



# **Anti-Corruption Update: A Global Perspective**

October 4, 2017

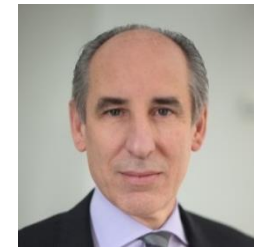
# Presenters



Constantin Achillas  
Partner, Paris  
+33 (0) 1 44 17 77 34  
[constantin.achillas@bryancave.com](mailto:constantin.achillas@bryancave.com)



Robert Dougans  
Partner, London  
+44 (0) 20 3207 1214  
[robert.dougans@bryancave.com](mailto:robert.dougans@bryancave.com)



Mark Srere  
Partner, DC  
+1 202 508 6050  
[mark.srere@bryancave.com](mailto:mark.srere@bryancave.com)



Jackson Pai  
Counsel, Los Angeles  
+1 310 508 6334  
[jackson.pai@bryancave.com](mailto:jackson.pai@bryancave.com)



Andreas Hentschel  
Associate, Hamburg  
+49 (0) 44 30 33 16 133  
[andreas.hentschel@bryancave.com](mailto:andreas.hentschel@bryancave.com)



Kristin Robinson  
Associate, DC  
+1 202 508 6334  
[kristin.robinson@bryancave.com](mailto:kristin.robinson@bryancave.com)



Cecile Terret  
Associate, Paris  
+33 (0) 1 44 17 77 17  
[cecile.terret@bryancave.com](mailto:cecile.terret@bryancave.com)

# Topics of Discussion

- Background: The FCPA and OECD Convention of Combating Bribery
- Anti-Corruption Enforcement Update:
  - U.S.
  - Latin America
  - China
  - Germany
  - France
  - U.K.
- Compliance Tips for Global Companies

# **BACKGROUND: THE FCPA AND OECD CONVENTION OF COMBATING BRIBERY**

# History of the FCPA

- SEC investigations in mid-1970s
  - 400+ US companies made questionable or illegal payments of more than \$300 million
  - Abuses ranged from bribery of high-level foreign officials to payments facilitating certain clerical duties (“facilitating payments”)
- 1977 – Congress enacted the FCPA

# OECD Convention on Combating Bribery

- Adopted 1997
- 43 Current Signatories
- Signing countries agree to:
  - Establish a criminal offence of bribery of foreign public officials
    - Liability of Legal Persons
    - Sanctions – prison and fines
    - Jurisdiction
  - Enforcement
  - Accounting controls
  - Mutual Legal Assistance and Extradition
  - Monitoring and follow-up

# **U.S. ENFORCEMENT UPDATE**

# FCPA Top Ten Settlements

1. Telia Company AB (Sweden): \$965 million (2017)
2. Siemens (Germany): \$800 million (2008)
3. Alstom (France): \$772 million (2014)
4. KBR / Halliburton (U.S.): \$579 million (2009)
5. Teva Pharmaceutical (Israel): \$519 million (2016)
6. Odebrecht/Braskem (Brazil): \$420 million (2016)
7. Och-Ziff (U.S.): \$412 million (2016)
8. BAE (UK): \$400 million (2010)
9. Total SA (France): \$398 million (2013)
10. VimpelCom (Holland): \$398 million (2016)



# International Cooperation

- **Global cooperation on the rise**
  - 150% increase in annual requests from foreign prosecutors related to bribery and corruption investigations since 2011
  - 75% increase in annual requests from the U.S. to its foreign partners
- **DOJ sending prosecutor on detail to the U.K.**
  - Will work with Financial Conduct Authority
  - First DOJ Criminal Division employee to work within a foreign regulatory agency on issues of white-collar crime
  - Intended to foster information exchange and greater collaboration with foreign nations

# Recent U.S. Enforcement Actions

- Telia Company – \$965 million total settlement, but
  - \$274 million to Netherlands
  - \$208.5 million to Sweden
- Bribe Recipient sent to jail
  - Use of anti-money laundering and fraud laws
  - Guinea Minister of Mines and Geology, Mahmoud Thiam – 7 years
- Limiting the amount of disgorgement available to the SEC
  - U.S. v. Kokesh

