



# ICLG

The International Comparative Legal Guide to:

## **Business Crime 2019**

**9th Edition**

A practical cross-border insight into business crime

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# British Virgin Islands

Maples and Calder

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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?

There is no bar on private prosecutions for the vast majority of criminal offences; therefore, in theory, any authority or private party may prosecute. Section 59 of the Virgin Islands Constitution provides that the Director of Public Prosecutions (“DPP”) shall have power, in any case in which he or she considers it desirable to do so, to take over and continue any criminal proceedings that have been instituted by any other person or authority, and is ultimately responsible for criminal prosecutions across the Territory. In practice, the DPP and Crown counsel prosecute offences in the BVI as opposed to any other authorities, albeit they are assisted by agencies such as the Financial Investigation Agency (“FIA”) and the Financial Services Commission (“FSC”).

### 1.2 If there is more than one set of enforcement agencies, how are decisions made regarding the body which will investigate and prosecute a matter?

This depends on the nature of the offence and the identity of the accused. Generally speaking, the police will investigate the majority of offences. However, the FIA has specific responsibility for the investigation and receipt of disclosures made in relation to money laundering. Additionally, the FSC will assist in investigating contraventions of the FSC Regulatory Code and other offences related to financial services.

### 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?

Yes, civil/administrative enforcement is available for contraventions of the FSC Regulatory Code and other financial regulatory crimes. Enforcement is mainly entrusted to the FSC.

### 1.4 Have there been any major business crime cases in your jurisdiction in the past year?

There have been no major business crime cases in the British Virgin Islands in the past year.

## 2 Organisation of the Courts

### 2.1 How are the criminal courts in your jurisdiction structured? Are there specialised criminal courts for particular crimes?

The Magistrates’ Court has jurisdiction to try summary offences only, i.e. offences which are triable either way and which have not been committed up to the High Court for trial. The High Court, which usually sits to hear criminal matters three times a year, is the superior court of record for indictable offences where the defendant has been committed up for trial. There are no specialised criminal courts for particular crimes.

Criminal appeals are to the Court of Appeal of Eastern Caribbean Supreme Court and then, ultimately, to the Judicial Committee of the Privy Council.

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

The right to trial by jury arises only in respect of crimes triable on indictment. If the particular offence is triable on indictment and committed for trial before the High Court, the right to a jury trial will arise.

## 3 Particular Statutes and Crimes

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

#### o Securities fraud

Sections 217 to 219 of the Criminal Code create offences in respect of fraud generally and, as such, fraud and misrepresentation in connection with the sale of securities may be prosecuted pursuant to those Sections.

Section 217 provides that any person who, by any deception, dishonestly obtains property belonging to another with the intention of permanently depriving the other of it, commits an offence. Obtaining property is defined as obtaining ownership, possession or control and includes obtaining for another or enabling another to obtain or retain.

Section 218 makes it an offence for any person who, by deception: (1) dishonestly secures the remission (in whole or in part) of any

existing liability to make a payment, whether his own or another's; (2) with intent to make permanent default (in whole or in part) on any existing liability to make a payment, dishonestly induces a creditor to wait for payment or to forgo payment; and/or (3) dishonestly obtains any exemption from or abatement of liability to make a payment.

Under Section 219, it is an offence for any person to, by deception, dishonestly obtain for himself or another any pecuniary advantage or any services from another.

In addition, the Securities Investment and Business Act 2010 ("SIBA") specifically creates securities fraud-related offences under Section 91 (market manipulation and misleading statements). Liability arises where any person induces another to enter into or refrain from entering into an arrangement constituting securities business or dealing by: (1) making or being reckless as to making a statement that is false, misleading or deceptive; (2) dishonestly concealing facts; or (3) his general conduct in creating a misleading or false impression as to the market, price or value of an investment.

#### o Accounting fraud

Accounting fraud is specifically covered by Section 221 of the Criminal Code, which makes it an offence for any person to dishonestly, with a view to gaining for himself or another or with intent to cause loss to another, destroy, deface, conceal or falsify any account, record or document made or required for an accounting purpose. In addition, it is an offence under this Section for any person who dishonestly, with a view to gaining for himself or another or with intent to cause loss to another, furnishes information for any purpose, produces or makes use of any account or any such record or document, which to his knowledge is or may be misleading, false, or deceptive. Any person who makes, or concurs in making, an entry in any account or other document which is or may be false, misleading or deceptive in a material particular, or who omits or concurs in omitting a material particular from an account or other document, is to be treated as falsifying the account or document.

