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Anti-Corruption Legislation
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Introduction

"...please know that a central priority of my tenure at the World Bank Group will be taking forward the corruption-fighting agenda that Jim Wolfensohn so ably articulated during his presidency and adapting it to today's challenge of shared prosperity and the end of poverty"

Jim Yong Kim, President of the World Bank Group, Speech on Anti-Corruption, Washington DC, 30 January 2013

Corruption is a global phenomenon which affects businesses seeking tenders (both public and private sector), contracting with intermediaries and agents, giving charitable donations, providing corporate hospitality, hiring employees, starting up operations abroad, keeping accurate accounts, filing tax claims or just carrying out their daily business. Perhaps a local government official has asked for a favour, or an agent offers to arrange a private meeting with the Minister awarding a contract. A customs official may demand an "expedition fee" before releasing a company's goods, or an agreement inherited as part of a take-over or merger situation seems to involve unusually high fees.

Corruption is illegal in many countries in the world, but what constitutes corruption varies considerably from jurisdiction to jurisdiction and the murky grey area between acceptable corporate behaviour and corruption can be very large. A number of international agreements on corruption have tried to set common standards, and to improve the ability of national authorities to prosecute corrupt individuals and companies by mechanisms on information sharing and extradition. Differences remain, however, causing headaches for multinationals wanting to implement global anti-corruption compliance policies.

There is, indeed, a plethora of international instruments on corruption and related issues. The United Nations Convention against Transnational Organized Crime, adopted in 2000, though aimed mainly at organised crime, also included provisions directly relating to corruption. The Council of Europe has adopted both a Civil Law Convention on Corruption, designed to ensure that effective remedies existed in national law for persons who had suffered damage as a result of corruption, and a Criminal Law Convention on Corruption, aimed to coordinate criminalisation of a range of corrupt practices, including the active and passive bribery of domestic and foreign public officials, parliamentarians, judges and officials of international organisations as well as active and passive bribery in the private sector.

Both the United Nations and the Council of Europe have adopted model codes of conduct for public officials (the International Code of Conduct for Public Officials adopted by the General Assembly in resolution 51/59 of 12 December 1996, and the Model Code of Conduct for Public Officials, adopted by the Committee of Ministers of the Council of Europe on 11 May 2000), dealing with general principles of integrity for public officials, and addressing specific issues such as conflicts of interest, the misuse of confidential information and the acceptance of gifts and hospitality.

Further instruments, such as the Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union (adopted by the Council of the European Union on 26 May 1997 and requiring EU Member States to criminalise active and passive corruption of Community or national officials), the African Union Convention on Preventing and Combating Corruption, and the Organization of American States Inter-American Convention against Corruption, emphasise both the importance of the topic and the range of international organisations involved.

This guide looks briefly at what are, arguably, the two most important agreements, the UN Convention against Corruption and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (and the related OECD Recommendation for Further Combating Bribery of Foreign Public Officials), and provides a short overview of the anti-corruption laws in a number of different countries around the world. It sets out the key elements of the offence in each jurisdiction, looks at how it is treated in relation to tax, facilitation payments and public procurement, and identifies what the penalties are, using eight questions:

- What is corruption?
- Does the law apply beyond national boundaries?
- Is there a difference between the treatment of corruption in the public and private sector and how is the public sector defined?
- How are "facilitation payments" treated?
- What are the rules on tax and accounting in relation to corrupt payments?
- Are there special rules for public procurement?
- Are companies liable for the actions of their subsidiaries?
- What are the penalties?

The United Nations Convention Against Corruption

"The cost of corruption is measured not just in the billions of dollars of squandered or stolen Government resources, but most poignantly in the absence of the hospitals, schools, clean water, roads and bridges that might have been built with that money and would have certainly changed the fortunes of families and communities."

UN Secretary-General Ban Ki-moon's message for International Anti-Corruption Day, 9 December 2012

The Convention, which was opened for signature on 9 December 2003, has been signed by 140 countries[1]. It came into force 90 days after ratification by the 30th country to do so, and remained open for signature until 9 December 2005. The 30th ratification took place on 15 September, so it came into force on 14 December 2005.

The purposes of the Convention, stated at Article 1, are:

- to promote and strengthen measures to prevent and combat corruption more efficiently and effectively;
- to promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption, including in asset recovery;
- to promote integrity, accountability and proper management of public affairs and public property.

All Parties to the Convention are required to criminalise:

- the bribery of national and foreign public officials, as well as officials of public international organisations;
- the embezzlement, misappropriation or other diversion of either public or private funds by a public official to whom the funds have been entrusted;
- the laundering of proceeds of crime; and
- obstruction of justice.

In addition, Parties must consider criminalising trading in influence, the abuse of functions by a public official, illicit enrichment and private sector bribery. Each Party must, consistent with its legal principles, adopt measures to establish the liability of legal persons for participation in Convention offences and must take, "to the greatest extent possible within its domestic legal system", measures to facilitate freezing, seizure and confiscation of the proceeds of Convention offences.

Parties are required to cooperate with other Parties in areas such as the extradition of offenders, mutual legal assistance and less formal methods of cooperation in the course of investigations and other law-enforcement activities.

Article 51 states that the return of assets is a "fundamental principle" of the Convention and requires Parties to give each other "the widest measure of cooperation and assistance in this regard". In particular, Parties must establish mechanisms including both civil and criminal recovery procedures, whereby assets can be traced, frozen, seized, forfeited and returned.

Preventative measures are also required, including the generation of records that can be used to assist in the asset recovery process and the identification of experts in developing countries to provide technical assistance.

While the Convention is clearly a welcome development as the first truly global legal instrument on corruption, there are a number of aspects to the Convention that have given rise for concern. One of these concerns, the lack of any inherent monitoring or enforcement mechanism in the instrument itself, was addressed at the November 2009 UN Conference in Doha when a "Review mechanism" was supported by a vast number of signatory countries, and by international companies. Under this mechanism, states parties to be reviewed in each year of the four-year cycle are selected by lot, and the country review, reports composed of self-assessments and peer reviews are published on the UN website.

Critics argue that a handful of countries have compromised the review mechanism by weakening key provisions, namely those providing for participation of civil society organisations in the review process and publication of country reports. The adopted mechanism gives governments discretion to exclude civil

[1] As at 29 May 2013

society from the review process, and withhold information from publication in country reports. Critics also suggest that the implementation review group will be ineffective because it is an open-ended intergovernmental group of State parties, rather than a smaller group of independent experts.

A further concern is the large number of "optional" Articles in the Convention. These include Articles where Parties are required simply to "consider" adopting particular measures (see above for examples), as well as Articles where Parties are required to adopt measures, but only "where appropriate and in accordance with the fundamental principles of its legal system". Finally, some business organisations have voiced anxiety about Article 35 and how far it goes in providing a private right of action against persons responsible for damage as a result of corruption.

The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

"Bribery is a corrosive crime. It erodes the integrity of our institutions, the strength of our economies and the trust of our citizens. We need to combat this peril with all the power and reach of the state, and through effective multilateral cooperation."

Angel Gurria, OECD Secretary General, 2 December 2014

On 17 December 1997, OECD member countries and five non-member countries (Argentina, Brazil, Bulgaria, Chile and Solvenia) signed a Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. There are now 41 signatory countries to the Convention*, which came into force on 15 February 1999.

The Convention requires Parties to make the bribery of foreign public officials (as defined) a criminal offence, as well as related offences of incitement, aiding and abetting, authorisation, attempt and conspiracy.

Parties must also (in accordance with their legal principles) establish the liability of legal persons for the bribery of foreign public officials, and must put in place effective penalties, including seizure and confiscation or comparable monetary sanctions.

A key element of the Convention is the requirement that Parties establish jurisdiction where the offence is committed in whole or in part in their territory. They are also required to take measures to establish jurisdiction to prosecute their nationals for offences committed abroad where such jurisdiction exists for other offences, according to the same principles.

Parties must also prohibit off-the-book accounts and other accounting irregularities for the purpose of bribery or of hiding such bribery.

There are also provisions on money laundering, mutual legal assistance, extradition and monitoring.

Signatories to the OECD Convention

Argentina	Italy
Australia	Japan
Austria	Korea
Belgium	Latvia
Brazil	Luxembourg
Bulgaria	Mexico
Canada	Netherlands
Chile	New Zealand
Colombia	Norway
Czech Republic	Poland
Denmark	Russia
Estonia	Portugal
Finland	Slovak Republic
France	Slovenia
Germany	South Africa
Greece	Spain
Hungary	Sweden
Iceland	Switzerland
Ireland	Turkey
Israel	United Kingdom
	United States

A table showing the date of ratification, the date of entry into force of the Convention and the date of entry into force of the implementing legislation can be found at http://www.oecd.org/daf/anti-bribery/antibriberyconventionratification.pdf.

Although (or perhaps because) the scope of the OECD Convention, both in terms of geographical coverage and in terms of the range of subject matter, is more restricted than the UN Convention, it has proved an effective instrument for changes in the laws and procedures of the Parties. The Parties are required (by Article 12) to cooperate in carrying out "a programme of systematic follow-up to monitor and promote the full implementation of [the] Convention", and the evaluation reports drawn up as part of this programme have identified areas of weakness in the implementing legislation and policies of the Parties, and made detailed recommendations for changes, which Parties have, in the main, heeded.

* As at 29 July 2013

The OECD Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions

On 9 December 2009, the Parties to the OECD Convention agreed to put in place further measures to reinforce their efforts to prevent, detect and investigate foreign bribery. These include provisions for combating small facilitation payments, protecting whistleblowers and improving communication between public officials and law enforcement authorities.

This Recommendation for Further Combating Bribery of Foreign Public Officials called on the State Parties to the OECD Anti-Bribery Convention to, *inter alia*:

- ensure companies cannot avoid sanctions by using agents and intermediaries to bribe for them;
- periodically review policies and approach on small facilitation payments. These are legal in some countries if the payment is made to a government employee to speed up an administrative process;
- improve co-operation between countries on foreign bribery investigations and the seizure, confiscation and recovery of the proceeds of transnational bribery;
- provide effective channels for reporting foreign bribery to law enforcement authorities and for protecting whistleblowers from retaliation; and
- working more closely with the private sector, adopt more stringent internal controls, ethics and compliance programmes and measures to prevent and detect bribery.

Along with the Recommendation, the OECD Council also adopted the Good Practice Guidance on Internal Controls, Ethics and Compliance.

Specifically, the Good Practice Guidance calls on businesses to:

- adopt a **clear and visible anti-bribery policy** that is strongly supported by senior management;
- instil a sense of **responsibility for compliance** with the policy at all levels of the company, and establish independent compliance structures;
- keep up regular **communication and training** on foreign bribery for all employees, as well as with business partners; and
- **encourage observance** of anti-bribery compliance measures, and have **disciplinary procedures** to address violations.

The Guidance also recommends that business organisations play a leading role in providing information, advice and training to companies, especially small- and medium-sized enterprises, on how to protect themselves against the risk of foreign bribery.

The Recommendation was amended in February 2010 to include an annex on 'Good Practice Guidance on Internal Controls, Ethics and Compliance'.

Australia

What is corruption?

Division 70 of the Criminal Code Act 1995 (Commonwealth) creates a statutory offence of bribing foreign public officials.

Section 70.2 provides:

"*(1) A person is guilty of an offence if:*

(a) the person:

(i) provides a benefit to another person; or

(ii) causes a benefit to another person; or

(iii) offers to provide, or promises to provide, a benefit to another person; or

(iv) causes an offer of the provision of a benefit, or a promise of the provision of a benefit, to be made to another person; and

(b) the benefit is not legitimately due to the other person; and

(c) the first-mentioned person does so with the intention of influencing a foreign public official (who may be the other person) in the exercise of the official's duties as a foreign public official in order to:

(i) obtain or retain business; or

(ii) obtain or retain a business advantage that is not legitimately due to the recipient, or intended recipient, of the business advantage (who may be the first-mentioned person)."

It is not necessary to prove that business, or a business advantage, was actually obtained or retained. In working out whether a benefit, or a business advantage, is "not legitimately due" for the purposes of the section, the Criminal Code requires that the following factors be disregarded:

- the fact that the benefit or business advantage may be, or be perceived to be, customary, in the situation;
- the value of the benefit or business advantage; and
- any official tolerance of the benefit or business advantage.

The Australian Government is considering an amendment to section 70.2 to clarify that it is not necessary to prove that the accused person intended to influence a particular foreign public official.

It is also an offence under sections 141.1 and 142.1 of the Criminal Code to bribe or give a corrupt benefit to a Commonwealth public official. The public official who receives the bribe can also be criminally liable under the Criminal Code.

Does the law apply beyond national boundaries?

Yes. The law will apply if the offending conduct occurs wholly or partly in Australia or wholly or partly on board an Australian aircraft or Australian ship. Even if no part of an offence takes place in Australia, a person may still be prosecuted in Australia if, at the time of the alleged offence, that person is:

- an Australian citizen;
- a resident of Australia; or
- a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory.

The offence of bribing a Commonwealth public official applies regardless of whether or not the conduct constituting the alleged offence occurs in Australia, and whether or not a result of the conduct occurs in Australia.