# Trump Administration—Tough or Tender?

## TOUGH

- AG committed to enforcing anti-corruption laws against corporations & individuals
- SEC Chair and DOJ DAG recognize the importance of anti-corruption enforcement and U.S. partnership with domestic and foreign authorities

## TENDER

- President made clear, unequivocal anti-FCPA statements
- DAG says DOJ not focused on record fines and prosecutions
- Greater effort to speed investigations, thereby saving companies money

# **LATIN AMERICA ENFORCEMENT UPDATE**

# Brazil: Operation Car Wash

- **Massive corruption probe began with a gas station network accused of money laundering in early 2014**
- **Informant revealed comprehensive political corruption scheme**
  - State-run oil company Petrobras overcharged on contracts
  - Surplus funds were used for campaign finance and to buy support for Worker's Party
- **Results of corruption probe:**
  - Unprecedented cooperation among foreign governments
  - “Whole pie” settlement approach
  - At least \$3.5 billion in fines paid to Brazil, Switzerland & U.S.

# Mexico & Colombia

- Mexico's National Anti-Corruption System effective in July 2017
  - General Law of Administrative Responsibilities
    - Imposes obligations on public officials
    - Corporate responsibility for employee actions (compliance program)
  - Federal Auditing and Accountability Law
    - Companies must cooperate
  - Coordination – National Digital Platform and Special Prosecutor
- Colombia's National Anti-Corruption System
  - Prohibition of bribery of foreign officials
  - Incentives to self-report

# **CHINESE ANTI-CORRUPTION LAW AND ENFORCEMENT DEVELOPMENTS**

# China – Recent Developments

- President Xi's pronouncement on tigers and flies
  - Continues to have relevance today
  - Much more aggressive investigations and penalties
- New National Supervisory Commission
  - Set to begin work in March 2018
  - Currently only a pilot program in Beijing, Shangxi and Zhejiang



# China: Sources of Anti-Corruption Laws

- PRC Criminal Law (revised in late 2015)
  - Added new crime of bribing close relatives of current or former government officials, among other changes
  - Added fines as an additional punishment for certain crimes
- 2016 Interpretation of People’s Supreme Court and People’s Prosecutor relating to bribery
  - Expanded definition of bribery to intangible material benefits
  - Increased monetary thresholds for categories of offenses and bringing prosecutions
  - Provided mitigation circumstances and “voluntary confessions”

# China: Sources of Anti-Corruption Laws

- PRC Unfair Competition Law (2017 proposed revision)
  - Law targets commercial bribery
  - Includes bribery of third parties with ability to influence transaction
  - Acts of employees are attributed to the employer unless employer can demonstrate that the employees acted on their own
  - Increased fines
- Other laws (not exhaustive)
  - Civil Servants Law
  - Agency and Communist Party Guidelines

# China – Impacts of GSK Case

- Lessons from GSK case in China
  - Nearly 500 million USD in fines plus imprisonment of officers
  - China no longer afraid to punish powerful multinationals
  - New emphasis on those who give, not just those who receive, bribes
  - Demonstrating corporate intent on violation by a corporate entity
  - China's investigation triggering FCPA and UK Bribery Law investigations

