is justices of the peace. Their competence in criminal law matters is limited to the first-instance trial of the crimes that are punished by not more than three years of imprisonment (with certain exceptions). The second level is the district courts, which are competent to try most of the criminal cases in the first instance (at least most of the business crimes) and are the appellate instance for the justices of the peace. The third level courts are the (supreme) courts for the constituent entities of the Russian Federation. Those courts are competent as the first instance courts in the cases involving most serious crimes and review on appeal the final acts of the district courts and their own interim orders. Presidiums of the third level courts act as cassation courts for all lower courts and their own interim judicial acts. Within the system of the military justice, garrison courts correspond to the first two levels of the general system and the circuit (naval) courts correspond to the third level of the same system.

The highest instance in the system of courts of general jurisdiction in the Russian Federation (including military courts) is the Supreme Court of the Russian Federation, which serves as a first instance court (in exceptional cases), as an appellate court for the third-level courts and military circuit (and naval) courts acting in the first instance as well as for its own first instance judgments. It also acts as a cassation court for all cases decided by the presidiums of the third level courts, and first instance judicial acts of these courts, if there was no appeal from that judgment to the Supreme Court. The presidium of this court supervises all the judicial acts reviewed by the same court on appeal (as opposed to cassation appeal), its own appellate and cassation judgments, and (surprisingly), its own judgments. The Supreme Court may also serve as a trial court for certain types of cases (such as the cases against the members of the Russian Parliament).

It is apparent from the above description that the system of appeal, cassation and supervision in the courts of general jurisdiction is still very complex. Although the reform was a step towards better implementation of constitutional and international standards of appeal, there is still room for improvement.

2.2 Is there a right to a jury in business-crime trials?

Articles 30(2(2)) and 31(3(1)) of the RF CPC determine the crimes which can be tried by a jury. Most of them are not connected to business. However, organisation of a criminal community (a structured criminal group organised to commit grave or especially grave crimes) and grave smuggling of highly regulated goods are on the list. Those offences often accompany business crimes, and if the charges are brought jointly for several crimes, only some of which can be tried by a jury, a jury (if requested by the accused) will be competent to try the case as a whole (this might be inferred from the Supreme Court's position expressed in paragraph 4 of its Ruling dated 22 November 2005 No 23). Juries used to try more business-related offences, but the list has been considerably shortened.

3 Particular Statutes and Crimes

3.1 Please describe any statutes that are commonly used in Russia to prosecute business crimes, including the elements of the crimes and the requisite mental state of the accused:

- **Fraud and misrepresentation in connection with sales of securities**

  In 2009, the RF CC was amended to include 3 additional articles (namely articles 185.2, 185.3 and 185.4 of the RF CC) to cover specific types of offences related to the securities market.

  The core Russian statutes used to prosecute the crimes of fraud and misrepresentation in connection with the sales of securities are:

  - article 159 of the RF CC – fraud as a misappropriation of another's property by deception or abuse of confidence (it is a general rule against fraudulent behaviour that can be applied for situations when no special rule against fraud

and misrepresentation at the securities market can be applied);

- article 159.1 of the RF CC – misappropriation of funds by means of misrepresentation to a creditor;
- article 159.4 of the RF CC – fraud related to deliberate failure to perform commercial obligations;
- article 159.6 of the RF CC – misappropriation effected via computer systems;
- article 185 of the RF CC – abuse in the securities issuance process;
- article 185.1 of the RF CC – persistent deliberate failure to provide information required under Russian law on securities to an investor or to a controlling authority;
- article 185.2 of the RF CC – breach of the procedure for keeping records of the rights in securities;
- article 185.3 of the RF CC – price manipulation on the securities market;
- article 185.4 of the RF CC – obstruction or unlawful restriction of the securities holders' rights; and
- article 186 of the RF CC – counterfeiting of securities.

All the listed crimes are intentional. The RF CAO also provide for liability for some wrongdoings on the securities market, e.g., for malpractice in the course of securities issuance, unlawful transactions with emissive securities and failure to disclose or incorrect disclosure of information which shall be disclosed under Russian law.

o Accounting fraud

This offence constitutes no breach of the provisions of the RF CC unless committed by an insolvent debtor or in view of hiding taxable income or property. But it is generally punishable under article 15.11 of the RF CAO. According to its provisions, gross violation of accounting rules and of the financial reporting regulations – as well as of the regulations on storing of the accounting documents – is punishable with an administrative fine for officials. This offence can be both negligent and intentional.

The accounting fraud in bankruptcy is an intentional offence under article 195 of the RF CC if it causes serious damage. Article 199.2 of the RF CC provides for criminal liability for hiding income or property that can be used to recover tax arrears and penalties, which is an intentional crime that can be committed, *inter alia*, by means of accounting fraud.

In 2014, article 172.1 was also introduced to the RF CC, which makes accounting fraud punishable when committed by the officials of a financial organisation so as to hide signs of insolvency, or grounds for withdrawal of licence and/or for appointing a temporary administration.

o Insider trading

According to the Federal Law No 224-FZ 'On the counteraction to illegal usage of insider information and market manipulation' (hereinafter – the 'Insider Trading Law') the 'insider information' is any detailed and concrete non-public and not communicated information, which, if made public or communicated, may seriously affect the prices of stock, currency or product markets. For each insider, there shall be a limitative list of insider information stipulated by the interested private entity or as a state regulation, depending on the situation. The Insider Trading Law generally prohibits unauthorised disclosure and usage of insider information, as well as market manipulation based on the insider information. The prohibitions contained in the Insider Trading Law itself, if violated, can give rise to civil liability.

