

# SOUTH AFRICA

## Limited enforcement

0.4% of global exports

### Investigations and cases

In the period 2016-2019, South Africa opened 14 investigations, commenced one case and concluded no cases with sanctions.

Since 2012, the South African Directorate for Priority Crime Investigation (DPCI or the Hawks) has been investigating the South African telecommunications company **MTN** concerning alleged bribery to secure a US\$31.6 billion mobile operating licence in Iran.<sup>1</sup> The Hawks raided MTN offices in 2018 in connection with the investigation.<sup>2</sup> In 2019, a former South African ambassador to Iran alleged to be involved in facilitating the deal was arrested and charged with foreign bribery, but he died before his trial commenced. Investigations into MTN are ongoing. Turkish telecoms firm Turkcell filed a US\$4.2 billion lawsuit against MTN in South Africa in 2013 (withdrawing a 2012 lawsuit in the United States), claiming it would have been awarded the licence if not for the bribery.<sup>3</sup> As of 2019, the lawsuit was still pending.<sup>4</sup>

### Recent developments

President Ramaphosa, in office since 2018, has sought to strengthen law enforcement agencies, and the dramatic change in political climate since 2018 has had a positive impact on agencies' capacity and willingness to investigate foreign bribery.<sup>5</sup>

Additional funds of up to R2.4 billion (US\$138 million) have been allocated for the National Prosecuting Authority (NPA), the Hawks and the Special Investigating Unit.<sup>6</sup> This budget will cover the appointment of approximately 800 investigators and 277 prosecutors, who will assist with, among other things, the clearing of case backlogs, such as those of the commissions looking into state capture and corruption, as well as foreign bribery investigations.

In addition, a Multi-Agency Task Team was formed, which meets monthly to discuss the status of ongoing foreign bribery investigations and possible new investigations, and to identify challenges. The agencies represented on this team are the Hawks, the NPA, the Department of Public Service and Administration, the Department of Justice and Constitutional Development, the Department of the Treasury, the South African Revenue Service, the South African Police Service and Interpol, the Financial Intelligence Centre (FIC) and the Master of the High Court.

Regulations for the Protected Disclosures Act were published in September 2018. They expand the list of entities to which protected disclosures can be made, and include the FIC for disclosures related to "any alleged irregular or improper conduct or impropriety with regard to money laundering activities or the financing of terrorist and related activities". Disclosures about foreign bribery activities are likely to fall under this category, and can therefore now be made as a protected disclosure to the FIC.<sup>7</sup>

### Transparency of enforcement information

There are no published statistics relating to foreign bribery enforcement in South Africa. Statistics on requests for mutual legal assistance (MLA) are kept

<sup>1</sup> [https://files.dorsey.com/files/Upload/Anti\\_Corruption\\_Digest\\_August2012.pdf](https://files.dorsey.com/files/Upload/Anti_Corruption_Digest_August2012.pdf);  
<https://www.wsj.com/articles/SB10001424052702303740704577522560497930748>

<sup>2</sup> <https://www.bloomberg.com/news/articles/2019-02-15/south-african-police-arrest-country-s-former-ambassador-to-iran>;  
<https://www.dailysabah.com/business/2018/06/06/elite-south-african-police-raid-mobile-operator-mtn-over-iran-dispute-with-turkcell>;  
<https://www.wsj.com/articles/SB10001424052702303740704577522560497930748>

<sup>3</sup> <https://www.reuters.com/article/us-mtn-turkcell-idUSKBN18S4LG>

<sup>4</sup> <https://www.bloomberg.com/press-releases/2019-04-19/turkcell-expects-a-conclusion-on-the-4-2-billion-dollar-lawsuit-against-mtn-this-year>

<sup>5</sup> <https://mg.co.za/article/2020-03-06-training-the-npas-next-prosecutors/>

<sup>6</sup> <http://www.treasury.gov.za/documents/national%20budget/2020/speech/speech.pdf>

<sup>7</sup> [https://www.justice.gov.za/legislation/notices/2018/20180914-gg41904\\_rg10867\\_gon949-PDaregulations.pdf](https://www.justice.gov.za/legislation/notices/2018/20180914-gg41904_rg10867_gon949-PDaregulations.pdf)

by the Department of Justice and available via freedom of information requests, but they are not published.

Court decisions are published in the *Saflii* database, which is free and open to the public.<sup>8</sup> However, it is not complete. There are other subscription-based services which provide court decisions.<sup>9</sup>

## Beneficial ownership transparency

There is no central register for beneficial ownership information in South Africa.<sup>10</sup>

According to the 2017 Amendments to the Financial Intelligence Centre Act, “accountable institutions” are obliged to establish and verify the identities of corporate vehicles. They should apply additional due diligence measures to establish the ownership and control structure of the client, and the beneficial ownership of clients, and to take reasonable steps to verify the identity of the beneficial owners.

The FIC assists law enforcement agents during their investigations by requesting beneficial ownership information from accountable institutions and providing agents with the name of the financial institutions, designated non-financial businesses and professions or virtual asset service providers, where the legal person or trust is a client. Law enforcement agents can then apply for a subpoena to obtain any beneficial ownership information held by the specific institution. The FIC is legally authorised to share information, on request or spontaneously, with relevant national authorities involved in the fight against corruption. The range of those entities is set forth in Section 40 of the FIC Act and includes, among others, law enforcement agents, supervisory bodies, courts and prosecution services, as well as any other person entitled to receive information from the FIC under other national legislation. South Africa has undertaken a national risk assessment of beneficial ownership transparency of trusts and is considering moving toward creating a beneficial ownership register.

## Inadequacies in legal framework

<sup>8</sup> <https://www.saflii.org/>

<sup>9</sup> LexisNexis (<https://www.lexisnexis.co.za/>) and Juta (<https://juta.co.za/law/>)

<sup>10</sup> [https://www.transparency.org/whatwedo/publication/g20\\_leaders\\_or\\_laggards](https://www.transparency.org/whatwedo/publication/g20_leaders_or_laggards)

<sup>11</sup> <https://www.oecd.org/corruption/anti-bribery/South-Africa-Phase-3-Written-Follow-Up-Report-ENG.pdf>

The lack of provision for deferred prosecution agreements is a major issue, hindering law enforcement authorities’ ability to detect foreign bribery and severely limiting the scope of voluntary disclosure by companies.

The OECD WGB’s Phase 3 Follow-Up Report noted that “sanctions for legal persons remain low, particularly where foreign bribery cases fall under the jurisdiction of the Regional Courts”.<sup>11</sup>

## Inadequacies in enforcement system

Inadequate resources were a major issue until recently, as investigators and prosecutors were overburdened with cases. A number of vacancies within the NPA have been filled in the past year, but this remains a source of concern.

## Recommendations

- Systematically publish enforcement data on foreign bribery, as well as on MLA requests made and received by South African authorities
- Create a publicly accessible register for beneficial ownership information
- Approve legislation providing for deferred prosecution agreements, as an important tool in foreign bribery enforcement
- Increase institutional capacity to detect, investigate and prosecute foreign bribery
- Increase available sanctions for legal persons convicted of foreign bribery
- Strengthen whistleblower protection
- Dedicate adequate resources to anti-corruption enforcement agencies.