*“One thing I know about the Germans:  
They like a good audit.”*

*- Mike Ehrmantraut, Breaking Bad*

# **GERMAN ANTI-CORRUPTION LAW AND ENFORCEMENT DEVELOPMENTS**

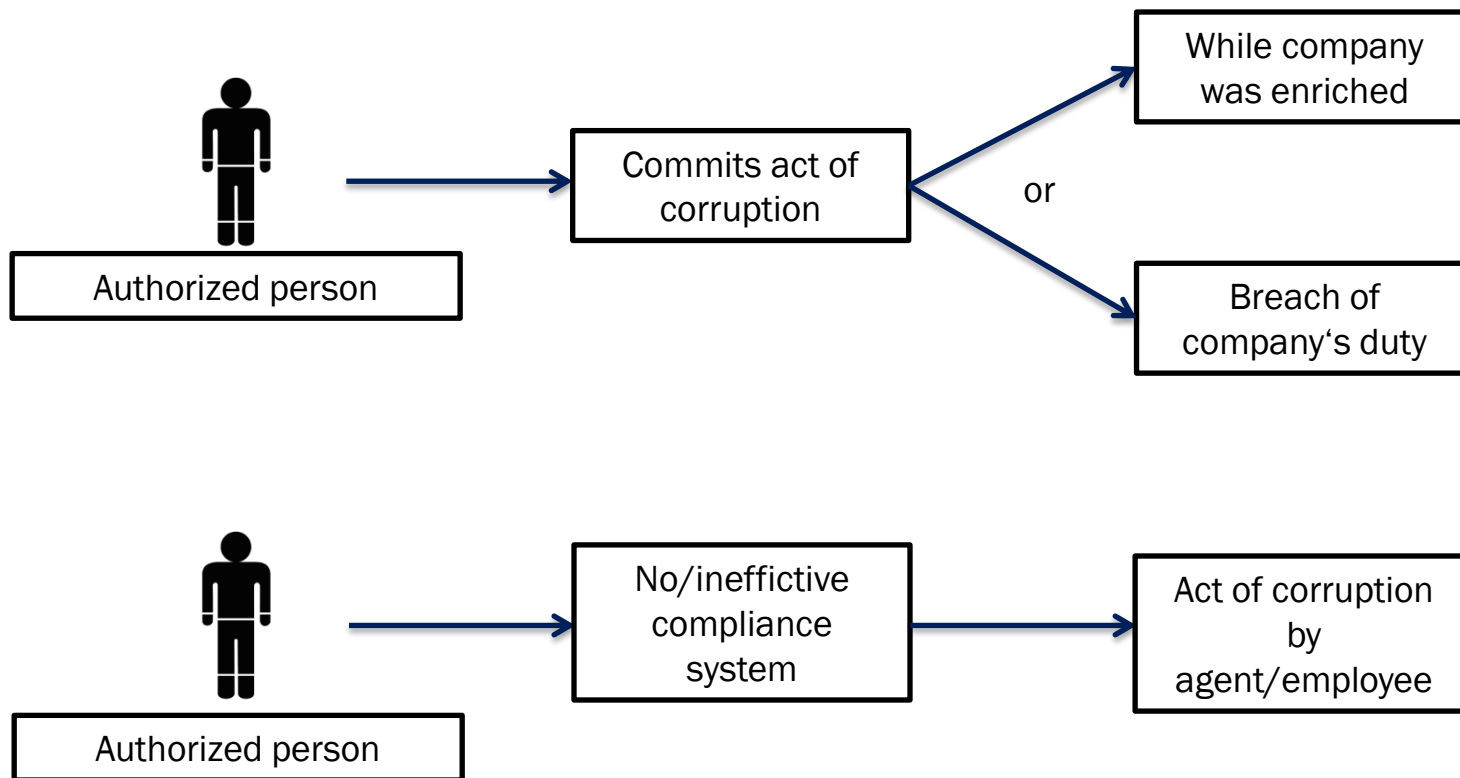
# New developments in German anti-corruption law - overview

## Highly active German legislator

- 5<sup>th</sup> Amendment to Act on Regulatory Offences, 26 June 2013
  - Especially: Increasing fines for violations anti-corruption laws
- Corruption Prevention Act, 20 November 2015
  - Amendment to provisions on giving/taking bribes in commercial practice, Sec. 299 German Penal Code (*GPC*)
  - Extended scope for bribery of public officials
- Act against Corruption in the Health Sector, 4 June 2016
- Act on Anti-Corruption Registry, 26 June 2017
- Money Laundering Act, 26 June 2017

# Corporate Liability for Corrupt Behaviour - Sec. 30 ARO

Company is subject to regulatory fines if



# 5<sup>th</sup> Amendment to Act on Regulatory Offences – Fines & Sanctions

- **Increased fines & sanctions**
  - Maximum fines for companies: from EUR 1 million to EUR 10 million
  - Maximum fines for CEOs, Managing Directors, Executive Board Members to EUR 1 million
  - Fines can be imposed on company *and* management cumulatively
  - Disgorgement of benefits resulting from corrupt behaviour
- **Cancellation of business licence, Sec. 35 Trade Regulation Act**
- **Criminal liability of CEOs, Managing Directors, Executive Board Members**