The Insider Trading Law also introduced some important amendments into other statutes. In particular, article 185.3 of the RF CC now prohibits any market manipulation in relation to the prices of financial instruments, by way of publicising false data or other activities in the market, including illegal usage of insider information, which results in serious benefit to the perpetrator or serious damage to others. The benefit (damage) shall be regarded as serious if it amounts to more than 2,500,000 roubles (about USD 86,000 at current rates). In the worst case, the punishment may be up to four years of imprisonment (up to seven if the damage exceeds 10 mln. roubles) that might also be accompanied by an accessory punishment (such as a fine).

Another article of the RF CC introduced by the Insider Trading Law (article 185.6) prohibits any intentional illegal usage of insider information if such actions lead to a serious benefit for the perpetrator or damage to the others. The insider shall be criminally liable whether he used the information for his own trading operations, advised others or passed the information to others. Intention is a requisite element of this offence.

The RF COA (articles 15.21 and 15.30) penalises any illegal use of insider information or market manipulation that is not covered by the RF CC. As to the state of mind of the perpetrator, the offence is intentional more often than not; however, even negligence will suffice. The RF COA (article 15.35) also penalises failure to disclose the insider information where such disclosure is required by law (this, for example, concerns state bodies that invest in financial instruments).

o Market manipulation in connection with the sale of derivatives

Derivatives related market manipulation is prohibited under the same heads as market manipulation in general. As it was explained in the immediately preceding paragraph, market manipulation is prohibited generally under article 185.3 of the RF CC. This article applies to trading in financial instruments, including derivative financial instruments. Less serious instances of market manipulation in this field are covered by article 15.30 of the RF COA.

o Embezzlement

This offence is prohibited by article 160 of the RF CC. Misappropriation or embezzlement is the stealing of other's property entrusted to the perpetrator. This crime may involve tangible property, as well as intangible property (e.g., securities or money). The property may be entrusted to the perpetrator, for example, in the course of employment, contractual relationship or otherwise. This offence can only be intentional.

o Bribery of government officials

There are two offences to distinguish, namely: the bribe-taking; and the bribe-giving. The first one is prohibited by article 290 of the RF CC. The second one is prohibited by article 291 of the same Code.

Bribe-taking, as stipulated in article 290, may be committed by a government official (including a foreign one) either personally or through an intermediary. The notion of the bribe encompasses various pecuniary benefits or gifts (money, securities, other assets or even services) given to an official to alter his behaviour in favour of the giver. Bribe-taking is an intentional crime.

Bribe-giving also may be effectuated either in person or by an intermediary. Bribe-giving is committed with direct intention. An attempt to give a bribe in order to make semblance of bribery to later blackmail the official involved is a separate crime envisaged by article 304 of the RF CC, and not an inchoate bribe-giving.

In May 2011, the RF CC was amended, *inter alia*, to criminalise the services of the intermediaries that pass the bribes to the recipients. Article 291.1 of the RF CC now penalises the services of intermediaries who physically pass the bribe or otherwise facilitate bribery.

- **Criminal anti-competition**

  This offence is stipulated by article 178 of the RF CC. This article prohibits cartel agreements. Criminal responsibility is envisaged for such activities only if they result in significant detriment to the state, legal entities or private individuals or allow earning or economising large amounts of money.

  The RF CAO provides for liability for abuse of dominance in the market, monopolistic agreements and concerted actions, unfair competition, restriction of competition by state and municipal authorities, failure to comply with the RF FAS's lawful requests and to move for and obtain the RF FAS's approval for market transactions where such approval is needed. Practically, any violation of antitrust laws is penalised by the RF CAO; the liability is normally applied in the special administrative proceedings in the RF FAS, and its executory orders can be enforced by the court.

- **Tax crimes**

  There are four articles in the RF CC that provide for criminal liability for the tax crimes. Those are articles 198-199.2 of the RF CC. The actions and omissions prohibited are: evasion of tax by a natural person or by a legal entity by failure to submit an income return in cases when the submission of a return is obligatory or by submitting a return data on incomes and expenses known to be false or by any other means; failure to perform tax agent duties for personal benefit; and concealment of money or property which can be used to collect arrears.

  All of these offences shall be intentional and therefore fall under the RF CC. Some tax offences are also punishable under the RF CAO, but the Tax Code of the Russian Federation is the primary source of liability for tax offences as it contains a whole chapter on tax law violations punishable by fines and penalties. The violations envisaged by these statutes are numerous and allow the state to prosecute various offences against its tax laws ranging from technical accounting mistakes to complicated fraud schemes.

- **Government-contracting fraud**

  In Russian criminal law there is no separate liability for this type of offence; such offence, however, is likely to fall under more general provisions of the RF CC such as fraud, bribery, misappropriation of state funds, etc. The only special provision to be mentioned is article 176(2) of the RF CC: the crime of illegal receipt of state special-purpose credits. This offence is committed where such a receipt has caused large-scale damage to individuals, organisations, or the state. As to the state of mind of the defendant, this crime may only be committed with direct intent.