Is there a difference between the treatment of corruption in the public and private sector and how is the public sector defined?

The Criminal Code provisions referred to above only apply to the public sector.

The term "foreign public official" is broadly defined in the Criminal Code and includes:

- an employee or official of a foreign government body;
- a member of the executive, judiciary or magistracy of a foreign country;
- a person who performs official duties under a foreign law;
- a member or officer of the legislature of a foreign country;
- an employee or official or a public international organisation;
- an authorised intermediary of a foreign public official or someone who holds themselves out to be an authorised intermediary.

The term "Commonwealth public official" is not defined in the Criminal Code.

There are laws in each State and Territory of Australia which make bribery of state and local officials an offence in some circumstances. In addition, the payment or receipt of secret commissions or corrupt rewards as inducements, both in the public and private sectors, also constitute offences under some State laws in Australia.

How are facilitation payments treated?

The Criminal Code provides a facilitation payment defence to the offence of bribing a foreign public official in section 70.4. In summary, there is a defence if:

- the value of the benefit was of a minor nature; and
- the person's conduct was engaged in for the sole or dominant purpose of expediting or securing the performance of a routine government action of a minor nature; and
- as soon as practicable after the conduct occurred, the person made a record of the conduct.

A 'routine government action' is an action that is ordinarily and commonly performed by the foreign public official (such as granting a licence, processing government papers, and unloading cargo), but does not cover decisions about whether to award new business or continue existing business.

The Australian Government is currently considering whether to remove the defence for facilitation payments by repealing section 70.4 of the Code.

What are the rules on tax and accounting in relation to corrupt payments?

Under the Commonwealth Income Tax Assessment Act 1997 sections 26-52 and 26-53, a person cannot deduct a loss or outgoing incurred that is a bribe to a foreign public official, or a bribe to a public official.

Under the Corporations Act 2001 (Commonwealth), every company must keep financial records that correctly record and explain its transactions and financial position and performance, and would enable true and fair financial statements to be prepared and audited. There are various civil penalties for a company and its officers, including directors, in respect of falsification of company accounts and presentation of documents which are false and misleading.

Are there special rules for public procurement?

No. The Commonwealth Procurement Rules 2014 issued under the Public Governance, Performance and Accountability Act 2013 do not specify any ground of ineligibility to tender for public contracts on the basis that a company or person has been convicted of corruption offences.

Are companies liable for the actions of their subsidiaries?

The Criminal Code provides that a company can be liable for the conduct of its employees, agents and officers if it 'expressly, tacitly or impliedly authorised or permitted the commission of the offence'. This may be established by showing:

- the board of directors or a high managerial agent intentionally, knowingly or recklessly carried out the conduct or expressly, tacitly or impliedly permitted the commission of the offence;
- a corporate culture existed that directed, encouraged, tolerated or led to the offence; or
- the company failed to create and maintain a corporate culture that required compliance with the relevant laws.

Otherwise the Criminal Code does not provide that a parent company is liable for the actions of its subsidiaries.

What are the penalties?

The maximum penalty for a corporation is the greater of:

- 100,000 penalty units or AUD 18 million;
- if the value of the benefit obtained directly or indirectly by the corporation or related body corporate can be determined by the court then three times the value of the benefit attributable to the conduct constituting the offence; or
- if the court cannot determine the value of the benefit, 10% of the annual turnover of the corporation during the 12 month period ending at the end of the month in which the offending conduct occurred.

The maximum penalty for an individual is 10 years' imprisonment and/or a fine of 10,000 penalty units or AUD 1.8 million.

Belgium

What is corruption?

Belgian law prohibits both active and passive bribery, and has separate offences of bribing public officials and private sector persons.

Active bribery in the public sector is described as "[t]he act of proposing, whether directly or through intermediaries, an offer, promise or advantage of any kind to a person exercising a public function, either for himself or a third party, in order to induce him to act in one of the ways specified in Article 247" (Article 246 (2) of the Criminal Code). Passive bribery consists of this person asking for or accepting this offer, promise or advantage of any kind (Article 246(1) of the Criminal Code).

It does not matter whether the offer, promise or advantage is for the benefit of the person who exercises a public function or for a third party, and there is no requirement to prove a connection between the public official and any such third party.

Article 247 of the Criminal Code (as amended by the Bribery Prevention Act of 10 February 1999) defines the different types of behaviour that bribery may seek to induce. Bribery can be aimed at inducing a public official to perform a proper but "unpaid" official act, to engage in an improper act while carrying out official duties or refrain from a proper one, or to commit a criminal offence or misdemeanour in the course of official duties.

A separate offence of trading in influence is defined as bribery that "is aimed at inducing a person exercising a public function to use the real or supposed influence he possesses because of his function to induce a public authority or administration to perform or refrain from an act" (Article 247 (4) of the Criminal Code). This offence is very broad since it covers acts that may or may not be a part of the public official's duties, and prohibits any use of influence.

Does the law apply beyond national boundaries?

Belgian courts have jurisdiction over public bribery offences where at least one element of the offence took place on Belgian territory.

Where a bribery offence is committed outside Belgium, Belgian courts have jurisdiction:

(i) where it is committed by a Belgian citizen or by someone who has their main residence in Belgium; or

(ii) with respect to the bribery of a person holding public office, where the offence relates to a Belgian official, to a Belgian official of a foreign country or an international organisation that has its headquarters in Belgium.

If the public official is neither Belgian nor employed by an international organisation headquartered in Belgium, Belgian courts will only have jurisdiction (where the bribe-payer is a Belgian national or resident) if the act is also punishable under the laws of the country in which the act is committed (Article 10 quater (1) of the Belgian Code of Criminal Procedure, introduced by the Law of 11 March 2007).

Is there a difference between the treatment of corruption in the public and private sector and how is the public sector defined?

Private sector bribery is a separate offence in Belgian law (although there is some overlap, as explained below). It is an offence for any person to propose to another person in his capacity as director or manager of a legal entity, proxy holder or employees of a legal entity, or proxy holder or employee of a natural person, any offer, promise or benefit, directly or indirectly and whether for himself or for a third party, in order to do, or omit to do an act within his function, without the authorisation and knowledge of the board of directors, the general meeting of shareholders, the principal or the employer (as the case may be). It is also

an offence for a person acting in one of the capacities above to request or accept such an offer, promise or benefit (Article 504 bis Criminal Code).

The concept of "any person exercising a public function under Belgian law" (for the purposes of the public sector bribery offence) covers all categories of persons who, whatever their status, exercise a public function of any kind, i.e., federal, regional, community, provincial, communal civil servants or public officials. It includes elected officials, i.e. any persons holding legislative, communal or other elected office, public officers, and temporary or permanent holders of public power or authority.

The provisions on public sector bribery also extend to certain persons who do not exercise a public function within the Belgian legal system. The same sanctions apply to bribery of persons exercising a public function in a foreign State or in a public international organisation (Article 250). The same broad, functional definition of "persons exercising a public function" applies to them.

Individuals who are applying for a public position, who lead others to believe that they will exercise a public function or who, by misrepresenting themselves, mislead others into believing that they will exercise a public function are also included (Article 246 (3)).

Managers of private enterprises are deemed to exercise public functions to the extent that the act of bribery affects a public service mission entrusted to the enterprise. A political party official in a single party country would be considered to be a public official if he performed public functions.

How are facilitation payments treated?

There is no exemption in Belgian law for facilitation payments, and such payments will therefore fall within the scope of the Article 246 offence if the necessary elements of the offence are present. Article 247 specifically states that a bribe for performing "a proper but unpaid official act" will be an offence.

What are the rules on tax and accounting in relation to corrupt payments?

The Law of 11 March 2007 explicitly prohibits the tax deductibility of secret commissions by companies. The Income Tax Code states that the following do not constitute business expenses: "… *commissions, brokerage fees, trade or other discounts, occasional or other fees, bonuses, all kinds of other payments and advantages which are awarded directly or indirectly to a person:*

a) *in connection with public bribery in Belgium as referred to in Article 246 of the Penal Code or private bribery in Belgium as referred to in Article 504 bis of the same Code;*

b) *in connection with public bribery of a person exercising a public function in a foreign State or in a public international organisation, as referred to in Article 250 of the same Code"* (Article 53 (24)).

Are there special rules for public procurement?

The Law of 20 March 1991 (amended in 1999 and 2011) on the authorisation of public works contractors and the Law of 15 June 2006 (amended in 2011) on public procurement and certain contracts for works, supplies and services contain provisions under which operators convicted of bribery are debarred from public procurement. Article 314 of the Criminal Code sanctions individuals who disrupt the freedom of auctions and/or submissions by way of violence, force, gifts, promises or other fraudulent means.

Are companies liable for the actions of their subsidiaries?

Parent companies cannot be held liable for offences committed by their subsidiaries. On the basis of the concrete circumstances of the case, a judge can establish that the offence has been committed by the parent itself. As a consequence, parent companies can only be held liable for their own actions.

What are the penalties?

Sanctions for bribery vary according to the nature of the offence and the public official who receives or is offered a bribe.

Active bribery of a person holding public office by an individual is punishable with a prison sentence of up to ten years and/or a fine of up to EUR 600,000.

For companies and other legal entities, the maximum fine is EUR 1.44 million, and assets may also be confiscated. Legal persons may also be dissolved, may be prohibited from carrying on an activity relating to the corporate services or may be required to close down one or more establishments.

Active private bribery by an individual is punishable with a prison sentence of up to three years and/or a fine of up to EUR 600,000. For companies and other legal entities, the maximum fine is EUR 1.2 million.

For both public and private bribery, other sanctions include being debarred from certain offices, from public sector contracts, and confiscation of the proceeds of the offence.

Czech Republic

What is corruption?

Czech Act No. 40/2009 Coll., the Criminal Code, as amended (the "**Czech Criminal Code**"), defines several "corruption offences" in sections 331 to 334, including: (a) accepting bribes, (b) offering bribes, and (c) indirect bribery.

In particular, the Czech Criminal Code prohibits:

(i) giving or accepting bribes in connection with "*procuring matters in the public interest*" for yourself or for someone else;

(ii) giving or accepting bribes in connection with your or someone else's "*business activities*"; and

(iii) giving or accepting bribes in order to exert influence on public officials (i.e. "*indirect bribery*").

Under the Czech Criminal Code "*procuring matters in the public interest*" means performing all tasks whose proper, due and impartial performance is in the interests of the public or in the interests of social groups. The Criminal Code (section 334(3)) further provides that "*procuring matters in the public interest*" is also deemed to include compliance with the obligation to cause no harm, and provide no unjustified advantage to parties to commercial transactions. In addition, the Criminal Code prohibits giving or accepting bribes in connection with "*business activities*". Although the term "*business activity*" is not defined in the Criminal Code, this term is indirectly defined in the definition of "entrepreneur" in Czech Act No. 89/2012 Coll, as amended (the "**Czech Civil Code**") as a profitable trade-like activity carried out independently on one's own account and responsibility and with the intention of doing so systematically in order to make a profit.

A "*bribe*" is defined as any unjustified advantage (i.e. direct property enrichment or other advantage) obtained directly by the recipient or by another person with the recipient's permission, to which the recipient is not legally entitled (e.g. gifts, hospitality and invitations to events) (s. 334(1) of the Czech Criminal Code).

Bribery is also prohibited by the Czech Civil Code under unfair competition provisions. It is defined as offering, promising or providing any benefit in order to obtain an undue competitive advantage, as well as requesting, accepting or being promised such benefit (s. 2983 of the Czech Civil Code).

Does the law apply beyond national boundaries?

Yes. The provisions of the Czech Criminal Code have particularly broad extraterritorial reach. Among other things, the Czech Criminal Code applies to (i) an act committed in the Czech Republic even if the breach of, or threat to, an interest protected under the Czech Criminal Code took place or was intended to take place abroad, and (ii) an act committed abroad if the breach of, or threat to, an interest protected under the Czech Criminal Code, or at least a part of the consequence of such act, took place or was intended to take place in the Czech Republic. The Czech Criminal Code also applies to conduct on board a Czech aircraft or a Czech ship abroad.

The provisions of the Czech Criminal Code are also applicable to criminal offences committed by Czech citizens abroad.

Is there a difference between the treatment of corruption in the public and private sector and how is the public sector defined?

To some extent, yes. The Czech Criminal Code prohibits both bribery in connection with procuring matters in the public interest as well as in connection with business activities. However, there are two main points to be noted with respect to public sector corruption, both of which reflect the more serious nature of the offences when compared with corruption in the private sector.

The first point is that indirect bribery is only an offence in relation to public officials.

This term is defined to include, inter alia: (i) the president of the Czech Republic, the members of the Czech Parliament, the members of the Czech government or other persons holding a position in a public authority, e.g. employees of the Czech Permanent Representation to the EU and Czech Embassies; (ii) persons holding office at the legislative body, judicial authority or other public authority of a foreign state; (iii) persons holding office, employed or working in an international organisation formed by states or other subjects of public international law or its bodies and institutions, e.g. employees of the EU institutions, members of the European Parliament; and (iv) persons holding an office in an enterprise in which the Czech Republic or a foreign state has a decisive influence (s. 127 and 334(2) of the Czech Criminal Code).