# Corruption Prevention Act - Bribery of Foreign Public Officials

## Criminal liability extended to

- Any foreign public officials /official of IO, when bribe is paid for specific illicit action
- Officials of European Union
- Extraterritorial cases, if giving or receiving party is German citizen



# Act against Corruption in the Health Sector

## Bribery in the health sector – closing a loophole

- Offer, promise or grant of a benefit to qualified healthcare practitioner
- In return for an unfair preference regarding
  - Prescription or purchase of medical or pharmaceutical products
  - Referral of patients or transmission of data on diagnosis

## Sensitive business models

- Retrospective discounts for reaching certain turnover with products
- Bonuses for referral of patients

# Act on Anti-Corruption Registry

## Keeping black sheep from the well\*

- Banned from bidding in public tender offers exceeding EUR 30,000
- Entry cleared after 5 years since conviction
- Possibility of self-purification
  - Compensation
  - Implementation of sufficient compliance program
  - Cooperation with authorities (=> factual disclosure in damage claim proceedings?)
- Full implementation 2019

# Enforcement Development & Forecast

- Significant raise of fines imposed on companies
- Public pressure to strengthen enforcement authorities
- Legal uncertainty due to numerous new provisions
- Agenda of newly elected government
  - Criminal liability of legal persons (?)

# **NEW FRENCH ANTI-CORRUPTION LAW AND LATEST DEVELOPMENTS**

# France: Sapin II Law, passed December 8, 2016

- **New law aimed at preventing, detecting and sanctioning**
  - Applies to French groups and French subsidiaries of foreign groups: 500+ employees and generating €100+ million in revenue
  - Requires implementation a documented and updated program of measures to prevent and detect corruption in France and abroad
- **Sapin II creates:**
  - The *Agence Française Anticorruption* (AFA), authorized to police what companies have implemented in terms of necessary measures to prevent and detect corruption
  - French Deferred Prosecution Agreements (CJIP)
  - Certain whistleblower protections
- **Expands scope of French anti-corruption laws**

# Sapin II: Penalties for failure to have a satisfactory compliance program

- Fines of up to one million Euros or for legal entities and 200,000 Euros for individuals
- Required application of a "monitoring system" (similar to those used by U.S. authorities) for up to five years\*
  - Costs incurred are borne by the company
  - Failure to fully comply with the monitoring is subject to a penalty of up to two years imprisonment and a fine of 50,000 euros for individuals
- CEOs, Presidents, Managing Directors, Executive Board Members and Managers can all be held individually liable

\* Up to three years if required by the Anti-Corruption Agency or up to five years if required by a judge

# France: Sapin II: Mandatory Measures

## Companies subject to the Sapin II Law must undertake the following measures in conformity with French law:

- conduct a risk mapping exercise
- implement internal or external accounting controls
- adopt a code of conduct
- Implement procedures to check the integrity of customers and direct suppliers as well as intermediaries
- setting up an internal sanctions policy with respect to the code of conduct
- set up an internal whistle-blowing mechanism
- initiate an anti-corruption training with regular follow-up.
- Internal control procedures to assess the efficiency of the compliance programme

# France: Sapin II Law in force since June 1st 2017

- French companies have a 6-month delay to be in compliance with Sapin II
- 1st part of the Guidelines on the Sapin II Law from the AFA to be released in the course of October 2017 with an open public consultation
- Inquiries and investigations from the AFA will start as from January 2018



# **U.K. ANTI-CORRUPTION LAW AND ENFORCEMENT DEVELOPMENTS**

# U.K.: Strengthened Enforcement by SFO

- **\$800 million global settlement with Rolls-Royce (Jan. 2017)**
  - \$605 million to Serious Fraud Office
  - \$170 million to Department of Justice
  - \$25.6 million to Ministério Público Federal
- **Paid bribes in at least twelve countries in exchange for confidential information or contract awards**
- **Potential for future prosecution of 30+ individuals**
- **Enforcement potentially weakened if subsumed by National Crime Agency**

# U.K.: Importance of Co-Operation

- **”XYZ” – small/medium size company exporting to Asian markets.**
  - Personnel engaged in large-scale bribery to secure contracts in Asia in 2004-2012.
  - “ABC” (parent) implemented enhanced compliance programme in 2011 – uncovered matters not previously known to ABC.
- XYZ self-reported to SFO and offered full & candid assistance.
- DPA approved. Terms included fine of £325,000 and disgorgement of £6.2 million.
  - Court mindful of XYZ’s means.
  - Prosecution of XYZ personnel underway.