  The RF CAO contains provisions on the whole range of offences which may be committed primarily by the state officials in violation of the provisions on government-contracting. For the most part those cannot be regarded as business crimes, but some of them, such as the conclusion of contracts in violation of the tender terms or failure to report in good faith to or to answer the legitimate requests of the state bodies responsible for monitoring the government contracts, can also be committed by private parties and are punished by fines under the RF CAO (e.g., articles 7.30, 19.7.2).

- **Environmental crimes**

  The RF CC, and in particular Chapter 26 of this Code, penalises the whole range of environmental offences. The main element of these offences is either illegal usage of natural resources or disregarding of limitations and safety procedures (including restrictions on waste disposal) that results in environmental damage. Managers of any non-compliant businesses risk facing criminal charges if the scale of the offence is sufficiently high.

  The main violation should be intentional, but it is not entirely clear whether the wrongdoer should intend to inflict the resulting harm. In practice, it is likely that some form of negligence would suffice.

  One very special environmental offence prohibited by the RF CC is ecocide recognised by the RF CC as a crime against peace and humanity. This offence is not subject to any limitation periods, but requires unusual magnitude of harm.

- **Campaign-finance/election law**

  Articles 141 and 141.1 of the RF CC protect the integrity of elections and election campaigns.

  Article 141 criminalises disruption of election procedures, in particular by interference with the work of election commissions, *inter alia*, by abuse of official powers.

  Article 141.1 is more relevant to business crimes. It prohibits financing of elections and referendums in any way other than through the special election and referendum funds (for which political parties and referendum initiative groups are accountable). It also penalises any contributions to such funds through figure-head persons and entities.

  The crimes listed in this section can only be committed intentionally.

- **Any other crime of particular interest in Russia**

  In December 2011 a series of changes introduced into the RF CC marked a new step in the Government's struggle against sham entities used for illegal and abusive schemes.

  Article 173.1 criminalises the creation and reorganisation of legal entities through figure-heads – i.e. where people are unaware of such usage of their personal details or are otherwise mislead by the perpetrators in order to be used as shareholders or executive bodies of the sham entities. Some commentators point out that trade in such entities should be criminalised as well, but that has not been done so far.

  Article 173.2 prohibits the use of identity documents and powers of attorney for creation or reorganisation of legal entities intended for use in criminal financial operations and other criminalised transactions. Both the persons acquiring such documents (including by various unlawful means) and the persons providing such documents can face criminal charges.

  All these offences only attract criminal liability if they are intentional.

- **Market manipulation in connection with the sale of derivatives**

  This offence is covered by article 185.3 of the RF CC that prohibits market manipulation more broadly (please see above in the Insider trading section).

- **Anti-money laundering or wire fraud**

  Anti-money laundering is prohibited by the articles 174 and 174.1 of the RF CC. These articles cover both the laundering of proceeds from the perpetrators own offence and the offences committed by others. Money laundering under the RF CC is always intentional, and can be classified as such only if the criminal has a nefarious purpose of laundering the money or other assets.

  There is extensive legislation aimed against money laundering that includes standard control procedures for the banks and other professionals, establishment of a special state body for supervision over financial operations and various reporting obligations for various market participants.

3.2 Is there liability for inchoate crimes in Russia? Can a person be liable for attempting to commit a crime, whether or not the attempted crime is completed?

Russian criminal law provides for liability for inchoate crimes. Inchoate crimes can be subdivided into (1) preparations for an offence, and (2) attempted offences.

Preparations for a crime include collecting means and resources for an offence, entering into necessary conspiracies, incitement and other actions aimed at creating circumstances in which the commission of the offence is possible. An attempted offence is an unsuccessful attempt to perform the actions which would otherwise constitute the offence.

The liability for the preparation of an offence and the attempted offence can be imposed only if the offence has not been accomplished in spite of the wrongdoer's will. The preparation only constitutes a criminal offence if the crime prepared for is grave or especially grave (see question 5.1 below).

4 Corporate Criminal Liability

4.1 Is there entity liability for criminal offences? If so, under what circumstances will an employee's conduct be imputed to the entity?

According to article 19 of the RF CC only a natural person who has attained the statutory age stipulated by the RF CC (which, for most crimes, including business crimes, is 16) can be criminally liable for his or her actions.

Legal entities may only be subject to civil and administrative liability.

4.2 Is there personal liability for managers, officers, and directors if the entity becomes liable for a crime?

The crime under the RF CC can only be attributed to the managers and officers of the company, as explained in the preceding question. When a company is liable for an 'administrative offence' under the RF CAO the senior managers and employees, or even owners, of such company responsible for the violation will also be liable under the RF CAO for breach of their duties (article 2.4 of the RF CAO). The sanctions imposed on the responsible managers and employees are normally lower than those stipulated for the legal entities.

4.3 Where there is entity liability and personal liability, do the authorities have a policy or preference as to when to pursue an entity, when to pursue an individual, or both?

If both the managers and the company are liable under the RF CAO, they should both be prosecuted (see article 2.1(3) of the RF CAO).