The other point relates to the severity of the penalties for corruption offences; the

fact that a corruption offence has been committed by a public official or in relation to a public official increases the maximum possible term of imprisonment.

How are "facilitation payments" treated?

There is no specific exemption in Czech law for facilitation payments. Each payment is judged according to whether or not it fulfils the criteria of a corruption offence.

What are the rules on tax and accounting in relation to corrupt payments?

Section 25 (1) (zf) of Czech Act No. 586/1992 Coll., on Income Taxes, as amended, expressly prohibits tax deductions for any payments or other benefits provided to a foreign state official (or with his consent to another person) in connection with the performance of his office, even if this concerns an official in a country where the granting of such payments or benefits is common or tolerated or is not regarded as a crime. With respect to payments or benefits made to other persons, there are no such express rules in Czech tax law, but under prevailing interpretations, such payments or benefits would generally be regarded as a tax non-deductible expense if the provision of such payment or benefit constitutes a criminal offence.

Are there special rules for public procurement?

Czech Act No. 137/2006 Coll., on Public Procurement, as amended, expressly prohibits participation in public procurement by persons who themselves or whose statutory body (or member thereof) were effectively convicted of a corruption offence.

Are companies liable for the actions of their subsidiaries?

Although under the Czech Criminal Code only an individual (not a legal entity) may be held liable for a criminal offence set out by the Czech Criminal Code, Act No. 418/2011 Coll., on Criminal Liability of Legal Entities (the "**Czech Act on Criminal Liability of Legal Entities**") has introduced the concept of criminal liability of legal entities for specific criminal offences including the criminal offence of offering bribes and indirect bribery, as described above.

The Czech Act on Criminal Liability of Legal Entities (s. 8(1) and 8(2)) states that a legal entity may be held criminally liable if the criminal offence is committed on its behalf, in its interests or as part of its activities and the offence is committed by:

(i) its statutory body, a member of its statutory body or other persons acting on behalf of the legal entity (e.g. agents);

(ii) persons performing managerial or supervisory activities within the legal entity, even if they are not specified in (i) above;

(iii) persons exercising decisive influence over the management of the legal entity, if the conduct of such person was one of the causes of the consequences upon which the criminal liability of the legal entity is based; or

(iv) employees of the legal entity or persons with similar status while carrying out their work tasks on the basis of resolutions or instructions of the legal entity's bodies or persons specified under (i) to (iii) above, or where due supervision by the legal entity's bodies or persons specified under (i) to (iii) above was not exercised.

A legal entity may be held liable even if the individual offender (as specified under (i) to (iv) above) cannot be identified (s. 8(3) of the Czech Act on Criminal Liability of Legal Entities). Moreover, criminal liability of a legal entity is without prejudice to and independent of the criminal liability of the individual offenders themselves and legal entities that have used other legal entities or individuals to commit criminal offences are also classed as offenders (s. 9(2) and 9(3) of the Czech Act on Criminal Liability of Legal Entities).

These provisions do not seem to introduce liability of companies for the actions of their subsidiaries. However, they have not yet been tested in court and it is not entirely clear how they would apply to parent companies and their subsidiaries.

What are the penalties?

The penalties for a corruption offence under the Czech Criminal Code include imprisonment for a term of up to 12 years, forfeiture of property and/or a monetary penalty of up to approx. EUR 1,350,000 (forfeiture of property and a monetary penalty cannot be imposed at the same time). The actual length of the term of imprisonment and/or the amount of the monetary penalty depends, among other things, on the scale and seriousness of the offence, the amount of the bribe etc.

The penalties for a corruption offence under the Czech Act on Criminal Liability of Legal Entities are the following:

(i) monetary penalty of up to approx. EUR 54,000,000; in addition to factors such as the scale and seriousness of the offence, the amount of the bribe etc., the actual amount of the monetary penalty is also based on the value of the property owned by the legal entity (s. 18 of the Czech Act on Criminal Liability of Legal Entities);

(ii) prohibition of activity (e.g. a business activity) for up to 20 years, if the criminal offence was committed in connection with such activity (s. 20 of the Czech Act on Criminal Liability of Legal Entities);

(iii) prohibition of performance under public procurement contracts, participation in concession procedures or public tenders for up to 20 years, if the criminal offence was committed in connection with participation of the legal entity therein (s. 21 of the Czech Act on Criminal Liability of Legal Entities);

(iv) prohibition on accepting grants and subsidies for up to 20 years if the criminal offence was committed in connection with the application, provision or utilisation of any grant, subsidy or any public aid (s. 22 of the Czech Act on Criminal Liability of Legal Entities); and/or

(v) publication of a judgment, if the court deems that the public should be informed about a condemning judgment (s. 23 of the Czech Act on Criminal Liability of Legal Entities).

Under the Czech Civil Code, penalties may include compensation, private damages and return of unfair enrichment.

France

What is corruption?

The offences of corruption are set out in the Criminal Code[1]. The offences of corruption in relation to foreign public officials and corruption in relation to private individuals were added to the offences of corruption in relation to public officials in the French legislation. Both passive and active corruption fall within the scope of the legislation.

Corruption in relation to public officials

Passive corruption: *"The direct or indirect **request or acceptance**, without right, at any time, of offers, promises, donations, gifts or advantages by a person holding a public authority or discharging a public service mission, or by a person holding a public electoral mandate, for himself or for a third party, where it is committed:*

(1) either to carry out or abstain from carrying out, or because he has carried out or has abstained from carrying out, an act relating to his office, duty or mandate, or facilitated by his office, duty or mandate; or

(2) to abuse, or because he has abused, his real or alleged influence with a view to obtaining from any public body or administration any distinction, employment, contract or any other favourable decision" (Article 432-11, Criminal Code).

Active corruption: *"The direct or indirect proposal [or acceptance], by anyone, without right, at any time, of offers, promises, donations, gifts or advantages to a person holding a public authority or discharging a public service mission or holding a public electoral mandate, for himself or for a third party:*

(1) either to induce him to carry out or abstain from carrying out, or because he has carried out or has abstained from carrying out, an act relating to his office, duty or mandate or facilitated by his office, duty or mandate; or

(2) either to induce him to abuse his real or alleged public influence, or because he has abused his real or alleged public influence, with a view to obtaining from a public body any distinction, contract [...]" (Article 433-1, Criminal Code).

Corruption in relation to foreign public officials

Passive corruption: *"The direct or indirect **request or acceptance**, without right, at any time, of offers, promises, donations, gifts or advantages by a person holding a public authority, discharging a public service mission or holding a public electoral mandate in a foreign country or in an international public organisation, for himself or for a third party, where it is committed either to carry out or abstain from carrying out, or because he has carried out or has abstained from carrying out, an act relating to his office, duty or mandate or facilitated by his office, duty or mandate"* (Article 435-1, Criminal Code).

Active corruption: *"The direct or indirect proposal, by anyone, without right, at any time, of offers, promises, donations, gifts or advantages to a person holding a public authority, discharging a public service mission or holding a public electoral mandate in a foreign country or in an international public organisation, for himself or for a third party, either to induce him to carry out or abstain from carrying out, or because he has carried out or has abstained from carrying out, an act relating to his office, duty or mandate or facilitated by his office, duty or mandate"* (Article 435-3, Criminal Code).

Corruption in relation to private individuals

*"The direct or indirect **request or acceptance**, without right, at any time, for himself or for a third party, of offers, promises, donations, gifts or advantages by a person not vested with public authority or discharging a public service mission, nor holding a public electoral mandate, performing in the course of his professional or social duties a function of management or performing a work for an individual or a corporate entity or any organism, either to carry out or abstain from carrying out, or because he has carried out or has abstained from carrying out, an act relating to his activity or office, or facilitated by his activity or office, infringing his legal, contractual or professional obligations"* (Article 445-2, Criminal Code).

Does the law apply beyond national boundaries?

Yes. Article 113-6 of the Criminal Code provides that "French criminal law is applicable to offences committed by French nationals outside the territory of the Republic if the offence involved is punishable under the law of the country where it was committed".

Proceedings may only be initiated at the request of the public prosecutor and must be preceded by a complaint lodged by the victim (or legal successor) or by an accusation formally made by the authorities of the country in which the conduct took place.

Under certain conditions, France also establishes jurisdiction over offences,

[1] Relevant articles are essentially 432-11 and 433-1 (domestic public official), 435-1 to 435-4 (foreign bribery), 445-1 and 445-2 (private sector bribery).

punishable by imprisonment, committed by a French national or a foreigner outside French territory against a French victim (the "victim" being a French national at the time of the offence) pursuant to Article 113-7 of the Criminal Code.

Is there a difference between the treatment of corruption in the public and private sector and how is the public sector defined?

Until the Act No. 2005-750 of 4 July 2005, the offence of bribery committed by private individuals was limited to those involving a public official as defined above (French and foreign public officials). The only exception was the specific offence of corruption of an employee, which is now abrogated (former Article L.152-6 of the Labour Law Code).

Since 4 July 2005, the scope of the criminal law has been extended to any person not vested with public authority if that person is performing, in the course of its professional or social duties, a function of management or a work for an individual, a corporate entity or any sort of organisation.

As a result, not only can employees be found liable of commercial bribery but also in particular:

- top management of companies;
- corporate entities; and
- liberal professions.

There is no major difference between the legal regimes applicable to public and private sectors. The main difference is that the maximum penalties applicable to bribery of private individuals are less than the ones applicable to bribery of public officials.

How are "facilitation payments" treated?

There are no specific provisions or exemptions in French law for facilitation payments. Each payment must be considered by Courts according to whether it fulfils the criteria for the offence of bribery or corruption.

What are the rules on tax and accounting in relation to corrupt payments?

Existing French law provisions on accounting and record keeping prohibit the making of falsified or fraudulent accounts, statements and records for the purpose of bribing foreign public officials or of concealing such bribery.

Article 39-2 bis of the General Tax Code states that:

"...from the coming into force of the Convention on combating bribery of foreign public officials in international business transactions, sums paid or advantages granted directly or through intermediaries, for the benefit of a public official within the meaning of Article 1(4) of the said Convention, or of a third party in order that the official acts or refrains from acting in the performance of official duties, with a view to obtaining or retaining business or another improper advantage in the conduct of international business, shall not be deductible from taxable profits".

Are there special rules for public procurement?

The general provisions on corruption outlined above apply to the public procurement process.

Public procurements are generally governed by two European Union directives[2] which have been implemented in the French Public Procurement Contracts Code (*"Code des marchés publics"*) and in the 6 June 2005 Order, which deals with procedures for the award of certain contracts in the water, energy, transport and telecommunication sectors (*"ordonnance n° 2005-649 du 6 juin 2005 relative aux marchés passés par certaines personnes publiques ou privées non soumises au Code des marchés publics"*).

As a result, any person (including a legal entity) who has been convicted by a final judgment of corruption of a foreign public official or corruption of a domestic public official is excluded from bidding for public contracts for a period of five years following the final judgment.

Are companies liable for the actions of their subsidiaries?

According to Article 121-1 of the Criminal Code, legal entities can be held criminally liable, providing the following requirements are met:

- the offence must have been committed by one or more natural persons constituting either a body or a representative of the legal person; and
- the offence must have been committed on behalf of the legal person.

Although a parent company is legally separate from its subsidiary, its criminal liability may be involved if it has used its subsidiary as intermediary for the payment/receiving of a bribe or if it has participated to the misconduct of its subsidiary in one way or in another.

[2] Directive on procurement in the public sector (2004/18/EC) and Directive on procurement in the utilities sector (2004/17/EC), adopted by the EU's Council of Ministers and the European Parliament on 31 March 2004. *Nota*: both directives will be repealed on 18 April 2016, and be respectively replaced by Directive 2014/24/EU on public procurement and Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors.

What are the penalties?

Individuals:

- Corruption involving domestic or foreign public officials: imprisonment of up to ten years and a fine of up to EUR 1 million.
- Private sector corruption: imprisonment of up to five years and a fine of up to EUR 500,000.

When the proceeds derived from the offence are higher than the maximum penalty, the court may increase the fine up to the double of the amount of the proceeds.

Additional criminal penalties applicable to individuals include:

- deprivation of rights (civic, criminal and family rights) for five years or more;
- possible banishment (in the case of foreign perpetrators);
- professional restrictions (a ban for up to five years on performing a public function or professional or social activity in connection with the offence or/and on performing a commercial or industrial activity in order to manage or control in any capacity, directly or indirectly, on his own name or on behalf of another, an industrial or commercial enterprise);
- confiscation; and
- the display of the Court's ruling.

Legal entities:

Fines of up to five times the maximum amount of the fines on individuals can be imposed on legal persons. The financial resources of the offender are taken into account when a court orders a fine.

Pursuant to Articles 433-25 and 445-4 of the Criminal Code, additional criminal penalties applicable to legal persons

(each of which may be imposed for a period of up to five years) include:

- a ban on directly or indirectly performing the professional or social activity in connection with which the offence was committed;
- placement under judicial supervision;
- closure of one or more of the establishments of the enterprise used to commit the acts;
- exclusion from public procurements;
- ban on public appeal for funds;
- ban on issuing cheques (with certain exceptions);
- ban on the use of payment cards;
- confiscation; and
- display of the court's ruling.