# Criminal Finances Act 2017

- Creates new corporate criminal offences of failure to prevent facilitation of tax evasion.
  - Failure to prevent facilitation of UK tax evasion (s. 45)
  - Failure to prevent facilitation of foreign tax evasion (s. 46)
- Can only be committed by a “relevant body” – corporate body or entity anywhere in the world.

# Criminal Finances Act 2017 - Cont

- Offences similar and require:
  - Criminal tax evasion by a taxpayer;
  - Criminal facilitation of the tax evasion by an individual acting on behalf of the “*relevant body*”; and
  - If above satisfied, the “*relevant body*” will be liable, subject to the defence of having either:
    - Put relevant safeguards in place; or
    - It not being reasonable in the circumstances to expect the “*relevant body*” to put relevant safeguards in place.

# Bribery Act 2010

- Re-drafting of anticorruption legislation.
- Bribery offences include promising/offering/giving a financial advantage in following cases:
  - To bring about the improper performance of a relevant function or activity by another, or to reward such improper performance.
  - Knowing or believing that the acceptance of the advantage offered, promised or given in itself constitutes the improper performance of a relevant function or activity.
- Applies to bribes given outside UK, or to activities with no connection with the UK.

# Bribery Act 2010 - Cont

- Separate specific offence of bribing foreign official.
- Failure to prevent.
  - Commercial organisation is guilty if a person associated with it bribes another person.
  - Offence can be committed in the UK or overseas.
  - Defence if – on balance of probabilities – organisation can show it had in place adequate procedures designed to prevent bribery.

# COMPLIANCE TIPS



# Essential Elements to Compliance Program

- Tone at the top – commitment from senior management and clearly articulated policy against corruption
- Code of conduct, compliance policies & procedures
- Oversight, autonomy, and resources
- Risk assessment
- Training and continuing advice
- Incentives and disciplinary measures
- Third-party due diligence
- Confidential reporting and internal investigation

# Criteria to Evaluate Compliance Program

DOJ's new compliance counsel recently identified four criteria for evaluating the effectiveness of a compliance program:

- **Addressing Risk** – Does the compliance program demonstrate thoughtful design to address current risks?
- **Active Compliance** – How operational is the program (not a paper program)?
- **Coordination** – How well are stakeholders working with each other?
- **Resources** – How well is the program resourced?