5 Statutes of Limitations

5.1 How are enforcement-limitations periods calculated, and when does a limitations period begin running?

A person shall be released from criminal responsibility if the following limitation periods have expired since the day of commission of the crime (article 78 of the RF CC): a) two years after the commission of a 'crime of lower gravity' (crimes punished by not more than three years' imprisonment); b) six years after the commission of a 'crime of medium gravity' (intentional crimes punished by not more than five years' imprisonment and the non-intentional crimes punished by more than three years' imprisonment); c) 10 years after the commission of a 'grave crime' (intentional crimes punished by not more than ten years' imprisonment); and d) 15 years after the commission of an 'especially grave crime' (intentional crimes punished by more than 10 years' imprisonment). Particular crimes can be placed by the court at its discretion in a less grave category, but not more than one category below the statutory characterisation.

The limitation period runs (and may expire) from the day a crime is committed to the day of entry of the court's sentence into force. The running of a limitation period shall be suspended if the person who has committed the crime evades the investigation or court trial. In this case, the running of the limitation period shall resume from the time of detaining of the person or from the time he or she acknowledges the commission of the crime. However, in case a crime is punished by life imprisonment, the application of the 15-year limitation period is entirely at the court's discretion.

The limitation period under RF CAO (article 4.5) may be up to six years and starts running from the date of the commission of the offence, or, if the offence is ongoing, from the date when the offence was revealed or, for the offences against free competition, from the date of finding by the Federal Antitrust Service.

5.2 Can crimes occurring outside the limitations period be prosecuted if they are part of a pattern or practice, or ongoing conspiracy?

As stated immediately above, if a wrongdoer is contriving to hide his or her offence under the RF CC, the running of the limitation period is suspended. Under the RF CAO any limitation period starts running only when the ongoing conspiracy is unveiled.

5.3 Can the limitations period be tolled? If so, how?

As explained in question 5.1 above, this may only occur if the crime is punishable by life imprisonment.

6 Initiation of Investigations

6.1 How are investigations initiated? Are there any rules or guidelines governing the government's initiation of any investigation? If so, please describe them.

Normally, the investigation shall be effected as a part of criminal proceedings called the 'preliminary investigation'. The conditions requisite for the proceedings in initiating a criminal case are described in question 8.1 below.

But even before the criminal case is initiated the responsible authorities are granted investigative powers which they may use to urgently collect and preserve evidence.

6.2 Do the criminal authorities have formal and/or informal mechanisms for cooperating with foreign prosecutors? Do they cooperate with foreign prosecutors?

The cooperation between Russian and foreign prosecutors may be based on treaties with the respective foreign states or on the principle of comity. Internal procedures related to such cooperation are governed by the RF CPC (chapter 53) or the RF CAO (for the investigations of administrative offences). To guarantee to the foreign prosecutors that comity shall be respected between Russia and the respective foreign state, Russian authorities are authorised to issue special guarantee letters.

As to the international treaties, it is to be mentioned that the Russian Federation is a party to the European Convention on Mutual

Assistance in Criminal Matters (Strasbourg, 1959), Convention on Mutual Assistance in Legal Relations in Civil, Family and Criminal Matters (Minsk, 1993) and about 30 more bilateral treaties that, *inter alia*, provide for mutual assistance in criminal matters.

To choose the competent authority and the correct form of request, it is very important to find the appropriate basis for the cooperation as the regulations vary considerably.

The cooperation is indeed effected from time-to-time. In particular, the Russian authorities have shown willingness to cooperate in some prominent international investigations, which might be of particular relevance for the transnational companies working in Russia. In 2010 the Russian Federation took part in at least two major anti-corruption investigations initiated by foreign authorities. The first one is the transnational bribery investigation against some executives of Daimler, its subsidiaries and affiliates. Russia has been named among the countries affected by these corrupt practices, which prompted Russian law enforcement authorities to start their own investigation in November 2010. Another resonant transnational anti-corruption investigation was initiated by the German authorities against Hewlett-Packard Co. According to German investigators, the company might have been bribing Russian officials to ensure government contracts. On 14 April 2010, in response to a legal assistance request received from German authorities, the Russian Investigative Committee conducted searches in the Moscow office of the company.

7 Procedures for Gathering Information from a Company

7.1 What powers does the government have generally to gather information when investigating business crimes?

The Responsible authorities have a right (sometimes only upon a court warrant) to search premises and perform personal searches, examinations and cross-examinations, seize documents and objects, seize and inspect the postal and telegraph communications, to monitor and record conversations of the suspect, etc.

The investigating authority under the RF CAO can issue a binding request for the information relevant to the offence. The 'administrative investigation' – as well as the special proceedings provided for the Federal Tax Service of the Russian Federation and the RF FAS – are not elaborately regulated as criminal proceedings. The following paragraphs of this chapter will describe the rules applicable to criminal investigations.

Document Gathering:

7.2 Under what circumstances can the government demand that a company under investigation produce documents to the government, and under what circumstances can the government raid a company under investigation and seize documents?

The search shall be based on the decision of the investigator. The investigator has the power to request and search for the items relevant to the criminal case.

Prior to the raid, the investigator offers for the person to provide voluntarily the articles or documents which are due to be seized. If the requested articles and documents are not provided voluntarily, the investigator is entitled to invade premises to obtain such articles or documents. The dwelling premises can normally only be invaded upon a court warrant.

When conducting a search, any premises can be opened if the owner refuses to open them voluntarily. The investigator may prohibit persons who are present at the place where a search is performed from leaving, or from communicating with each other or other persons before the end of the search.

7.3 Are there any protections against production or seizure that the company can assert for any types of documents? For example, does Russia recognise any privileges protecting documents prepared by attorneys or communications with attorneys? Do Russia's labour laws protect personal documents of employees, even if located in company files?