With respect to both natural and legal persons, confiscation of the "*instrument that was used or intended to be used to commit the offence, or of the proceeds of the offence*" may be imposed (Section 3 of Act No. 2000-595 of 30 June 2000).

French case law supports a broad interpretation of the proceeds of an offence which can, for example, cover the price of the contract secured as a result of bribery.

Additional comments

The Act of 6 December 2013 on the fight against tax fraud and serious economic and financial crimes has recently modified French anti-corruption legislation in the following ways:

- a new financial prosecution office is responsible, at a national level, for the prosecution of some specific corruption offences;
- approved anti-corruption associations which have been in existence for at least five years will be able to initiate some criminal proceedings against offences of corruption; and
- the penalties for offences of corruption are increased (as set out above).

Federal Republic of Germany

What is corruption?

The principal corruption offences (*Straftaten*) concerning public officials (*Amtsträger*) are defined in sections. 331 *et seqq.* of the Criminal Code (*Strafgesetzbuch* ("StGB")). Further legislation – the European Bribery Act (*EU-Bestechungsgesetz*, "EUBestG") and the International Bribery Act (*Gesetz zur Bekämpfung internationaler Bestechung*, "IntBestG") – has extended the scope of the offences.

Accepting a benefit (Vorteilsannahme)

"(1) A public official or a person with special public service obligations who demands, allows himself to be promised or accepts a benefit for himself or for a third person for the discharge of a duty …

(2) A judge or arbitrator who demands, allows himself to be promised or accepts a benefit for himself or a third person in return for the fact that he performed, or would in the future perform a judicial act … An attempt shall be punishable.

(3) The act shall not be punishable under subsection (1), if the perpetrator allows himself to be promised or accepts a benefit which he did not demand and the competent public authority, within the scope of its powers, either previously authorises the acceptance, or the perpetrator promptly makes a report to it and it authorises the acceptance" (section 331 StGB).

Accepting a bribe (*Bestechlichkeit*)

"(1) A public official or person with special public service obligations who demands, allows himself to be promised or accepts a benefit for himself or for a third person in return for the fact that he performed or would in the future perform an official act, and thereby violated or would violate his official duties … An attempt shall be punishable.

(2) A judge or an arbitrator who demands, allows himself to be promised or accepts a benefit for himself or for a third person in return for the fact that he performed or would in the future perform a judicial act, and thereby violates or would violate his judicial duties ...

(3) If the perpetrator demands, allows himself to be promised or accepts a benefit in return for a future act, subsections (1) and (2) shall already be applicable if he has indicated to the other his willingness to:

> *violate his duties by the act; or*
>
> *to the extent the act is within his discretion, to allow himself to be influenced by the benefit in the exercise of his discretion."* (section 332 StGB).

Granting a benefit (*Vorteilsgewährung*)

"(1) Whoever offers, promises or grants a benefit to a public official, a person with specific public service obligations or a soldier in the Federal Armed Forces, for that person or a third person, for the discharge of a duty …

(2) Whoever offers, promises or grants a benefit to a judge or an arbitrator, for that judicial act …

(3) The act shall not be punishable under subsection (1), if the competent public authority, within the scope of its powers, either previously authorised the acceptance of the benefit by the recipient or authorises it upon prompt report by the recipient" (section 333 StGB).

Granting a bribe (*Bestechung*)

"(1) Whoever offers, promises or grants a benefit to a public official, a person with special public service obligations, or a soldier of the Federal Armed Forces, for that person or a third person, in return for the fact that he performed or would in the future perform an official act and thereby violates or would violate his official duties …

(2) Whoever offers, promises or grants a benefit to a judge or an arbitrator, for that person or a third person, in return for the fact that he:

> *performed a judicial act and thereby violated his judicial duties; or*
>
> *would in the future perform a judicial act and would thereby violate his judicial duties,*
>
> *…[A]n attempt shall be punishable.*

(3) If the perpetrator offers, promises or grants the benefit in return for a future act, then subsections (1) and (2) shall already be applicable if he attempts to induce the other to:

> *violate his duties by the act; or*
>
> *to the extent the act is within his discretion, to allow himself to be influenced by the benefit in the exercise of his discretion"* (section 334 StGB).

The EUBestG stipulates that the provisions of the StGB on active and passive bribery of public officials apply also to officials and judges of EU organisations and courts and of EU member states. The IntBestG extends the provisions of the StGB on active bribery to officials and judges of international organisations and courts and of other foreign countries.

The criminal corruption offence of bribery of delegates (*Mandatsträger*) is defined in section 108e of the StGB:

Acceptance by, and granting bribes to, delegates (*Bestechlichkeit und Bestechung von Mandatsträgern*)
"(1) A member of Parliament of the Federation (Bund) or of the federal states (Länder) who demands, allows himself to be promised or accepts an undue benefit for himself or a third party as a consideration for the performance of an action or omission in relation to his mandate and in accordance with an order (Auftrag) or instruction (Weisung) …

(2) Whoever offers, promises or grants a member of parliament of the Federation (Bund) or of the federal state (Länder) an undue advantage for that member or a third party as a consideration for an action or omission in relation to that member's mandate and in accordance with an order (Auftrag) or instruction (Weisung) …

(3) The following members are equivalent to the members in paragraphs 1 and 2 …

- *a member of the European Parliament;*
- *a member of a parliamentary assembly of an international organization: and*
- *a member of a legislative body of a foreign state.*

(4) A benefit will not be undue if the acceptance of the benefit is in line with the legal status of the member and the respective regulations ...(section 108e StGB).

According to the explanatory notes to the Act, the undue benefit must be granted (offered or promised) in pursuance of a specific agreement of wrongdoing in the sense that the delegate must act in a certain way in accordance with an order or instruction of the donor.

However, section 108e StGB does not apply to rewards or benefits agreed for past actions.

There are also more specific criminal offences or administrative offences (*Ordnungswidrigkeiten*) defined in other provisions of the StGB (e.g., section 108b on bribery of electors of the European Parliament or German parliamentary representations) or in other statutes (e.g., section 2 of the IntBestG on bribery of members of parliamentary representations of international organisations or foreign states and section 405 para. 3 no. 2 and 3 of the German Stock Exchange Act (*Aktiengesetz*) on bribery in connection with voting rights).

The general criminal offence of bribery of employees (*Angestellte*) and agents (*Beauftragte*) in the private sector is defined in section 299 paras. 1 and 2 of the StGB:

Accepting and granting a bribe in business transactions (*Bestechlichkeit und Bestechung im geschäftlichen Verkehr*)
"(1) Whoever, as an employee or an agent of a business, demands, allows himself to be promised, or accepts a benefit for himself or another in a business transaction as consideration for giving a preference in an unfair manner to another in the competitive purchase of goods or commercial services …

(2) Whoever, for competitive purposes, offers, promises or grants an employee or an agent of a business a benefit or for himself or for a third person in a business transaction as consideration for his giving him or another a preference in an unfair manner in the purchase of goods or commercial services …" (section 299 paras. 1 and 2 StGB).

Please note that the concept of a "benefit" under these provisions is construed very broadly. German prosecution authorities and courts may assume such benefit even in case of modest gifts or hospitality, charitable donations or standard business contracts with scientists or other employees in the public or private sector (e.g., regarding research, consulting, lectures, etc.).

There are also more specific criminal offences or administrative offences (*Ordnungswidrigkeiten*) defined in other provisions of the StGB (e.g., section 108b and 108e on bribery of members and electors of the European Parliament or German parliamentary representations) or in other statutes (e.g., section 2 of the IntBestG on bribery of members of parliamentary representations of international organisations or foreign states and section 405 para. 3 no. 2 and 3 of the German Stock Exchange Act (*Aktiengesetz*) on bribery in connection with voting rights).

Does the law apply beyond national boundaries?

Yes. The EUBestG and the IntBestG stipulate that certain provisions of the StGB on bribery of public officials apply also to activities outside Germany if they are committed (i) by a German perpetrator or (ii) involving a public official or judge who is employed by Germany or the EU or who is a German national. Section 108e para. 3 of the StGB states that para. 1 and 2 also apply in connection with, amongst others, members of the European Parliament, members of a parliamentary assembly of an international organization and members of a legislative body of a foreign state. Section 299 para. 3 of the StGB clarifies that the criminal provisions for bribery of employees and agents apply

also to activities in foreign competition. Furthermore, according to general rules, provisions on German criminal or administrative offences may apply to activities outside Germany, in particular, if they are committed (i) by a German perpetrator, (ii) jointly with co-perpetrators who act in Germany, or (iii) to the detriment of a German natural or legal person (e.g., corruption offences to the detriment of the German employer of a bribed employee or of a German competitor of the person bribing him). Moreover, section 9 para. 2 sentence 2 StGB stipulates that German criminal law (including criminal anti-corruption law) applies if someone from Germany participates (in the form of instigation or of aiding and abetting) in a principal offence committed by a principal offender outside Germany, even if this principal offence is not a criminal offence under the law of the country where it is committed.

Is there a difference between the treatment of corruption in the public and private sector and how is the public sector defined?

The term "public official" ("*Amtsträger*") within the meaning of sections 331 et seq. of the StGB (see above) is defined as follows:

"2. A public official is whoever, under German law:

(a) is a civil servant or judge;

(b) otherwise has an official relationship with public law functions or;

(c) has been appointed to a public authority or other agency or has been commissioned to perform duties of public administration without prejudice to the organisational form chosen to fulfil such duties" (section 11 para. 1, no. 2, StGB).

Please note that such "other agency" may also be a legal entity under civil law.

As mentioned above, the EUBestG and the IntBestG stipulate that certain provisions of the StGB on bribery of public officials apply also to officials and judges of European and international organisations and courts and of EU member states and other foreign countries. Furthermore, the StGB and the IntBestG contain separate criminal provisions regarding bribery of members and electors of parliamentary representations of Germany, foreign countries, the EU and international organisations.

There are two main differences between treatment of corruption in the public and private sectors.

In the public sector, the granting of a benefit to a public official may constitute the criminal offence of granting a benefit (*Vorteilsgewährung*) if there is no prior permission by the competent superior. If, in addition, the benefit is granted on the basis of an agreement that this will influence official activities of the public official, this may constitute the even more serious criminal offence of granting a bribe (*Bestechung*). In the private sector, criminal liability for granting a bribe in business transactions (*Bestechung im geschäftlichen Verkehr*) may not result from the granting of a benefit in itself, but only from an agreement that such granting a benefit will influence the commercial activities of the recipient.

In the public sector, corruption offences are so-called official offences (*Offizialdelikte*) which may be prosecuted without a demand for prosecution (*Strafantrag*). In the private sector, corruption offences can only be prosecuted if, and as long as, there is such demand for prosecution (e.g., by the employer of a bribed employee or a competitor of the person bribing him), unless the criminal prosecution authority considers ex *officio* that the case should be prosecuted because of a special public interest.

How are "facilitation payments" treated?

There is no specific exemption in German law for facilitation payments. Each payment must be judged according to whether it fulfils the criteria for corruption offences.

What are the rules on tax and accounting in relation to corrupt payments?

Under German tax law, expenses are not tax-deductible if they were made in connection with (international or domestic) criminal or administrative offences, in particular, corruption offences. If such offences are made tax-deductible, this may, under certain circumstances, lead to criminal or administrative liability for tax offences. The German criminal prosecution and tax authorities are obliged to inform each other about any suspicion that expenses were made in connection with criminal or administrative offences, in particular, corruption offences.

False or fraudulent accounting, particularly in connection with corruption offences, may, under certain circumstances, lead to criminal or administrative liability.

Are there special rules for public procurement?

Although there are no federal legal provisions on an exclusion from public procurement in the case of corruption, some Federal States (*Länder*) and other public law bodies have provisions of this kind. Furthermore, there are general provisions on the requirement of reliability of a contract partner, which may lead to exclusion from procurement in the case of corruption. Moreover, many German companies have introduced internal guidelines providing for an exclusion from procurement in the case of corruption.

Are companies liable for the actions of their subsidiaries?

Section 130 of the German Administrative Offences Act (*Ordnungswidrigkeitengesetz*, "OWiG") establishes the administrative offence of violation of supervisory duties consisting of a failure by superiors appropriately and efficiently to supervise subordinate employees in enterprises if this leads to criminal or administrative offences, in particular, corruption offences. This offence may be sanctioned by an administrative fine (*Geldbuße*) against the superiors concerned which may amount to up to EUR 1 million or even more if this is necessary to siphon off higher profits. German prosecution authorities and courts may assume such violation of supervisory duties if superiors do not duly instruct employees regarding anti-corruption provisions (e.g., by compliance guidelines) and do not establish effective monitoring (e.g., by appointing a compliance officer and establishing a compliance process).

However, there is debate, not yet settled by the German Federal Court of Justice, whether managers of a parent company do have supervisory duties with regard to subsidiaries. Regardless of this question, though, there is the risk that managers of a parent company may, under certain circumstances, be held criminally liable pursuant to section 13 of the StGB for participating by omission in criminal corruption offences committed by employees of subsidiaries if they do not use their influence to prevent such offences.