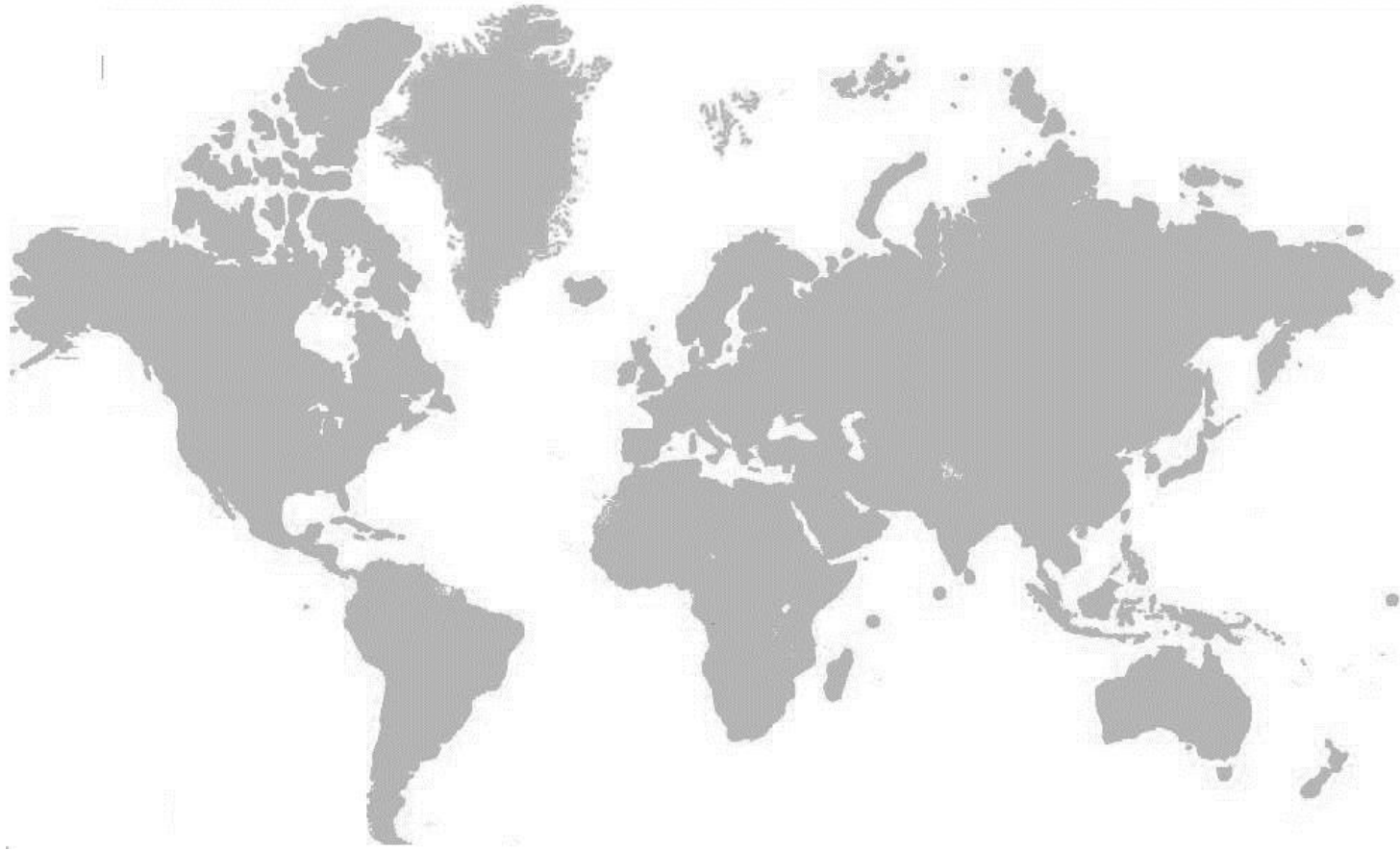
# Third Parties

- **Third parties remain one of the top risk areas for companies conducting business abroad**
- **Best practices include:**
  - Due diligence on potential third parties
  - FCPA compliance certification
  - Continuous monitoring of third party transactions
  - Auditing third party for compliance