Personal data (in particular, obtained in connection with employment) as well as trade secrets are protected by Russian law from unlawful disclosures. However, no protection is granted against disclosure to the Responsible authorities in the course of an official investigation.

The information obtained by advocates in connection with the legal assistance provided to their clients is, however, better protected: the advocates' premises can be raided only upon the court's mandate and the articles and documents obtained from the advocates (which could have been lawfully kept by the advocates) can only be used in court against the accused if they have not been kept in advocates' files.

7.4 Under what circumstances can the government demand that a company employee produce documents to the government, or raid the home or office of an employee and seize documents?

The demand for documents is justified where the investigator reasonably believes that documents that are of significance to the investigation can be obtained from a person. The investigator's decision is sufficient to raid an office, but a court warrant is needed to invade living premises, unless there are exceptional circumstances where such action appears to be urgent. In the latter case, the investigator can enter the premises without the warrant but has to inform the court about the raid within 24 hours. If the court finds that the raid was unjustified, all the evidence collected shall be held inadmissible.

7.5 Under what circumstances can the government demand that a third person produce documents to the government, or raid the home or office of a third person and seize documents?

There is no difference between suspects and third persons in this respect.

Questioning of Individuals:

7.6 Under what circumstances can the government demand that an employee, officer, or director of a company under investigation submit to questioning? In what forum can the questioning take place?

The investigator does not have to provide reasons for the subpoena and can in principle question any person. The questioning is normally effected in the place where the preliminary investigation is conducted. The investigator may, if he or she deems necessary, conduct questioning at the location of the questioned person.

The questioning may not exceed four hours. Continued questioning is allowed after a break of at least one hour for rest and meals, and total duration of the questioning during one day should not exceed eight hours. For medical reasons, the length of the interrogation can be limited by a doctor.

The court can also question witnesses upon the reasoned request of any party. If a witness cannot testify in person or his or her testimony differs from that obtained in the course of the preliminary investigation, the court can allow the records of the previous questionings to be read aloud in the court.

7.7 Under what circumstances can the government demand that a third person submit to questioning? In what forum can the questioning take place?

There is no difference between suspects and third persons in this respect.

7.8 What protections can a person being questioned by the government assert? Is there a right to refuse to answer the government's questions? Is there a right to be represented by an attorney during questioning?

The testifying person has a right to refuse to answer the government's questions in order to avoid self-incrimination. The suspected person and the accused are not obliged to testify.

Advocates, priests and public representatives shall refer to their respective professional privileges if called to testify in relation to the protected matters.

The advocate cannot be questioned as a witness about the facts which he or she has become aware of in connection with the legal assistance provided or in the course of initial communications with potential clients. The advocate can be questioned only upon the court's warrant.

The suspects and the accused have a right to counsel during the examination and other procedural actions.

8 Initiation of Prosecutions / Deferred Prosecution / Civil Dispositions

8.1 How are criminal cases initiated?

The criminal case can be initiated where the investigator is satisfied that there are sufficient factual grounds to initiate a case and that there is a formal cause for the initiation.

The cause is a formal communication of information about a crime which has been committed or is being prepared, for example, a criminal complaint (which is the only admissible cause for some crimes, including the criminal violations of the intellectual property rights), a perpetrator's voluntary report on the committed crime, an official's report on the detected crime or a media report. If the investigator believes that there is enough information available to him evidencing the requisite elements of crime, he or she shall initiate a criminal case.

In accordance with article 20 of the RF CPC in some cases a criminal case may be also initiated by a victim of a crime by filing an application with the court. Depending on whether the case in question is of private prosecution or of public-private prosecution the victim respectively can or cannot control the case further by withdrawing it on the grounds of settlement with the perpetrator.

8.2 Are there any rules or guidelines governing the government's decision to charge an entity or individual with a crime? If so, please describe them.

There are no elaborate rules or guidelines governing the government's decision as to whether or not the criminal case is to be initiated; the only test is whether the information obtained suggests that the requisite elements of a crime are present in a given case. The decision shall be made by the investigator upon conscious study of the information available to him or her. The investigator's decision is subject to judicial review which is a guarantee against arbitrariness at this stage of proceedings (article 145(2) of the RF CPC).

After the preliminary investigation the charges may be brought against the suspect. Here again we are not aware of any detailed regulations governing the investigator's decision as to whether or not to bring charges. The investigator shall be satisfied that there is enough evidence to prove that the crime has been committed by the accused and that the case has reasonable prospects of success in court.

The charges are brought by the investigator in an accusation report which is sent to the prosecutor. This report shall contain the factual background of the case and the legal basis for the accusations. The allegations made in the accusation report shall be corroborated by evidence appended to this report. If the prosecutor is satisfied that the accusation report in form and in substance conforms to the law, he or she approves the report and transmits it to the court.

The charges may also be brought by a private party, which is allowed for a very limited range of crimes, including, notably, criminal violations of intellectual property rights.

8.3 Can a defendant and the government agree to resolve a criminal investigation through pretrial diversion or an agreement to defer prosecution? If so, please describe any rules or guidelines governing whether pretrial diversion or deferred prosecution are available to dispose of criminal investigations.

The criminal investigation can be amicably terminated at a pretrial stage. Different grounds for such termination may be envisaged depending on the situation.