It is also an offence, under Section 233 of the Criminal Code, for an officer or director of a company or unincorporated association (or a person purporting to act as such) to publish or concur in publishing a written statement or account or document which to his knowledge is or may be deceptive, false or misleading, with intent to deceive the members or creditors of the entity about the entity's affairs.

#### o Insider trading

Section 88 of SIBA provides that an offence is committed when a person in possession of inside information deals or encourages another person to deal in price-affected securities or discloses inside information to another. There are a number of defences under Section 89 which include, for example, that the person: (1) did not expect the dealing to result in a profit; (2) believed the information to be widely disclosed; (3) would, in any event, have taken the same steps; (4) did not expect disclosure to result in dealing; or (5) had good faith in the course of business/employment. The defence of territorial scope of offence is also provided in Section 90.

#### o Embezzlement

Embezzlement by a private individual may be prosecuted as a theft or fraud (see 'Securities fraud' for the applicable provisions above). In addition, Section 81G of the Criminal Code provides that a public official who, in the discharge of his duties, commits any fraud or breach of trust against a private person (whether that fraud/breach of trust would have been criminal or not), commits an offence.

Further, pursuant to Section 81H, where a public official fails to give a satisfactory explanation for the significant increase in his assets when investigated for illicit enrichment, the significant increase in assets is deemed an illicit enrichment and the public official commits an offence.

#### o Bribery of government officials

Sections 80 and 80A–E of the Criminal Code create various offences in relation to bribery of government officials. Section 80 makes it an offence for a public official to directly or indirectly solicit, accept or obtain a gratification for: (1) doing or abstaining from an act in the execution of his duties or facilitated by his functions or duties; (2) expediting, delaying, hindering or preventing the performance of an act by himself or another public official in the execution of that public official's duties; and (3) expediting, delaying, hindering or preventing another person in the transaction of business with a public body. Equally, it is an offence under Section 80A for a person to directly or indirectly offer a gratification to a public official in the foregoing circumstances.

Pursuant to Section 80B, it is an offence for a person to directly or indirectly solicit, accept or obtain a gratification in consideration for concealing an offence, not proceeding against any other person, and obtaining or endeavouring to obtain the withdrawal of a prosecution against any other person. This does not, however, extend to any lawful compromise as to civil interests resulting from the offence or lawful compromise arising out of mediation approved by a court or plea bargaining.

Section 80C makes the use of office by a public official for gratification an offence. Section 80D also makes it an offence for a person to bribe or offer to bribe a public official to influence the decision of a public body.

It is also an offence under Section 80E for a person who, in order to obtain or retain business or other undue advantage in relation to the conduct of international business, directly or indirectly gives or agrees to give or offer gratification to a foreign public official.

#### o Criminal anti-competition

There is very little by way of criminal anti-competition offences in the BVI, and what does exist (i.e. offence of contravention of the Telecommunications Act which prohibits anti-competitive behaviour by public suppliers) only affects businesses licensed to trade in the domestic market.

#### o Cartels and other competition offences

See the answer directly above.

#### o Tax crimes

Save for in respect of businesses that are licensed to trade in the BVI, there are no applicable taxes in the jurisdiction. For businesses which are licensed to trade in the BVI domestic market, it is an offence to withhold payroll tax and social security contributions.

By the International Tax Enforcement (British Virgin Islands) Order 2014, the BVI government agreed to greater spontaneous/automatic disclosure and sharing of tax information with the UK government, making it easier for the UK government to trace any proceeds of tax crime committed within its own jurisdiction.

#### o Government-contracting fraud

Section 81A of the Criminal Code provides that it is an offence for a person to, directly or indirectly, agree to give or offer a gratification to another person or public official, or to cause a public official or another person to use his influence (real or fictitious) to obtain any work, employment contract or other benefit from a public body. It is also an offence under Section 81A for a person or public official to solicit, accept or obtain a gratification from another person for himself or another person to make use of his influence (real or fictitious) to obtain any work, employment contract or other benefit from a public body.