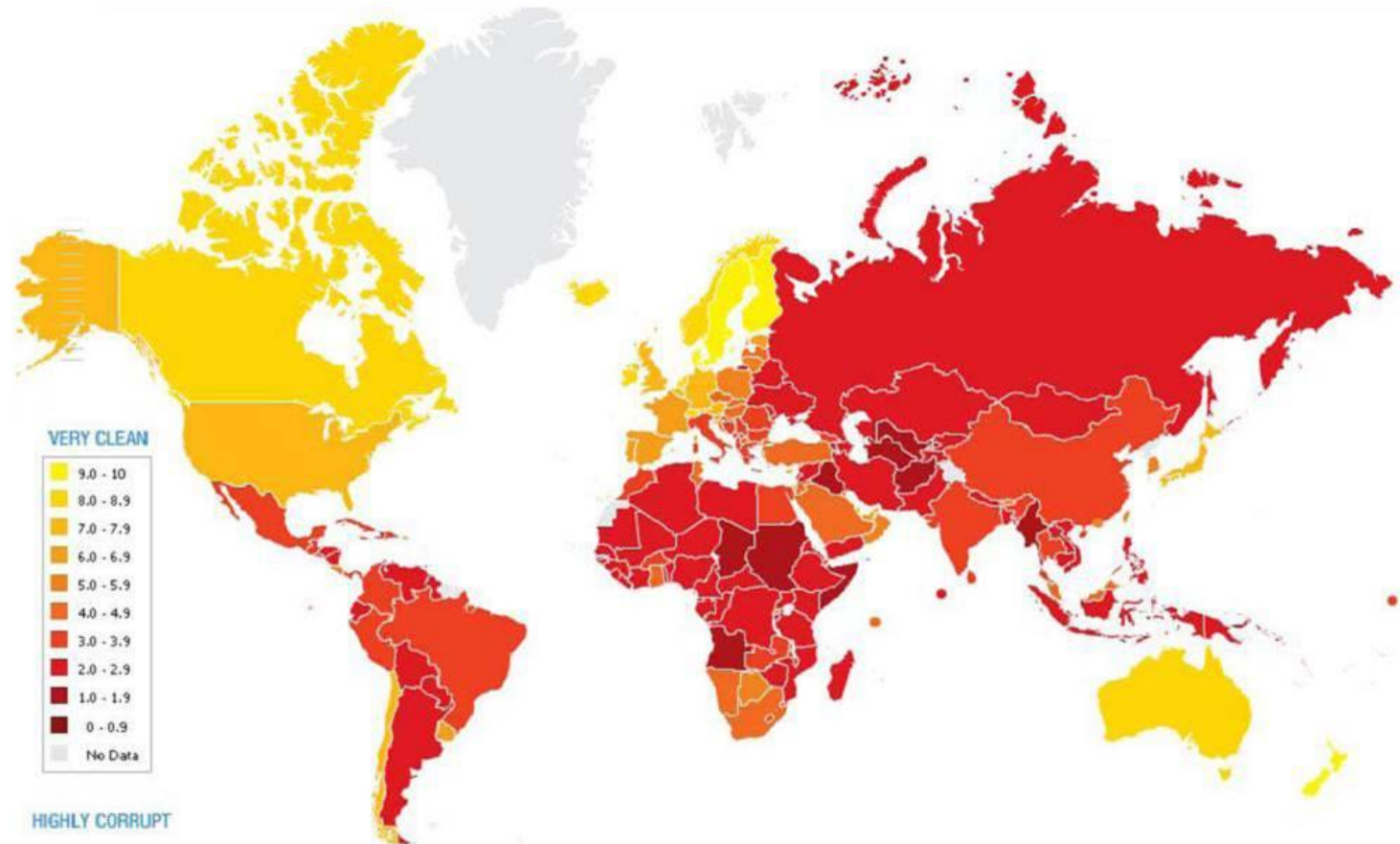
# Mergers & Acquisitions

- DOJ continues to emphasize importance of effective anti-corruption due diligence in deal context
- DOJ/SEC urge the following:
  - Pre-acquisition due diligence
  - Post-acquisition compliance integration
  - Anti-corruption training
  - FCPA audits
  - Disclosures to government

# The Sales Personnel See...



# Prosecutors See...



# QUESTIONS

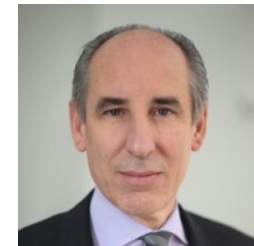
# Presenters



Constantin Achillas  
Partner, Paris  
+33 (0) 1 44 17 77 34  
[constantin.achillas@bryancave.com](mailto:constantin.achillas@bryancave.com)



Robert Dougans  
Partner, London  
+44 (0) 20 3207 1214  
[robert.dougans@bryancave.com](mailto:robert.dougans@bryancave.com)



Mark Srere  
Partner, DC  
+1 202 508 6050  
[mark.srere@bryancave.com](mailto:mark.srere@bryancave.com)



Jackson Pai  
Counsel, Los Angeles  
+1 310 508 6334  
[jackson.pai@bryancave.com](mailto:jackson.pai@bryancave.com)



Andreas Hentschel  
Associate, Hamburg  
+49 (0) 44 30 33 16 133  
[andreas.hentschel@bryancave.com](mailto:andreas.hentschel@bryancave.com)



Kristin Robinson  
Associate, DC  
+1 202 508 6334  
[kristin.robinson@bryancave.com](mailto:kristin.robinson@bryancave.com)



Cecile Terret  
Associate, Paris  
+33 (0) 1 44 17 77 17  
[cecile.terret@bryancave.com](mailto:cecile.terret@bryancave.com)