First of all, the agreement might be reached between the wrongdoer and the victim in cases of private prosecution or where a crime of lower or medium gravity (see question 5.1 above) is committed for the first time. If the perpetrator provides full compensation for the harm inflicted and the victim agrees to the amicable settlement, the case is terminated.

Another possibility is that the person that has committed a crime of lower or medium gravity for the first time actively collaborates with the prosecutors and provides compensation for any harm inflicted and therefore can be considered not to be a danger to society; this is called efficient and effective repentance.

Finally, the criminal liability for a tax crime shall be lifted if all the arrears, penalties and fines are paid before the preliminary investigation is completed.

See also question 13.1 below, in particular on pre-trial agreements with investigators.

8.4 In addition to or instead of any criminal disposition to an investigation, can a defendant be subject to any civil penalties or remedies? If so, please describe the circumstances under which civil penalties or remedies are appropriate.

Yes. A crime may also cause civil damage and (as explained in question 1.3 above) in such case shall be regarded as a civil wrong as well. The claim for civil remedies may be filed in the same proceedings if the civil law issues involved are not very complicated (see article 44(4) of the RF CPC) or in a separate proceedings in an appropriate civil court.

9 Burden of Proof

9.1 For each element of the business crimes identified above, which party has the burden of proof? Which party has the burden of proof with respect to any affirmative defences?

The presumption of innocence is one of the basic principles of the Russian legal system. According to this principle, the government bears the burden of proof for every element of any crime indicted. Article 14 of the RF CPC stipulates that the accused shall be regarded as not guilty until his guilt of committing the crime is proved in accordance with the procedure, stipulated by the rules of the same Code. Moreover, the guilt may be established exclusively by the court sentence, which has entered into legal force. The suspect or the accused is not obliged to prove his or her innocence. The defendant therefore is exonerated from the burden of proof, which doesn't diminish the role of defendant's representative in the criminal proceedings.

Another principle of criminal procedure in Russia is the principle of the adversarial nature of the court proceedings (article 15 of the RF CPC). Therefore any affirmative defences shall be proved by the defendant.

9.2 What is the standard of proof that the party with the burden must satisfy?

Russian law doesn't contain elaborate provisions concerning the standard of proof that the party with the burden must satisfy. As provided in article 14(3) of the RF CPC, all doubts concerning the guilt of the accused which cannot be eliminated shall be interpreted in favour of the accused. That is to say that the standard of proof for the prosecution is analogous to the "beyond reasonable doubt" standard normally applied in criminal cases in common law jurisdictions.

9.3 In a criminal trial, who is the arbiter of fact? Who determines whether the party has satisfied its burden of proof?

The sole arbiter of fact and of law in the Russian criminal proceedings is always the court (article 30 of the RF CPC). The court may be comprised of professional judges only, in which case these magistrates act as both arbiters of fact and of law. If, upon the defendant's request, the court is composed of one judge and a jury (see question 2.2 above), the jurors shall be the arbiters of fact (article 339 of the RF CPC).

10 Conspiracy / Aiding and Abetting

10.1 Can a person who conspires with or assists another to commit a crime be liable? If so, what is the nature of the liability and what are the elements of the offence?

The RF CC provides a set of rules, set forth in chapter 7 of the RF CC, concerning the liability of the accomplices. Three types of accomplices are named: the organiser; the instigator; and the helper. They shall be liable for the same offence or inchoate offence as the actual perpetrator to the extent it has been actually perpetrated (unless he or she acts in excess of what was agreed between them). The punishment is determined within the limits provided in the RF CC, depending on the role of each accomplice in the wrongdoing (articles 33, 34 of the RF CC).

11 Common Defences

11.1 Is it a defence to a criminal charge that the defendant did not have the requisite intent to commit the crime? If so, who has the burden of proof with respect to intent?

The defendant's state of mind is an essential element of the *corpus delicti*. Not all crimes have to be intentional though. The RF CC stipulates that some crimes may be committed recklessly or negligently (see article 24(2) of the RF CC). However, the crime is regarded as intentional even if the harm inflicted by the crime is not foreseen by the wrongdoer. It is enough that the actions directly prohibited by the RF CC are intentional.

The burden of proof with respect to the intent of the defendant is borne by the prosecution.

11.2 Is it a defence to a criminal charge that the defendant was ignorant of the law i.e. that he did not know that his conduct was unlawful? If so, what are the elements of this defence, and who has the burden of proof with respect to the defendant's knowledge of the law?

The general principle *ignorantia juris non excusat* is applicable, i.e. that ignorance of the law is no excuse. The defendant is presumed to know the law.

11.3 Is it a defence to a criminal charge that the defendant was ignorant of the facts i.e. that he did not know that he had engaged in conduct that he knew was unlawful? If so, what are the elements of this defence, and who has the burden of proof with respect to the defendant's knowledge of the facts?

Such ignorance will be taken into account by the court when determining whether the necessary *mens rea* is shown. If the defendant should have known the facts but he or she ignored them, such conduct has been negligent and can constitute a criminal offence where intent is not a requisite element of the crime. If, on the contrary, the ignorance has been legitimate, the criminal liability cannot be imposed. With regard to the burden of proof, the general rules apply (see questions 9.1 to 9.3 above).