If German prosecution authorities and courts assume that senior executives committed an administrative offence of violation of supervisory duties (section 130 of the OWiG) or participated in a criminal offence (e.g., by omission pursuant to section 13 of the StGB), this may lead to administrative fines (section 30 of the OWiG) or forfeiture orders (*Verfallsanordnungen*) (sections 73 para. 3 of the StGB, 29a para. 2 of the OWiG) against the company (legal entity) they are working for.

There are no general anti-corruption provisions regarding the use of agents. However, in some procurement processes the use of agents is specifically prohibited. If such prohibitions are violated and the use of agents is not disclosed, German prosecution authorities and courts may take the position that this constitutes fraud. Generally, it is advisable to include into agency agreements clauses expressly obliging the agent to comply with all applicable legal provisions, in particular, with all anti-corruption provisions. Furthermore, agency agreements should not provide for inappropriately high commissions or other remuneration structures which German prosecution authorities or courts could interpret as incentives for corruption offences.

What are the Penalties?

The maximum penalty under the StGB for a corruption offence is imprisonment for a term not exceeding 10 years (in particularly serious cases of bribery of public officials). Furthermore, the court may impose a forfeiture order (*Verfallsanordnung*) siphoning off the gross proceeds from a corruption offence (without deduction of expenses made). Moreover, if a natural person commits a corruption offence when acting for a company, the company may also be subject to a forfeiture order or to an administrative fine which may amount to up to EUR 1 million or even more if this is necessary to siphon off higher profits. Natural persons convicted of bribing a delegate, and delegates convicted of accepting bribes, may also be disqualified from voting, and standing in public elections.

Hong Kong

What is corruption?

The Hong Kong Prevention of Bribery Ordinance ("**POBO**") does not define "corruption", but it sets out various public sector bribery offences and private sector bribery offences.

Public sector bribery offences under the POBO include:

- any prescribed officer, without the general or special permission of the Chief Executive, soliciting or accepting any advantage (section 3);
- any person, without lawful authority or reasonable excuse, offering any advantage to the Chief Executive or a public servant in relation to his (1) performing or abstaining from performing any act in public capacity, (2) expediting, delaying, hindering or preventing the performance of an act in public capacity by himself or other public servants, or (3) assisting, favouring, hindering or delaying any person in the transaction of any business with a public body (section 4);
- the Chief Executive or any public servant, without lawful authority or reasonable excuse, soliciting or accepting any advantage in relation to his (1) performing or abstaining from performing any act in public capacity, (2) expediting, delaying, hindering or preventing the performance of an act in public capacity by himself or other public servants, or (3) assisting, favouring, hindering or delaying any person in the transaction with a public body (section 4);
- any person, without lawful authority or reasonable excuse, offering, soliciting or accepting any advantage to the Chief Executive or a public servant in relation to any contract with a public body (section 5);
- the Chief Executive or any public servant, without lawful authority or reasonable excuse, soliciting or accepting any advantage in relation to any contract with a public body (section 5);
- any person, without lawful authority or reasonable excuse, offering, soliciting or accepting any advantage for procuring withdrawal of tenders (section 6);
- any person, without lawful authority or reasonable excuse, offering, soliciting or accepting any advantage in relation to any auction conducted by or on behalf of any public body (section 7);
- any person, without lawful authority or reasonable excuse, offering any advantage to any prescribed officer or public servant while having dealings with the Government or any other public body (section 8); and
- any agent, without lawful authority or reasonable excuse, offering, soliciting or accepting any advantage in relation to his principal's affairs or business (section 9). This provision provides the route through which bribery connected with non-Hong Kong public officials is prosecuted.
- the Chief Executive or prescribed officer possessing unexplained property (section 10).

Private sector bribery offences under the POBO include:

- any agent, without lawful authority or reasonable excuse, soliciting or accepting any advantage in relation to his principal's affairs or business (section 9);
- any person, without lawful authority or reasonable excuse, offering any advantage to any agent in relation to the latter's principal's affairs or business (section 9); and
- any agent, with intent to deceive his principal, using any receipt, account or other document containing materially false, erroneous or defective particular (section 9).

"Advantage" is widely drafted under the POBO to capture almost limitless circumstances in which bribes may be offered, including, in particular, money, gifts, loans, commissions, offices, contracts, services, favours and discharge of liability in whole or in part. There is no *de minimis* threshold for an "advantage". However, evidence of the insignificance of the advantage may be relevant to establishing a defence or as proof that it was not for an illegitimate purpose.

It excludes declared political donations. (Election donations are regulated by the Elections (Corrupt and Illegal Conduct) Ordinance.)

Does the law apply beyond national boundaries?

Section 4 of the POBO as summarised above has extraterritorial effect since it includes an express reference to the advantage being offered "whether in Hong Kong or elsewhere." As such, bribery offences connected to Hong Kong public officials are captured wherever they take place.

For other corruption offences summarised above, the position is less certain as they do not include the words "whether in Hong Kong or elsewhere." Such omission may well be construed as a legislative intention not to afford extraterritorial effect to these sections. Indeed, case law suggests that, with regard to section 9 of the POBO (which covers private sector bribery, and bribery connected with non-Hong Kong public officials), the whole course of offer, solicitation or acceptance of the illegal advantage must take place within Hong Kong jurisdiction to be caught by the section. The same logic should apply to other sections.

Accordingly, the POBO does not have extraterritorial effect in respect of bribery of foreign public officials; while bribery of a foreign public official is an offence that is captured by the broad definition of agent under section 9 of the POBO, it is only an offence if the bribery takes place within Hong Kong.

Is there a difference between the treatment of corruption in the public and private sector and how is the public sector defined?

Both public sector and private sector bribery are covered by the POBO, but by different provisions as summarised above.

Public servant is defined under the POBO to mean (1) any prescribed officer and (2) any employee of a public body. The Chief Executive of Hong Kong, though not a public servant, also falls within the public sector. Prescribed officers include government officials and judicial officers.

"Public body" is defined broadly to cover the Hong Kong Government, the Executive Council, the Legislative Council, any District Council, any board, commission, committee or other body, whether paid or unpaid, appointed by or on behalf of the Chief Executive or the Chief Executive in Council and any board, commission, committee or other body (including government owned enterprises) as set forth in Schedule 1 to the POBO.

Therefore, the concept of "public servant" is far broader than merely the civil service and encompasses all persons employed by, or associated in any way with, an organisation which the Government decides has such a substantial and important role in the public affairs of Hong Kong that it should be made a public body. For instance, any member of a club or an association vested with any responsibility for the conduct or management of its affairs is considered a public servant. "Club" is not defined and should be given its general meaning.

Bribery connected to non-Hong Kong public officials is covered by section 9 of the POBO.

How are "facilitation payments" treated?

Under Hong Kong law, there is no exemption for facilitation payments.

What are the rules on tax and accounting in relation to corrupt payments?

There is no specific law in Hong Kong regarding the deduction of corrupt payments in tax assessment. However, Hong Kong has endorsed the OECD Anti-Corruption Action Plan for Asia and the Pacific, which calls for "effective measures to promote corporate responsibility and accountability on the basis of existing relevant international standards through … the existence and the effective enforcement of legislation to eliminate any indirect support of bribery such as tax deductibility of bribes."

Under the Hong Kong Companies Ordinance, a Hong Kong company is required to keep proper books of accounts to give a true and fair view of the state of the company's affairs and have its financial accounts audited by external auditors annually. Listed companies are subject to additional corporate governance requirements (for example, establishment of audit committees). Falsification of company accounts is an offence under, inter alia, section 19 of the Theft Ordinance and section 349 of the Companies Ordinance.

Are there special rules for public procurement?

In Hong Kong, public procurement is conducted under the Stores and Procurement Regulations issued under the Public Finance Ordinance, as well as Financial Circulars issued by the Secretary for Financial Services and the Treasury from time to time. Public procurement is based on principles of public accountability, value for money, transparency and open and fair competition.

According to a joint report by the OECD and the Asian Development Bank[1], "while no law [in Hong Kong] explicitly provides for debarment, it is well-publicised administrative practice to remove a company found to have committed offences under the [POBO] from the list of approved contractors and to temporarily suspend it from bidding."

Hong Kong is also a party to the World Trade Organization Agreement on Government Procurement.

Are companies liable for the actions of their subsidiary?

The POBO does not directly cover actions of subsidiaries. There does not appear to be any case law in Hong Kong which directly relates to parent companies' liability for bribes or corruption committed by their subsidiaries. However, it has been accepted in Hong Kong case law that as a matter of general principle in the context of public policy or illegality, the courts are inclined to look at the substance rather than form of an entity. Thus, in an extreme case, such as where a wholly-owned subsidiary may be used to do something illegal, the court may be more than ready to equate the subsidiary with its parent company. Therefore, a parent company may be liable for bribes or corruption committed by its subsidiaries, particularly a wholly owned subsidiary.

What are the penalties?

For soliciting or accepting an advantage (section 3), maximum penalties are a fine of HKD 100,000 and imprisonment for one year.

For other offences:

- On indictment, maximum penalties for:
  - possession of unexplained property (Section 10): fine of HKD 1,000,000 and imprisonment for ten years;
  - bribery in relation to any contract with a public body (Section 5) or for procuring withdrawal of tenders (Section 6): fine of HKD 500,000 and imprisonment for ten years; and
  - other offences: fine of HKD 500,000 and imprisonment for seven years.
- On summary conviction, maximum penalties for:
  - possession of unexplained property: fine of HKD 500,000 and imprisonment for three years; and
  - other offences: fine of HKD 100,000 and imprisonment for three years.

[1] http://www.oecd.org/site/adboecdanti-corruptioninitiative/37575976.pdf

Italy

What is corruption?

Italian law criminalises both active and passive corruption in the public and the private sector (including bribery of foreign public officials). Common to all these offences is that a person gives or promises to give money or other thing of value, directly or indirectly, to either a public official (including persons in charge of a public service) or to a company director against an abuse of his or her function.

This abuse may consist of an act in violation of the duties of the public official or company director, but may also consist of a due act, or a more general abuse of their function which does not necessarily involve the performance of any specific act. The mere offer or promise of undue payments or other benefits to a public official or a person in charge of a public service is also an offence even where it is not accepted.

The offence of corruption in relation to foreign public officials was introduced by Law No. 300 of 29 September 2000 while the offence of private bribery was introduced in Italian legislation in 2002 at article 2635 of the Italian Civil Code. On 28 November 2012, Law No. 190 (setting out "Rules for the prevention and repression of corruption and illegality within the public administration") introduced further offences and heavier penalties.

Corruption offences currently include:

Extortion by a public official (article 317 of the Criminal Code):
"The public official or the person in charge of a public service who, abusing his or her position or powers, compels anyone unduly to give or promise to him/her or to a third party money or other thing of value shall be liable to imprisonment of between six and twelve years";

(Passive) Corruption in the performance of a public office (article 318 of the Criminal Code):
"The Public Official who, for the performance of his/her functions or for the exercise of his/her powers, unduly receives for him/herself or others money or other thing of value or accepts their promise shall be liable to imprisonment of between one and six years";

(Passive) Corruption involving a specific act in breach of official duties (article 319 of the Criminal Code);
who, for performing, refraining from performing or delaying a specific act in breach of his official duties, receives money or other thing of value for him/herself or for a third party or accepts their promise shall be liable to imprisonment of between six and ten years";

Undue inducement to give or promise a bribe (article 319 *quater* of the Criminal Code):
"Save where this constitutes a more serious offence, the Public Official or the person in charge of a public service who, abusing his or her position or powers, induces someone unduly to give or promise money or other thing of value to him or to a third party shall be liable to imprisonment of between six and ten years and six months.
The person who gives or promises money or any other thing of value shall be liable to imprisonment up to three years";

(Passive) Corruption of persons in charge of a public service (article 320 of the Criminal Code);
The relevant article extends the offences provided for by Articles 318 and 319 of the Criminal Code to persons in charge of a public service, with lowered penalties.

(Active) Corruption of a public official or of a person in charge of a public service (article 321 of the Criminal Code);
In addition to where already expressly specified, the person who unduly gives or promises money or other thing of value to bribe a Public Official or a person in charge of a public service as described in the articles above shall be punishable with the same penalties.

Instigation to Corruption (article 322 of the Criminal Code):
Both active and passive corruption are punishable as "Instigation to corruption" when no illegal agreement is reached between the parties because either the Public Official/the person in charge of a public service or the citizen respectively refuse to abuse their function and to give or promise undue advantages.

Corruption of a foreign public official or of an officer of the European Union (Article 322 *bis* of the Criminal Code):
The scope of the offences described by the articles mentioned above is extended to include bribery of foreign officials, including officials of EU institutions, public officials of foreign Countries and members of international organisations.