Section 81C also creates offences in relation to bribery for procuring contracts with public bodies, i.e. it is an offence for a person to directly or indirectly agree to give or offer a gratification to a public

official in consideration of that public official giving assistance or using influence in promoting, executing or procuring a contract with a public body, in payment of the price provided for in the contract and/or obtaining an advantage under a contract for work or procurement. Similarly, Section 81C also makes it an offence for the public official to solicit, accept or obtain such a gratification in those circumstances.

#### o Environmental crimes

Section 292 of the Criminal Code creates environmental offences where a person: (1) intentionally or negligently corrupts or fouls the water of any spring, stream, well or reservoir so as to render it less fit for the use of mankind or livestock; (2) intentionally or negligently vitiates the atmosphere in any place so as to render it noxious to the health or comfort of persons in the neighbourhood; (3) for any purposes makes loud noises or offensive smells in such place and such circumstances as to interfere with the comfort of persons in the exercise of their common rights; or (4) deposits offal or refuse at sea within 500 yards of the shore.

#### o Campaign-finance/election law

Relevant offences are set out in the Elections Act 1994 (as amended). These cover: the conduct of the election officers; and acts which are prohibited on polling day, such as: promotional party broadcasts; bribery and treating of voters; undue influence of voters; and personation. There are also offences in respect of the forgery, destruction or defacement of ballot papers, and infringement of secrecy by election officers and agents.

#### o Market manipulation in connection with the sale of derivatives

Market manipulation is an offence under Section 91 of SIBA – see Section 1.

#### o Money laundering or wire fraud

The British Virgin Islands has a well-developed anti-money laundering regime. The principle regulatory framework is contained in the Proceeds of Criminal Conduct Act 1997 (“PCCA”) and the Drug Trafficking Offences Act 1993; however, there are a number of additional pieces of legislation that have some bearing. The primary secondary legislation in this area is the Anti-Money Laundering Regulations 2008 and the Terrorist Financing Code of Practice 2008.

The PCCA sets out the principle anti-money laundering offences in the territory, including use/possession of the proceeds of crime, concealment and tipping off.

#### o Cybersecurity and data protection law

The Computer Misuse and Cybercrime Act 2014 details a number of offences in this area including: (i) unauthorised access to computer material; (ii) unauthorised use or interception of computer services; and (iii) unlawfully making available a device or data for the commission of an offence.

#### o Trade sanctions and export control violations

Trade and economic sanctions are implemented from time to time to reflect the UK government’s international sanctions obligations, including those derived from its UN and EU membership. The exact terms of the sanctions are specific to the relevant legislation and subject to change.

#### o Any other crime of particular interest in your jurisdiction

There are a number of regulatory offences which are contained in the FSC Act and the FSC Regulatory Code with regard to FSC licensed entities and BVI licensees. Equally, there are a number of licensing offences contained in SIBA relevant to business crime. Under the money laundering legislation, offences including use/possession of the proceeds of crime, concealment and tipping off, exist.

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

Section 316 of the Criminal Code provides that where a person intending to commit an offence begins to put his intention into execution by an act which goes towards the commission of an offence and which is not merely preparatory, but does not fulfil his intention to the extent that he does not commit that offence, is deemed to have attempted to commit an offence. It is immaterial (except in respect of sentencing) whether the offender does all that is necessary on his part to complete the commission of the offence or whether he is prevented or desists of his own motion, for an attempt to be committed.

## 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?

Under the Interpretation Act, a person is defined to include corporate bodies, and so an entity may have liability for an offence. Where an offence provides that an employee may be found vicariously liable, or where an employee was the controlling mind of an entity, the entity may be imputed with the employee’s conduct.

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

Criminal liability may arise where managers, officers or directors are found to be the controlling mind of the company. In particular, Part XIV of the Criminal Code, which covers fraud and other related offences relating to property, specifically provides that where any offence committed under Part XIV is committed by a body corporate and is proved to have been committed with the consent or connivance of any director, manager, secretary or other similar officer of the body corporate or any person purporting to act in any such capacity, then that person, as well as the body corporate, commits the offence and is liable to be prosecuted.