12 Voluntary Disclosure Obligations

12.1 If a person becomes aware that a crime has been committed, must the person report the crime to the government? Can the person be liable for failing to report the crime to the government?

There is no general duty to report the committed crime or the crime in preparation under Russian law. An exception to that rule is that any attempt to bribe a public official shall be reported by this public official to his or her superiors or to the prosecutor's office or to other competent authorities. The public official that failed to perform this duty shall be reprimanded or even discharged from the state service.

Reporting the committed or the planned crime may exonerate the perpetrator or the accomplices from liability in certain cases. Thus the bribe giver shall be released from criminal liability if he has informed the government about the offence on his own move (article 291 of the RF CC). The voluntary report of the committed crime or the crime being prepared is generally a mitigating factor that justifies application of a milder punishment (article 61 of the RF CC).

13 Cooperation Provisions / Leniency

13.1 If a person voluntarily discloses criminal conduct to the government or cooperates in a government criminal investigation of the person, can the person request leniency from the government? If so, what rules or guidelines govern the government's ability to offer leniency in exchange for voluntary disclosures or cooperation?

Please see question 8.3 on pretrial settlement strategies available to the wrongdoer and question 12.1 on voluntary disclosure.

Leniency can be envisaged if the perpetrator pleads guilty (articles 314 to 317 of the RF CPC); in that case a so-called simplified trial might be conducted, based on the confession of guilt (see question 14.1 below). In general, the final decision is at the court's discretion; however, if the procedure of a simplified trial is eventually applied, the actual punishment cannot exceed two-thirds of the maximum punishment (article 316(7) of the RF CPC). The wrongdoer may also choose to cooperate with the investigation by entering into a formal cooperation agreement with the investigators in the course of preliminary investigation. To enter into this agreement the wrongdoer shall make a full report on the crime committed; the article(s) of the RF CC applicable to this crime shall also be indicated in this agreement. The wrongdoer shall further undertake to provide information and render cooperation to help to investigate the crimes committed by other persons. It is not sufficient to provide cooperation with regard to his or her own criminal activities.

If the wrongdoer fulfils all of his or her obligations under the valid cooperation agreement, the court shall hold summary proceedings to issue a sentence which shall not exceed half (or, in exceptionally serious cases punished, *inter alia*, by the life imprisonment, the two thirds) of the maximum punishment provided by the RF CC for the crime at issue. The court may at its entire discretion show further leniency, but is not obliged to do so.

13.2 Describe the extent of cooperation, including the steps that an entity would take, that is generally required of entities seeking leniency in Russia, and describe the favourable treatment generally received.

Please see question 8.3 on pretrial settlement strategies available to the wrongdoer and question 12.1 on voluntary disclosure. In case the voluntary disclosure is referred to only as a mitigating factor and no other special provisions apply, the punishment shall not exceed two thirds of the maximum punishment provided by the RF CC for the crime committed, unless any aggravating factors have been shown.

Please see question 13.1 with regards to the guilty plea and favourable treatment provided as a result of a cooperation agreement and the obligations implied thereby.

14 Plea Bargaining

14.1 Can a defendant voluntarily decline to contest criminal charges in exchange for a conviction on reduced charges, or in exchange for an agreed upon sentence?

No plea bargaining is permitted by the RF CPC. The accused may, however, choose to plead guilty, which – if the maximum punishment for the crime committed does not exceed 10 years' imprisonment – allows him to lodge a motion for simplified hearing without the court trial. In such case the court shall regard the facts to be established as accepted by the defendant; however, the court remains sole arbiter of law and shall apply the RF CC to the facts thus established by his own judgment.

As described in question 13.1 above, leniency shall be shown in such case and the sentence shall not exceed two thirds of the maximum punishment stipulated by the RF CC for the crime at issue.

See also questions 8.3 and 13.1 above.

14.2 Please describe any rules or guidelines governing the government's ability to plea bargain with a defendant. Must any aspects of the plea bargain be approved by the court?

The court remains ultimately responsible for the application of the RF CC to the facts accepted by the defendant (see question 14.1 above).

15 Elements of a Corporate Sentence

15.1 After the court determines that a defendant is guilty of a crime, are there any rules or guidelines governing the court's imposition of sentence on the defendant? Please describe the sentencing process.

The minimum and maximum sentences are set forth in the articles of the RF CC. Generally, in each particular case the court may impose punishment only of the type envisaged for a particular offence and within the scope stipulated in the relevant article of the RF CC.

The court shall also take into account the mitigating and aggravating factors. The latter are listed in the RF CC, and for the former, only a non-limitative list is provided. Thus, for example, the wrongdoer's minority or pregnancy or the fact that the wrongdoer

has minor children or that the offence was committed as a result of the victim's immoral conduct shall mitigate the sentence which, in such case, cannot exceed two thirds of the statutory maximum. On the contrary, if the crime is committed because of the racial, ideological or religious hatred shown by the wrongdoer or if the crime is committed by an organised group or if the wrongdoer played central role in the criminal activities or abused confidence gained by virtue of his official status or a contractual relationship, the crime is regarded as aggravated, which might justify a stricter sentence within the statutory limits.

If the offence is committed repeatedly, the sentence shall be not less than one third of the statutory maximum; however, mitigating factors are still applicable in such a case.

If the court concludes that the circumstances show that the social danger of the crime is considerably reduced or if a high level of cooperation with the investigators with regard to the crimes committed by other persons has been shown by the wrongdoer, the court may impose punishment which would be lower than the statutory minimum provided for the crime at issue.