Trading in influence (Article 346 *bis* of the Criminal Code):
"Save where this constitutes aiding and abetting corruption offences provided for by Articles 319 and 319 ter of the Criminal Code, the person who, taking advantage of his or her relationship with a Public Official or with a person in charge of a public service, induces someone unduly to give or promise to him/herself or to a third party money or other thing of value either as compensation for his or her illegal mediation or as compensation for the Public Official or the person in charge of a public service to perform or refrain from performing an act in breach of their duties shall be liable to imprisonment of between one to three years. The same penalty shall be applicable to the person who unduly gives or promises the money or the other thing of value";

Private bribery (Article 2635 of the Civil Code):
"Save where this constitutes a more serious offence, companies' directors, general managers, internal auditors and liquidators, who, further to the receipt, or the promise of an advantage, perform or refrain from performing an act in breach of their fiduciary duties thus causing a damage to the company, shall be liable to imprisonment of between one to three years. Where the relevant offence is committed by those under the respective supervision of the individuals identified above, the penalty is up to 18 months' imprisonment. The person who gives or promises the undue advantage shall be liable to the same penalties".

Does the law apply beyond national boundaries?

Yes. Articles 7, 9 and 10 of the Criminal Code provide that:

- both Italian citizens and foreigners who commit certain criminal offences (including corruption) abroad are subject to Italian criminal law when the relevant criminal offence[1] was committed:
  - by an Italian Public Official;
  - in service; and
  - in breach of his/her duties;
- Italian citizens are subject to Italian criminal law even if they committed the crime abroad when:
  - under Italian law the relevant criminal offence is punishable with imprisonment of not less than three years in the minimum[2], and
  - the offender is located in Italy;
- Foreign citizens are subject to Italian criminal law even if they committed the crime abroad when:
  - under Italian law the relevant offence is punishable with imprisonment of not less than one year in the minimum,
  - Italy or an Italian citizen were the victims of the crime;
  - the offender is located in Italy; and
  - either the victim of the crime or the Italian Ministry of Justice asked that the offender be prosecuted.

Special rules are also set out to determine the cases in which Italian Law applies to crimes committed abroad against the EU or a foreign State.

Is there a difference between the treatment of corruption in the public and private sector and how is the public sector defined?

Yes. The main differences in the treatment of the two offences are as follows.

- The offence of passive private bribery can be committed not only by companies' directors, managers, auditors, or liquidators, but also by people under their supervision, while the offence of passive corruption in the public sector can only be committed by public officials or people in charge of a public service.
- Unlike the offence of corruption in the public sector, the private bribery offence requires that some damage to the corporate entity derive from the criminal

[1] Please note that under Italian Criminal Law, criminal offences are divided into two main categories depending on the penalty applicable to the relevant offender: these are crimes in the strict sense ("*delitti*") and contraventions ("*contravvenzioni*"). The relevant provisions of articles 7, 9 and 10 of the Criminal Code only refer to the first category of criminal offences.
[2] The offender may be subject to Italian Criminal Law even where the relevant criminal offence is punishable with a lower term of imprisonment, but only upon the Ministry of Justice's or victim's request.

conduct of its bribed director for him or her and the corruptor to be punishable.

- While Public Officials (and their corruptors) are punishable regardless of when the undue payment or promise is made, in the private sector the law requires that the undue payment or promise is made *before* the breach of duties on the part of the director.
- Unlike corruption in the public sector, private bribery can only be prosecuted upon the victim's request, unless the crime distorted competition.

For the purposes of the offence of corruption in the public sector the following definitions, set out by the Criminal Code, apply:

- Public Official (Article 357): any person who performs official duties within a legislative body, the Judiciary and the Public Administration;

Person in charge of a public service (Article 358): any person carrying out a public service: this notion is still unclear and very much discussed between scholars and judges in Italy. For the purposes of its application, a service is normally considered public when it is regulated by public law and when the nature of the activity which forms the object of the service is public or linked to public utility. However, low level tasks are expressly excluded by the law. Examples of what has been deemed to fit into the notion of person in charge of a public service by the case law include: Court translators, heads of public archives, bursar's officers, trustees.

How are "facilitation payments" treated?

There are no specific provisions or exemptions for facilitation payments under Italian Law. Consequently, these must be considered by the courts in the context of all the relevant facts in order to decide whether they meet the legal test for one of the corruption offences provided for by the Italian criminal law.

Italian Courts have so far tended to consider giving or promising small payments and gifts to Public Officials as active corruption, except where the Public Official performs an act without any breach of his or her duties and the gift has such a small value that it cannot have any influence on the Public Official's behaviour.

What are the rules on tax and accounting in relation to corrupt payments?

Under Italian law, expenses are not tax-deductible if they were made in connection with a criminal offence and Italian law provisions on accounting prohibit the making of falsified or fraudulent accounts, statements and records, which, under certain circumstances, constitutes a criminal offence in itself.

Are there special rules for public procurement?

Italian law sets for rules and procedures aimed at assuring the maximum transparency and fairness of public procurement. A person convicted of a corruption offence, committed either for the benefit, or to the detriment, of a corporate entity, is debarred from tendering for public contracts (under Article 32 *quater* of the Criminal Code).

Are companies liable for the actions of their subsidiaries?

Yes. Under Law No. 231 of 2001 (the "Vicarious Liability Act") corporate entities may be held liable if their representatives, employees or agents commit one of the corruption offences listed above in the interest, or for the benefit, of the entity, unless they show they put in place and effectively implemented adequate systems and controls to prevent the commission of the crime.

What are the penalties?

Penalties for corruption include:

- Imprisonment;
- Temporary and permanent bans from public offices;
- Bans from contracting with the Public Administration;
- Temporary bans from carrying out business activity (for corporate entities);
- Suspension or revocation of licences which were instrumental to the commission of the crime (for corporate entities);
- Fines (for corporate entities);
- Payment of compensation equal to the bribe received (for individuals), in addition to possible damages;
- Confiscation of bribes.

Law No. 69 of 27 May 2015 (setting out "Rules concerning offences against the Public Administration, mafia-type conspiracy crimes and false accounting") introduced more severe sanctions for corruption offences. It also made the availability of plea bargains and suspended judgments for corruption offences subject to restitution of the profits of the crime. Penalties may be reduced where the offender acted to prevent further consequences of the offence or cooperated with the investigation.

Japan

What is corruption?

The offences of bribery are set out in the Japanese Criminal Code (Law No. 45 of 1907, as amended) (the "**Criminal Code**") and the Unfair Competition Prevention Act (Law No. 47 of 1993, as amended) (the "**UCPA**"). The Criminal Code deals with the bribery of public officials belonging to Japanese governmental/official bodies and the UCPA deals with the bribery of public officials belonging to foreign (non-Japanese) governmental/official bodies.

A "bribe" is construed under both the Criminal Code and the UCPA to mean any benefit that amounts to illegal compensation, including any economic or other tangible benefit which could satisfy the needs/desires of a person. There is no *de minimis* threshold amount for a bribe.

The Criminal Code prohibits a public official from accepting, soliciting or agreeing to receive a bribe in connection with his/her duties and provides penalties for both the public official and the individual who offers, gives or promises such a bribe.

The UCPA provides that no person shall give, offer or promise to give a bribe to a foreign public official for the purpose of having the foreign public official act or refrain from acting in a particular way in relation to his/her duties, or having the foreign public official use his/her position to influence another foreign public official to act or refrain from acting in a particular way in relation to that official's duties, in order to obtain illicit gains in business with regard to international commercial transactions. The UCPA only penalises the giver/offeror/promisor of the bribe.

Gifts or hospitality can amount to a "bribe". However, Japanese courts generally consider that gifts or hospitality do not constitute a "bribe" if given within the bounds of "social courtesy" (*shakouteki girei*). The following elements will be taken into account in order to determine whether a gift or hospitality is given within the bounds of social courtesy: the relationship between the giver and receiver, the value of the gift, the social status of the giver and receiver and the social circumstances.

Does the law apply beyond national boundaries?

Yes. Under the Criminal Code public officials can be found guilty of being bribed even where the bribery was committed outside the territory of Japan. However, the giver of the bribe (including a Japanese national) must have committed part of the bribe within the territory of Japan to be held liable for prosecution under the Criminal Code.

Japanese nationals can be found guilty of the bribery of foreign public officials under the UCPA notwithstanding that the bribery was committed outside the territory of Japan.

Is there a difference between the treatment of corruption in the public and private sectors and how is the public sector defined?

Yes. Under Japanese law there are no general criminal laws against bribery in the private sector. However, there are several laws addressing private sector bribery in specific situations, for example:

- Certain laws in relation to specific companies which perform public services include laws prohibiting the bribery of employees. For example, the Nippon Telegraph and Telephone ("**NTT**") Corporation Act (Law No. 85 of 1984, as amended) forbids the bribery of NTT employees; and
- The Companies Act (Law No. 86 of 2005, as amended), specifically Articles 967 and 969, prohibits giving economic benefits to directors (or similar officers) of stock corporations with the request of unlawful actions/inactions in respect of their duties. Both the director and the person giving the bribe are liable to imprisonment or a fine. The bribe will be confiscated or the value of the bribe will be levied as a further penalty.

In relation to the Criminal Code, the definition of public sector is understood by reference to public officials (*koumu-in*) who are subject to the offences of corruption under the Criminal Code. Under the Criminal Code, such a "public official" is defined to mean a national or local government official, a member of an assembly or committee, or other employees engaged in the performance of public duties in accordance with laws and regulations.

Foreign Public Officials for the purpose of the UCPA are:

(i) an official of a foreign national or local government;

(ii) a person engaged in the performance of duties for an entity established under foreign laws and regulations in order to perform specific duties in respect of public interests;

(iii) a person engaged in the performance of duties for an entity (a) a majority stake of which is owned, or a majority of the officers (director, statutory auditor, liquidator and other persons engaged in management of the entity) of which is appointed, by foreign national and/or local government(s) and (b) which is granted specific rights and interests for the performance of its business by a national or local government, as well as a person who is considered similar to the

aforementioned person as designated in the cabinet ordinance;

(iv) an official of an international organisation consisting of governments or inter-governmental organisations (an "**IO**"); and

(v) a person engaged in the performance of duties over which a national or local government or an IO has power and authority and which are delegated to such person by a national or local government or an IO.

How are "facilitation payments" treated?

There is no exemption for facilitation payments in the Criminal Code.

There is no specific exemption either in the UCPA. However, if a person makes a payment to a foreign public official purely for the purpose of facilitating a normal administrative service to which he/she is entitled, it is generally understood that such payment will not be found by Japanese courts to constitute bribery of the official, as it is not thought that there is an improper business advantage.

What are the rules on tax and accounting in relation to corrupt payments?

The cost for bribery of domestic and international public officials cannot be categorised as necessary expenses or deductible expenses for the purposes of tax returns. Claiming a tax deduction for a bribe, if deliberate, may amount to a criminal offence for tax return manipulation.

Are there special rules for public procurement?

The provisions on bribery outlined above apply to the public procurement process.

In order to increase transparency, the method generally employed for public procurement contracts by Japanese public bodies is a competitive bid process (*ippan kyoso nyusatsu*) where any person who has passed the eligibility test conducted by the procurement body and has been registered in the registry managed by such body is invited to make a procurement bid and the lowest bidder in terms of fees to be charged is granted the contract.

A person or company may be disqualified from tendering for public contracts under various national and/or local laws/ordinances.

Are companies liable for the actions of their subsidiaries?

There is no provision providing for corporate liability under the Criminal Code.

Corporate liability is possible under the UCPA. However, for a parent to be liable, the parent would need to have had some involvement in the subsidiary's bribery.

What are the penalties?

Under the Criminal Code a public official may be sentenced to a maximum term of imprisonment of 20 years. The bribe may be confiscated or the value of the bribe levied as a further penalty.

The person who bribed, or attempted to bribe, the public official may be sentenced to a maximum term of imprisonment of three years or fined up to JPY 2.5 million (approx. USD 25,000).

As noted above, the Criminal Code does not provide for corporate liability.

Under the UCPA, there are no sanctions for the foreign public official (the UCPA only penalises the persons giving or offering the bribe).

The person who bribed, or attempted to bribe, the foreign public official may be sentenced to a maximum term of imprisonment of five years and/or may be fined up to JPY 5 million (approx. USD 50,000).

Corporations that bribed, or attempted to bribe, a public official may be fined up to JPY 300 million (approx. USD 3 million).

Liability for bribing public officials (domestic or foreign) is not just restricted to those who physically pay the bribe. Under both the Criminal Code and the UCPA, an individual who expressly or impliedly consents to money (or other things of value) being given to an intermediary for the payment of a bribe to a public official will also be guilty of an offence (conspiracy to commit a crime). Knowledge of the principal is required, but such knowledge can be found impliedly on the basis of the particular circumstances.

The Netherlands

What is corruption?

Dutch anti-bribery rules are set out in the Dutch Criminal Code ("**DCC**") as amended as of 1 January 2015.

Dutch law makes a distinction between bribery of public officials (public bribery) and bribery of persons other than public officials (private commercial bribery). A further distinction is made between active and passive bribery. The term "active" relates to conduct by the briber, i.e. the person who provides a gift or gives a promise, or renders or offers to render a service, while the term "passive" refers to the recipient i.e. the person being bribed or allowing him/herself to be bribed by accepting a gift, promise or service.