### 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?

Each individual case will turn on its facts, in particular with respect to the conduct complained of, as well as the relative ease with which prosecution can be undertaken. It is more likely, in cases where an individual is overseas but the company is a BVI entity within the jurisdiction, that prosecution will be against the company.

### 4.4 In a merger or acquisition context, can successor liability apply to the successor entity? When does successor liability apply?

Convictions, judgments, rulings, orders, debts, liabilities or obligations of a company (or its members, directors, officers and agents) are not released or impaired by a merger or consolidation. Similarly, proceedings pending at the time of a merger or consolidation against

a company which participated in a merger or consolidation (or its members, directors, officers or agents) are not abated or discontinued by the merger or consolidation.

## 5 Statutes of Limitations

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

Generally for summary-only offences, there is a six-month limit for prosecution and no time limit for indictable offences. However, certain offences may have a different limitation period – i.e. for bribery offences under Sections 80 to 81I of the Criminal Code, there is a 10-year limitation period from the commission of the relevant offence.

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

No, they cannot.

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

No, it cannot.

## 6 Initiation of Investigations

### 6.1 Do enforcement agencies have jurisdiction to enforce their authority outside your jurisdiction's territory for certain business crimes? If so, which laws can be enforced extraterritorially and what are the jurisdictional grounds that allow such enforcement? How frequently do enforcement agencies rely on extraterritorial jurisdiction to prosecute business crimes?

Neither the relevant regulatory bodies, investigative bodies, nor the courts have extra-territorial jurisdiction in cases involving suspected bribery, corruption, conflicts of interest or money laundering. The circumstances where domestic criminal courts will assert extra-territorial jurisdiction are extremely limited, but could include offences under the BVI Computer Misuse and Cybercrime Act 2014 and those committed by functionaries of BVI hedge funds not properly authorised under Section 41(2) of the Securities and Investment Business Act 2010.

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

In general, investigations are initiated once a complaint has been received or the relevant authority suspects a crime has been committed.

### 6.3 Do the criminal authorities in your jurisdiction have formal and/or informal mechanisms for cooperating with foreign enforcement authorities? Do they cooperate with foreign enforcement authorities?

Yes, the BVI does cooperate with foreign prosecutors. In particular,

the FSC has entered into a number of memoranda of understanding and treaties with other foreign regulatory authorities/countries in order to facilitate mutual legal assistance.

## 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 police and regulatory bodies, such as the FIA and FSC, have powers to gather information. This includes powers to request information from licensed entities, as well as searches of company premises and seizure of company documents.

### 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?

Where a criminal offence is reasonably suspected during the course of an investigation, the police may apply to court for a search warrant, subpoena or order for seizure. Moreover, the FSC and FIA have very wide powers of inspection, in addition to powers to request production from licensed entities.

### 7.3 Are there any protections against production or seizure that the company can assert for any types of documents? For example, does your jurisdiction recognise any privileges protecting documents prepared by in-house attorneys or external counsel, or corporate communications with in-house attorneys or external counsel?

Legal privilege is recognised in the BVI and can be a bar to production or seizure of documents.

### 7.4 Are there any labour or privacy laws in your jurisdiction (such as the General Data Protection Regulation in the European Union) which may impact the collection, processing, or transfer of employees' personal data, even if located in company files? Does your jurisdiction have blocking statutes or other domestic laws that may impede cross-border disclosure?

The BVI labour laws do not offer protection in respect of confidentiality; however, common law or contractual protection of confidentiality may exist. It is possible to seize personal documents of employees, even though they may be confidential, as investigation of a criminal offence is sufficiently serious to provide a defence to any possible breach of confidentiality. There is at present no legislation regulating data protection in the British Virgin Islands or specifically impeding cross-border disclosure.

### 7.5 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?

If, during the course of an investigation, the police reasonably

suspect that an employee or any person has documents that will assist and/or that the employee may have committed an offence, then a warrant to search and seize documents may be obtained and executed.

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

See questions 7.4 and 7.5.

**Questioning of Individuals:**

**7.7 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?**

Where the investigation is criminal in nature, following arrest, an interview under caution may be conducted, and will generally be held at a police station.

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

A third person who is not under arrest cannot be compelled to submit to questioning in respect of a criminal investigation.