Russian criminal law also provides for special means for the mitigation of punishment or for the complete release from punishment in some cases. The convict may be released on parole, released from punishment due to a change of situation (where his actions are not regarded as socially dangerous anymore), or released from punishment due to illness; the remaining term of punishment may be replaced with a milder penalty, and a deferred sentence for pregnant women and women with minor children may be imposed. Leniency shall be shown on the basis of the jury's verdict, which is binding upon the court.

15.2 Before imposing a sentence on a corporation, must the court determine whether the sentence satisfies any elements? If so, please describe those elements.

As stated above, the corporations cannot be criminally liable under Russian law.

When imposing the sentence the court shall take account of the characteristics of the crime and the defendant and his or her family situation. The sentence is aimed at prevention of further crimes, correction of the convict and the restoration of social justice. When imposing a sentence the court shall decide whether the elements of the crime are proved, what punishment shall be imposed (including whether the leniency shall be shown or whether the release from punishment shall be granted), what correctional institution shall execute the punishment, whether any civil claims shall be granted and the confiscation ordered, who shall bear the costs of the proceedings, and what shall be done with the articles used as evidence.

16 Appeals

16.1 Is a guilty or a non-guilty verdict appealable by either the defendant or the government?

The jury's verdict itself is not appealable in Russia. A defendant may appeal only the judicial sentence based upon the jury's verdict.

16.2 Is a criminal sentence following a guilty verdict appealable? If so, which party may appeal?

The sentence following the guilty verdict can be appealed before it comes into force (appeal) and after it comes into legal force (cassation and supervision).

According to article 389.1 of the RF CPC, the right to appeal against a court decision which has not come into legal force is vested in the convicted, acquitted, their counsel and legal representatives, the public prosecutor or the superior prosecutor, the victim and private party and their representatives, as well as in other interested persons. The same article stipulates that the civil claimant, the civil defendant or their representatives have the right to appeal against the court decision exclusively in the part concerning the civil claim.

As to the sentences that have entered into legal force, the same parties as well as the General Prosecutor of the Russian Federation and the head prosecutor for a region can file an application for cassation and supervision.

16.3 What is the appellate court's standard of review?

The appellate court is not limited by the issues raised in the appeal and can review the whole case (Article 389.19 of the RF CPC). The court can even extend its review to the convicted parties that have not filed appeals, if at least one appeal has been filed.

The appellate court can change or annul the sentence if, on review, it discovers that:

- there are discrepancies between the court's conclusions, stipulated in the sentence, and the factual circumstances established by the same court;
- there was a material violation of the criminal procedure;
- the criminal law was applied incorrectly;
- the sentence is unjust;
- certain mistakes were committed by the investigators and prosecutors before the case was submitted to the first instance court; or
- new effects of the case have emerged that demand re-characterisation of the crime.

The cassation court is also not limited by the cassation appeal or petition and can review the whole case (article 401.16 of the RF CC), but only as to the correct application of criminal law and rules of criminal procedure (article 401.15 of the RF CC). It is interesting that the cassation court can review the case if the accused was not available for the first instance court but can subsequently attend proceedings. The court is limited in its powers to change the sentence to the detriment of the convicted persons, but can send the case back as far as the pre-trial stage, if necessary.

The supervision, on the contrary, is generally limited to the applicant's complaint. However, the court may review the whole case if that is in the interests of legal order. The court's review is limited to the issues of law, as at the cassation stage.

16.4 If the appellate court upholds the appeal, what powers does it have to remedy any injustice by the trial court?

The appellate court may issue the following decisions if it upholds the appeal:

- to vacate the sentence of conviction of the first instance court and to acquit the defendant;
- to vacate the acquittal sentence of the first instance court and to impose the sentence of conviction or an acquittal sentence;
- to vacate the sentence and to remit the case to the first instance court;
- to vacate an order of a lower case and to acquit the defendant or to issue another judicial act;

- to vacate the sentence and remand the case to the prosecutor;
- to vacate the sentence or another judicial act and to discontinue the case; or
- to alter the sentence or another judicial act of the first instance court.

The cassation court upholding the appeal may issue the following decisions:

- to vacate the sentence and all other judicial acts in the case and discontinue the criminal case;
- to vacate the sentence and all other judicial acts in the case and remit the case for a new trial or to remand it to the prosecutor;
- to vacate the appellate court's sentence and remit the case for a new appellate trial;
- to vacate the (lower) cassation court's sentence and remit the case for a new cassation review; or
- to alter the sentence or the other challenged decision.

The supervision court, if the supervision is exercised in favour of the applicant, has the same powers as the cassation court.

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Vasily Torkanovskiy heads the international law practice group at Ivanyan & Partners. He has extensive experience in international dispute resolution, including major public international law cases as well as commercial litigation abroad. In the latter domain he has been involved in a broad array of matters, but his particular specialism is commercial fraud litigation. Vasily has acted for the state and private litigants in a number of jurisdictions, including domestic courts in a number of European countries and various international fora.

Apart from his litigation experience, Vasily assists the firm's clients in transnational business structuring and corporate matters. His focus on international regulatory and compliance law makes his advice particularly relevant in developing balanced and risk-conscious solutions.

As well as Russian, Vasily is also fluent in English and French.

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