Public bribery

Under Dutch law it is prohibited to bribe a public official with the object of inducing him or her to act or refrain from acting in a given manner (active public bribery, article 177 DCC). For passive bribery, the decisive factor is whether the public official knows or should have reasonably suspected that he/she had been given a bribe in order to induce him/her to act or refrain from acting in a given manner (article 363 DCC). These prohibitions apply in relation to Dutch and foreign public officials (article 178a DCC). The bribery offence is applicable even where the bribe has been provided, offered or promised before the person being bribed becomes a public official or after he/she has ended his/her work as public official.

The active and passive bribery of judges (including both national and international judges and arbitrators) is a separate offence (articles 178 and 364 DCC) with a tougher maximum punishment.

Commercial bribery

Active private commercial bribery is punishable if the person bribing can reasonably assume that making the gift or promise or providing or offering a service to an employee or agent in order to induce the employee or agent to act or refrain from acting in a given manner is contrary to the employee's or agent's duty. Passive private commercial bribery is punishable if an employee or agent, in breach of his/her duty, requests or accepts gifts, promises or services offered to induce the employee/agent to act or refrain from acting in a given manner (article 328 ter DCC). The bribery offence is applicable even where the bribe has been provided, offered or promised before the person being bribed becomes an employee or agent or after he/she has ended his/her engagement in relation to which the bribe relates.

Acting in breach of one's duty can include failing to disclose gifts, promises or services to the relevant employer or principal, contrary to good faith.

Bribes

Bribes may consist of gifts, promises or services. No further definitions of these terms are provided by law. In accordance with Dutch case law, a gift means a transfer of something that has any value to the recipient. A promise is the promise of a gift (offering money is a promise). Gifts and promises should be broadly interpreted; the terms also include invitations to dinners, excursions, working visits, and visits to an event. Providing/offering a service as a bribe has been added to include rewards that may not have a specific economic value, such as a (honorary) title, and also includes providing pleasure trips and holiday homes at significantly discounted prices.

Does the law apply beyond national boundaries?

The following persons may be prosecuted in the Netherlands:

- any person who bribes a public official (foreign or domestic) in or from the Netherlands;
- a Dutch public official (not necessarily having Dutch nationality) or a Dutch national who accepts a bribe abroad;
- any person in the public service of an international institution with its seat in the Netherlands who accepts a bribe abroad;
- a Dutch national who bribes a public official (foreign or domestic) abroad; and
- a Dutch public official or a person in the public service of an international institution with its seat in the Netherlands who commits the offence of bribery abroad.

Is there a difference between the treatment of corruption in the public and private sector and how is the public sector defined?

Since the recent amendment of the Dutch anti-bribery rules, the provisions in relation to public and private bribery have become more aligned.

Public official

The DCC does not provide a definition of public sector and there is no overall definition of "public official". Article 84 DCC states that the term "public officials" also includes members from (publicly) elected representative bodies, judges, arbitrators, and the armed forces. In Dutch case law, a "public official" is defined as a "person who, under the

supervision and responsibility of the government, has been appointed to perform a function that undeniably has a public character and to exercise some powers of the State or its agencies."

Dutch courts apply the following three criteria to determine whether a person can be considered a public official: (i) the function of the public official is to a large part influenced by governmental institutions, notably if the public official has been appointed under supervision and responsibility of the government; (ii) the function of the public official is of a public nature; and (iii) the public official's tasks entail the execution of governmental tasks. Whether a person is also considered a public official from an employment or administrative law perspective is irrelevant.

Since the purpose of the anti-bribery rules is to prevent any form of corruption in the civil service and to stimulate honest governmental conduct, the term public official should be interpreted broadly. In general, employees of privatised organisations that perform a public service that is supervised by a governmental body will be considered public officials. However, persons employed by private companies with commercial objectives in which the Dutch state merely has a role as a (majority) shareholder will generally not be considered to be public officials, because they do not perform the government's duties and are not appointed by the Dutch state (but are instead appointed, depending on their role and on the structure of the company, by a board of directors whose directors will be appointed by the general meeting of shareholders or the board of supervisory directors).

Foreign public official

No definition of "foreign public official" is provided and there is no case law defining which criteria are applicable. It can be assumed that the same criteria for domestic public officials will apply to foreign public officials. Persons in the public service of a foreign state or an international institution are considered public officials.

The term private entities/persons relates to those that are not defined as public officials.

How are "facilitation payments" treated?

Such payments are considered bribes and therefore making facilitation payments is an offence under Dutch criminal law. However, the 2011 Instructions for the Investigation and Prosecution of Public Officials Abroad make it clear that in certain circumstances prosecutors may decide not to prosecute in respect of facilitation payments. Relevant factors for prosecutors to consider in deciding whether to prosecute are whether:

- the public official concerned was required by law to carry out or to refrain from carrying out the act that was facilitated by the payment;
- the payment cannot in any way have a distortive effect on competition;
- the amounts involved are small (in absolute or in relative terms);
- the payments are made to lower tier public officials;
- the payment has been entered into the records of the company in a clear, transparent manner; and
- the initiative for the payment was taken by the foreign public official.

What are the rules on tax and accounting in relation to corrupt payments?

Pursuant to the Dutch Income Tax Act and the Dutch Corporation Tax Act 1969, bribery payments are not deductible for Dutch tax purposes. Tax authorities have a duty to report bribes paid to public officials to the enforcement authorities.

Advantages received as bribes will usually be considered additional income connected to the recipient's employment as defined in the Income Tax Act, and therefore excluding such income from the annual tax return constitutes a separate (tax) offence.

Are there special rules for public procurement?

The anti-bribery rules in the DCC also apply in relation to the public procurement process. If in the four years prior to submission of a tender, a legal person is convicted of bribery by final judgment, this legal person will be excluded from the public procurement process (article 2.86 Public Procurement Act 2012).

Are companies liable for the actions of their subsidiary?

The anti-bribery rules also apply to legal entities. Pursuant to Dutch case law, an offence can be attributed to a legal entity depending on the circumstances of the case and whether such attribution is reasonable. The following (non comprehensive) factors are relevant for such attribution:

- the conduct constituting the offence falls within the scope of the entity;

- the entity benefited from the offence;
- the offence was committed by employees, or persons working on behalf of the entity;
- the entity could have prevented the conduct but neglected to do so and "accepted" it. Not taking reasonable care to prevent such conduct can also constitute acceptance of the conduct.

The Netherlands has no jurisdiction over foreign subsidiaries of Dutch parent companies. However, it is possible to prosecute the Dutch parent company if the conduct constituting the offence of bribery can reasonably be attributed to the Dutch parent company (the same attribution factors as set out above would apply). It is generally assumed that a parent company cannot be held liable merely because of its majority shareholding and formal legal structure. But there is currently no case law to give more guidance on the legal position of parent companies with regard to offences committed by their subsidiaries.

What are the penalties?

Active or passive bribery of a public official is punishable by a maximum term of imprisonment of six years and a maximum fine of EUR 81,000 for natural persons and EUR 810,000 for legal entities (articles 177 and 363 DCC). Active and passive private commercial bribery are punishable by a maximum prison term of four years and a maximum fine of EUR 81,000 for natural persons and EUR 810,000 for legal entities (article 328 ter DCC).

The maximum fine for legal entities can be increased up to a maximum of 10% of their annual turnover, if the maximum fine of EUR 810,000 is not considered an appropriate punishment.

People's Republic of China

What is corruption?

The relevant rules regarding bribery and corruption are contained in various texts, the most important of which are the PRC Criminal Law ("**Criminal Law**", effective as from 1 October 1997), providing criminal offences, and the Anti-Unfair Competition Law ("**AUCL**", effective as from 1 December 1993), dealing with non-criminal offences.

The Criminal Law criminalises bribery of public officials and commercial bribery involving companies and their employees. The AUCL deals with commercial bribery only.

Corruption in relation to public Officials

Under the Criminal Law, a crime of bribery is committed if:

(i) an individual offers a state functionary:

a) *"money or property for the purpose of securing an illegitimate benefit;"*

b) *"money or property of relatively high value in violation of state regulations during a commercial transaction"; or*

c) *"various forms of 'kickbacks' or 'handling fees' during a commercial transaction in contravention of state regulations"*[1]*;*

(ii) an entity offers a state functionary:

a) "a bribe for the purpose of securing an illegitimate benefit"; or

b) "'kickbacks' or 'handling fees' in violation of state regulations and the circumstances are serious"[2]; or

(iii) an individual or an entity offers a state organisation (i.e., a state organ, a state-owned company/enterprise/institution or a people's organisation):

a) *"money or property for the purpose of securing illegitimate benefits"; or*

b) *"various forms of 'kickbacks' or 'handling fees' during a commercial transaction in contravention of state regulations"*[3]*.*

Accepting a bribe by a state functionary is also criminally prohibited: the criminal offence of accepting a bribe is committed by a state functionary if he:

(i) "takes advantage of his office to demand money or property";

(ii) "illegally accepts 'money or property' in relation to a favour provided to the briber";

(iii) "accepts various kinds of 'kickbacks' or 'handling fees' during a commercial transaction for his personal use in violation of state provisions"; or

(iv) "abuses his status as a state functionary, by influencing another state functionary to secure an illegitimate gain for another party, in exchange for money or property"[4]*.*

The illegal bribe can take various forms such as: (i) cash; (ii) "kickbacks" or "handling fees"; or (iii) assets and benefits other than cash that can be valued in monetary terms.

Corruption in relation to foreign public officials

PRC adopted the Eighth Amendment to the Criminal Law of the People's Republic of China, which took effect on 1 May 2011. This Amendment added a second paragraph into Article 164 of the PRC Criminal Law creating a new offence of bribery of foreign public officials or officials of international public organisations (active bribery only).

The second paragraph to Article 164 of the Criminal Law reads as follows:

"Providing property to any foreign public official or official of an international public organisation for the purpose of seeking improper commercial benefit shall be subject to the penalty provided by the preceding paragraph."

The term "foreign public official" is not defined under the Criminal Law. In an interview on the Amendment, the officials in the Congress responsible for the drafting of this Amendment confirmed that it was adopted to implement the United Nations Convention Against Corruption ratified by China in 2005. According to Article 2 of this Convention, "foreign public official" refers to any person holding a legislative, executive, administrative or judicial office of a foreign country, whether appointed or elected, and any person performing a public function, including for a public agency or public enterprise or providing a public service under the law of a foreign country. Similarly, the term "official of an international public organisation" is not defined by the Amendment. Under Article 2 of the United Nations Convention Against Corruption, this term refers to any international civil servant or any person who is authorised by such an organisation to act on behalf of that organisation.

On 14 November 2011, the Supreme People's Procuratorate and the Ministry of Public Security issued the Supplemental Rules to Provisions (II) on the Standards

[1] Article 389 of the Criminal Law
[2] Article 393 of the Criminal Law
[3] Article 391 of the Criminal Law
[4] Articles 385 and 388 of the Criminal Law

for Initiating Investigation and Prosecution of Criminal Cases under the Jurisdiction of the Public Security Authorities. These Supplemental Rules set out thresholds for initiating investigation and prosecution of the offence of bribery of foreign public officials or officials of international public organisations. The threshold is RMB 10,000 if the offender is an individual, and RMB 200,000 if the offender is an organisation (e.g., a company).

Corruption in relation to private individuals or entities

Commercial bribery is prohibited under the Criminal Law (criminal liability) and under the AUCL (administrative liability). The Criminal Law prohibits any person from offering money or property to a staff member of a company, an enterprise or other organisation for the purpose of securing an illegitimate benefit[5].

It is also criminally prohibited for a staff member of a company, an enterprise or other organisation to accept or solicit money or property from any person in relation to any benefit provided to the briber[6].

Except for special circumstances, commercial bribery may trigger criminal liability (as opposed to administrative liability under the AUCL) but only if the value of the bribe is "relatively high" or "high" and if the purpose of the bribery is to secure illegitimate benefits. It appears that the difference between criminal and non-criminal commercial bribery is essentially based on the amount of the bribe.

Under the AUCL, business operators are prohibited from offering bribes by way of cash, property or any other means to sell or purchase merchandise or giving the other party any unlawful kickbacks. Also, any commission to an intermediary or discount to any party must be recorded in the accounting books of the company and the party who receives a commission or "kickback" not recorded in the accounting books of that party may also be punished for commercial bribery[7].

Accordingly, bribing a state-owned enterprise or its employee in order to secure a business transaction may trigger both the AUCL and the Criminal Law.

Does the law apply beyond national boundaries?

The Criminal Law applies to any crime (i) committed within Chinese territory (a crime is deemed to have been committed within Chinese territory when either its act or result – e.g., receiving an improper commercial benefit – takes place in China) or (ii) committed anywhere by a Chinese citizen or entity. In the latter case, however, if, depending on the value of the bribe, the offence is subject to penalties of less than three years of imprisonment, the bribery may be exempted from prosecution.

Is there a difference between the treatment of corruption in the public and private sector and how is the public sector defined?