**7.9 What protections can a person assert upon being questioned by the government? Is there a right to be represented by an attorney during questioning? Is there a right or privilege against self-incrimination that may be asserted? If a right to assert the privilege against self-incrimination exists, can the assertion of the right result in an inference of guilt at trial?**

No person may be compelled to answer any question in interview in a criminal investigation. All suspects are entitled to legal counsel at the interview, and the interview should not be conducted in an oppressive manner. The accused has the benefit of privilege against self-incrimination, though silence could lead to adverse inferences being drawn at trial.

**8 Initiation of Prosecutions / Deferred Prosecution / Civil Dispositions**

**8.1 How are criminal cases initiated?**

Criminal prosecutions are initiated by way of charge and summons to the Magistrates' Court or the laying of information.

**8.2 What rules or guidelines govern the government's decision to charge an entity or individual with a crime?**

We are unaware of any such published guidelines.

**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 agreements are available to dispose of criminal investigations.**

The DPP has wide discretion in determining whether to prosecute any case. We are unaware of any such published guidelines.

**8.4 If deferred prosecution or non-prosecution agreements are available to dispose of criminal investigations in your jurisdiction, must any aspects of these agreements be judicially approved? If so, please describe the factors which courts consider when reviewing deferred prosecution or non-prosecution agreements.**

We are unaware of any such agreements having been proposed or reached.

**8.5 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 may apply.**

An accused may be subject to civil penalties and remedies may be applied, which will usually be prosecuted by the relevant regulatory authority. They are likely to be applied in circumstances where culpability and harm caused are objectively low, and it is not in the public interest to commence a criminal prosecution when the regulatory aims could be met by means of a civil sanction.

**9 Burden of Proof**

**9.1 For each element of the business crimes identified above in Section 3, which party has the burden of proof? Which party has the burden of proof with respect to any affirmative defences?**

In general, the prosecution has the burden of proving every element of the offence, albeit certain evidential presumptions may apply against an accused, who will have the evidential burden of rebutting any such presumption. It is likely that the legal burden would, thereafter, be on the prosecution if sufficient evidence is raised by the defence to rebut the presumption to prove, beyond a reasonable doubt, that the presumption still applied and the offence was made out. Notably, reverse burdens of proof exist in relation to the defences to insider trading and market manipulation. It remains to be seen whether this will be interpreted as relating to the legal, as opposed to evidential, burden.

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

The prosecution must satisfy the decision-maker that it has proved its case beyond a reasonable doubt. In civil or administrative matters, the claimant authority must prove its case on a balance of probabilities.

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

In the Magistrates' Court, all questions as to law and fact will be determined by the Magistrates. In a jury trial in the High Court, the jury will determine the facts and whether the Crown has satisfied the burden of proof, save if there is an application to stay the trial as an abuse, submission of no case to answer, or if the judge otherwise directs the jury to acquit; in which case, the judge will determine all questions as to law and evidence that arise.

## 10 Conspiracy / Aiding and Abetting

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

Yes, it is an offence to conspire with or assist another to commit a crime. Section 311 of the Criminal Code provides that any person who agrees with another that a course of conduct should be pursued which will necessarily amount to or involve the commission of an offence by one or more parties to the agreement, if the agreement is carried out in accordance with their intention, is guilty of conspiracy to commit the offence. Where liability for an offence may be incurred without knowledge on the part of the person committing it of any fact or circumstance necessary for the commission of an offence, the accused will not be convicted unless he and at least one other party to the agreement intended or knew that the fact or circumstance would exist at the time when the conduct constituting the offence was to take place. It is a defence to a charge of conspiracy if: (1) the accused is the sole intended victim; or (2) the only other person with whom the accused enters into the agreement is his spouse, a child under the age of 10 or the sole intended victim.

## 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?

Yes, it is a defence to a criminal charge that the defendant did not have the requisite intent to commit the crime if intention to commit an offence is an element of that offence (i.e. the crime is not one of strict liability). It is generally for the prosecution to prove beyond reasonable doubt that the accused had the necessary intent to commit the offence.

### 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?

Ignorance of the law is no defence, pursuant to Section 5 of the Criminal Code, although it will be a mitigating factor when it comes to sentencing post-conviction.

### 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?

Yes, Section 8 of the Criminal Code provides that (subject to any express or implied statutory provisions to the contrary) a person who performs, or omits to perform, an act under an honest or reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist. Once the accused has raised sufficient evidence of this, it is for the prosecution to prove beyond a reasonable doubt that the accused did not believe in the state of things as averred.

## 12 Voluntary Disclosure Obligations

### 12.1 If a person or entity becomes aware that a crime has been committed, must the person or entity report the crime to the government? Can the person or entity be liable for failing to report the crime to the government? Can the person or entity receive leniency or "credit" for voluntary disclosure?

Whilst in general there is no duty to report crime, there are exceptions. For example, under the Proceeds of Crime and the Anti-Money Laundering and Terrorist Financing legislation, failure to report a suspicious transaction is an offence. In terms of voluntary disclosure, this may impact upon the decision to prosecute or upon conviction to sentencing.

## 13 Cooperation Provisions / Leniency

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

The DPP enjoys a wide prosecutorial discretion in respect of whether criminal proceedings are initiated or withdrawn and the level of charges brought. We are unaware of any rules or guidelines that govern the government's ability to offer leniency in exchange for voluntary disclosures or cooperation.

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

As with any criminal offence, contrition, prompt cooperation and evidence of a change in conduct will all assist in any request for leniency. The steps to be taken (i.e. contact with the prosecuting authorities and steps taken to effect reparation) will depend on the nature of the conduct and the seriousness of the offence committed.

## 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?

Whilst it is possible for a defendant to plead to a lesser offence in exchange for more serious charges to be discontinued by the Crown upon the entering of a plea to the lesser offence, it is not possible for the Crown and the defendant to agree upon a sentence. In addition, any basis of plea will be subject to court approval and, if not agreed by the Crown, may result in a *Newton* hearing (a procedure derived from the English case of *R v Newton* [1983] Crim LR 198, wherein a judge decides issues of fact without a jury).

### 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 Crown enjoys wide prosecutorial discretion and can determine the charges to be brought (which may limit sentencing options), and may enter a *nolle prosequi* if it determines that the prosecution should be discontinued (say for providing assistance to apprehend further offenders). That being said, sentencing itself is at the sole discretion of the judge; therefore, it is not possible for the Crown to effectively plea bargain with a defendant. In such circumstances, a *Goodyear* direction may be sought (a procedure derived from the English case of *R v Goodyear (Karl)* [2005] EWCA Crim 888, wherein a defendant may request an indication of the likely maximum sentence should he plead guilty).

## 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 a sentence on the defendant? Please describe the sentencing process.

The court is required by Section 4 of the Criminal Justice (Alternative Sentencing Act) 2005 to have regard to a myriad of different factors, including the circumstances of the offence, previous convictions, the defendant's cooperation with the investigation, the harm caused to the victim, the personal circumstances of any victim and the defendant, the deterrent effect of sentencing and public protection considerations. Whilst any sentence passed can be no more than that prescribed for the particular offence in question, the court can have regard to any other matter that it considers appropriate, and therefore enjoys a wide discretion in this respect.

In addition, the court will have regard to case law and the sentencing guidelines of both England and Wales and the Eastern Caribbean Supreme 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.

The court will consider the elements that arise in respect of the exercise of its discretion under Section 4 of the Criminal Justice (Alternative Sentencing Act) 2005, as summarised above.

## 16 Appeals

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

Both the prosecution and the defendant may appeal a verdict. The prosecution is circumscribed to appealing an acquittal, following a trial on indictment, only in circumstances where: (1) there is a defect in the depositions/committal or the indictment; (2) the case was dismissed following a submission of no case to answer; (3) there was exclusion of evidence sought to be adduced by the prosecution; or (4) there was a misdirection by the judge to the jury.

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

The defendant may appeal against a sentence, and the Attorney General may appeal unduly lenient sentences by way of reference.

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

The standard of review is whether: (1) a conviction is unsafe; (2) due to a defect in the trial process (see question 16.1), an acquittal should be quashed as there was enough evidence to enable the jury to conclude beyond reasonable doubt that the defendant committed the crime; and (3) a sentence is manifestly excessive or unduly lenient.

### 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 quash the conviction or acquittal, remit the case for trial, or increase or decrease the sentence passed.

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# MAPLES

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