The notion of a state functionary, which is specific to public sector bribery, is broadly construed under the Criminal Law and includes in particular: (i) people who perform public services in state organs including all levels of power organs, administrative organs (i.e., the State Council and the local governments), judicial organs (e.g., courts and prosecution bodies) and military organs; (ii) people who perform public services in state-owned institutions (e.g., universities or hospitals) or civil organisations; (iii) people who perform public services in state-owned enterprises ("**SOEs**"), including directors, managers, supervisors or accountants (however, SOE employees who perform technical services without government-related functions, such as back office staff, should be excluded); (iv) people assigned by the government or SOEs to perform public services in non-state-owned enterprises, institutions or civil organisations[8].

There are two main differences between private sector and public sector corruption. First, the purpose of securing an illegitimate benefit, which is a requisite condition of commercial bribery, is not an absolute condition for the offence of bribery involving public officials. For example, a criminal offence is committed if an individual offers a bribe of RMB 10,000 or above to a state functionary even if there is no purpose of securing an illegitimate benefit. Second, the bribery of public officials (whether offering or accepting bribes) is a much more serious criminal offence than commercial bribery. For instance, the most serious case involving a bribed state functionary may give rise to the death penalty, while the maximum penalty for having committed commercial bribery is an imprisonment sentence.

How are "facilitation payments" treated?

There are no specific provisions or exemptions under Chinese Law for facilitation payments. Each payment must

[5] Article 164 of the Criminal Law
[6] Article 163 of the Criminal Law
[7] Article 8 of the AUCL
[8] Article 93 of the Criminal Law

be judged according to whether it fulfills the criteria for the offences described above. Please note, however, if a payment is made under extortion and no illegitimate benefit is obtained in return, the payment should not be regarded as a bribe under the Criminal Law[9]. This exemption does not exist under the AUCL though.

However, the Criminal Law, as opposed to the AUCL, sets out differing thresholds regarding the value of the concerned bribe. A criminal offence is committed only if the bribe offered by an individual (whether to a governmental or non-governmental official) is RMB 10,000 or above or the bribe offered by an entity is RMB 200,000 or above. On 26 December 2012, the Supreme People's Court and the Supreme People's Procuratorate jointly promulgated the Interpretation of Several Issues Concerning the Application of Law for Handling Criminal Cases of Bribery (the "**Interpretation**").

The Interpretation specifies that the criminal threshold for investigation of individuals offering bribery to a state functionary remains at RMB 10,000, as set out in the 1999 Interpretation[10].

However, the 1999 Interpretation provides that these thresholds do not apply to the offence of offering a bribe to a governmental official (i) if the purpose of the bribe is to secure an illegitimate benefit; (ii) if bribes were paid to three or more government officials; (iii) if the bribe was paid to a government leader, judicial official, etc.; or (iv) if the bribe caused severe damage to national or social interests. Now it is unclear from the new Interpretation's sole mention of the monetary threshold, whether these additional triggers remain effective.

It is also noteworthy that, according to a notice circulated by Chinese authorities, business gifts may be distinguished from bribes as far as commercial bribery is concerned. The factors to be taken into account for the purpose of the distinction include the background of the transaction, the relationship between the parties, the value of the reward given, and the purpose of the reward (e.g., obtaining or not a position-related favour)[11].

What are the rules on tax and accounting in relation to corrupt payments?

According to Article 8 of the AUCL:

"*An operator shall not practise bribery by using money, valuables or other means to sell or buy goods. Where an operator secretly pays a kickback to the other party, be it an entity or individual, not recorded in the accounting books of that party, it or he shall be punished for offering a bribe; where the other party, be it an entity or individual, secretly accepts a kickback not recorded in accounting books of that party, it or he shall be punished for taking a bribe.*"

As a result, any discount, commission or other payment made to the other party in a contractual relationship must be expressed in the contract and accurately recorded in the accounting books of the parties. Any "kickbacks not recorded in the accounting books" are prohibited under the AUCL and may constitute an offence of commercial bribery triggering administrative liability.

[9] Article 389 of the Criminal Law
[10] "*Rules on the Standard for Filing Cases that are Directly Filed for Investigation to People's Procuratorate (Trial)* which is promulgated on 9 September 1999 ("**1999 Interpretation**").
[11] "Opinions on Several Issues and Application of Law concerning the Handling of Criminal Cases of Commercial Bribery" jointly issued by the Supreme People's Court and the Supreme People's Procuratorate on 20 November 2008

Are there special rules for public procurement?

Under the PRC Governmental Procurement Law effective as from 1 January 2003, the bidder/supplier who bribed or provided any improper benefits to the buyer or procurement intermediary, may be (i) subject to a fine ranging from 0.5% to 1% of the procurement amount, (ii) recorded in the blacklist maintained by the government, and (iii) banned from participating in government procurement activities for one to three years. Any illegal income may also be confiscated. If the circumstances are serious, the business licence of the offender can be revoked, and/or he may face criminal liability under the Criminal Law.

Furthermore, if the bribery affects or may affect the determination of the winning bidder or winning supplier, it shall be handled in accordance with the following situations respectively:

(i) if the winning bidder or supplier has not yet been determined, the procurement process shall be terminated;

(ii) if the winning bidder or supplier has been determined but the procurement contract has not yet been performed, the contract shall be rescinded and another winning bidder or supplier be chosen among the qualified candidates; or,

(iii) if the procurement contract has been performed, the responsible person shall be liable for compensation of any losses suffered by the buyer or supplier.

Is a company liable for the actions of its subsidiary?

As a general principle under PRC law, a company is legally independent from its subsidiary, and not liable for any action taken by it, unless the company itself has participated in such action.

What are the penalties?

Corruption in relation to public officials

Under the Criminal Law, an individual convicted of the offence of offering a bribe to a state functionary may be subject to criminal detention[12], a fixed term of imprisonment, or life imprisonment[13] and confiscation of property.

Which penalty shall apply depends on the severity of the offences. By defining "severe," "causing significant losses to the State," and "significantly severe", the Interpretation provides guidance on the determination of the penalties.

The Interpretation also sets forth several incentives for confession. Mitigation or exemption from penalties based on confession is possible for both entities and individuals.

A corporate entity convicted of the same offence may be subject to a fine and any person directly in charge of the management of the entity as well as any other person personally involved in the commission of the offence may be sentenced to a fixed term of imprisonment of up to five years or criminal detention.

A state functionary who is convicted of having committed the offence of accepting a bribe may be sentenced to criminal detention, a fixed term of imprisonment, life imprisonment or even the death penalty and confiscation of property.

Corruption in relation to private individuals or entities

Under the Criminal Law, an individual convicted of the offence of offering a bribe to a staff member of a company, an enterprise or other organisation may be subject to criminal detention or a term of imprisonment of up to 10 years and confiscation of property. An entity convicted of the same offence is subject to a fine, and any person directly in charge of the management of the entity as well as any other person personally involved in the commission of the offence may be sentenced to criminal detention or to a term of imprisonment of up to 10 years and confiscation of property.

A staff member of a company, an enterprise or other organisation having accepted a bribe may be sentenced to criminal detention or to a term of imprisonment and confiscation of property.

Under the AUCL, a business operator who offers a bribe, if the circumstances are not serious enough to constitute a criminal offence, may be subject to a fine ranging between RMB 10,000 to RMB 200,000 and any illegal income may be confiscated. Entities and individuals accepting bribes when purchasing or selling goods are subject to the same administrative penalty as the business operators offering the bribes.

[12] "Criminal detention" is a "less serious form" of imprisonment. The length of criminal detention ranges from one month to six months. An individual under criminal detention is allowed leave from the detention of one or two days for each month.
[13] Under the Criminal Law, a term of imprisonment usually ranges from six months to 15 years.

Poland

What is corruption?

Bribery

According to Article 228 section 1 of the Polish Criminal Code, anyone who, in connection with performing a public function accepts a material or personal benefit, or a promise thereof, is liable to imprisonment for between six months and eight years.

According to Article 229 section 1 of the Polish Criminal Code, anyone who gives or promises to give a material or personal benefit to a person in relation to his/her holding a public office is liable to imprisonment for between six months and eight years.

According to the Polish Criminal Code a person performing a public function is a public official, a member of the local government, a person employed in an organisational unit provided with public funds, unless exclusively a service employee, and any other person whose rights and obligations in terms of public activity are defined or recognised by law or international agreement binding the Republic of Poland.

The scope of "person performing public functions" is interpreted widely and may include even a person who is in charge of public funds and administrative activities (e.g. a head of a hospital department, a director of a state enterprise, members of tender commissions who opine on applications for the awarding of public works and employees of banks whose majority shareholder is the State Treasury).

Polish criminal law does not provide a definition of a material or personal benefit and limits itself in this scope to the statement that a material or personal benefit is a benefit received either for oneself or for another person. The most obvious form of delivering financial benefits is the handing over of money (in cash). However, at present it is assumed that the term "material benefit" is capable of referring to any increase in property assets or decrease in liabilities. There are also views that winning a tender could be a material benefit.

Paid patronage

Undertaking to assist in dealing with a matter in exchange for a financial benefit by invoking influence in a government or local government institution, in an international or national institution or in a foreign organisational unit having public funds at its disposal or by giving another person the impression of such influence or confirming the belief of that person in such influence (passive paid patronage) is subject to penalty (Article 230 section 1 of the Polish Criminal Code).

According to Article 230a section 1 of the Polish Criminal Code, it is also an offence to grant or promise to grant a benefit in exchange for mediation in the above-mentioned institutions, with the intention of illegally influencing a decision, or causing a person holding public office to act or omit to act, in connection with the holding of that office.

Does the law apply beyond national boundaries?

According to the Polish Criminal Code, Polish criminal law applies to Polish citizens who have committed an offence abroad provided that such offence is considered an offence by the law in force where it was committed. The condition that the offence has to be considered an offence by the law in force where it was committed does not apply to a Polish public official who, while performing his duties abroad, has committed an offence there in connection with performing his duties, or to a person who committed an offence in a place not under the jurisdiction of any state authority.

Furthermore, notwithstanding the provisions in force in the place where an offence is committed, Polish criminal law applies to a Polish national or a foreigner who commits, among other things, an offence against Polish offices or public officials.

Is there a difference between the treatment of corruption in the public and private sector and how is the public sector defined?

The Polish Criminal Code provides for criminal liability for commercial bribery.

Passive bribery consists in the acceptance by a person holding a managerial position in an organisational unit, or by a person who, owing to the function held, has significant influence on the decision-making connected with this unit, of a financial or personal benefit or a promise thereof in exchange for behaviour that could cause property damage to that unit, an act of unfair competition or inadmissible preferential action in favour of the acquirer or recipient of a good, service or benefit.

Active bribery, on the other hand, consists in granting or promising to grant a financial or personal benefit in the same cases.

How are "facilitation payments" treated?

There is no exemption in Poland for facilitation payments, and such payments are likely to fall under the statutory definition of a bribery offence.

What are the rules on tax and accounting in relation to corrupt payments?

According to article 16 section 1 point 66 of the Corporation Income Tax Act and article 23 section 1 point 61 of the Personal Income Tax Act, expenses and costs of goods, rights or services provided in relation to actions that

cannot be the subject of a valid agreement, in particular in relation to corrupt payments, may not be deducted when calculating income for corporation or personal tax purposes.

Under Article 77 of the Act on Accountancy, a company that violates its statutory duty to make and keep accounting books, records and accounts or produces unreliable data in its records commits a criminal offence. In addition, under the Fiscal Penal Code an entity that keeps accounting books incorrectly or dishonestly may be fined.

Are there special rules for public procurement?

Under Article 200 of the Polish Act on Public Procurement it is an offence to violate public procurement procedures, in particular, by awarding a contract (i) in breach of the provisions of the Act on Public Procurement concerning the prerequisites for the application of certain types of public procurement procedures, (ii) without the required notice and (iii) without applying the Act on Public Procurement. The Act on Public Procurement provides for fines for violations of the public procurement rules and procedures and introduces the administrative enforcement thereof.

Fraudulent dealing with the government falls within the general rules concerning fraud.

Are companies liable for the actions of their subsidiaries?

The liability of entities for criminal offences is regulated by the Act on the Liability of Collective Entities for Punishable Acts. In general, under that Act, a corporate entity may be liable if a specified offence is committed by a specific person and his/her conduct has resulted or may have resulted in a benefit for the corporate entity.

A corporate entity may be held liable for offences committed by:

- a person acting on behalf of the corporate entity or in its interest and within the scope of his/her powers or duty to represent it, a person who makes decisions on behalf of the entity or who exercises internal control, or, exceeds his/her powers or fails to perform his/her duty (a "Manager");
- a person given permission to act by a Manager;
- a person acting on behalf of the corporate entity or in its interest with the consent or knowledge of a Manager; or
- a person being "an entrepreneur" (a sole trader) who is involved in a business relationship with the corporate entity.

The entity will face liability for actions of the above-mentioned persons only if:

- the entity's bodies or representatives failed to exercise due diligence in preventing the commission of an offence by the Managers or the entrepreneur; or
- it has failed to exercise due diligence in hiring or supervising a person given permission to act by the Manager or a person acting with his/her consent or knowledge.

The liability of the entity is secondary to the liability of the person who committed the offence, i.e. the entity can be held criminally liable only after the person who committed the offence has been found guilty and sentenced by a court of law.

Under the provisions of the Act on the Liability of Collective Entities for Punishable Acts, the lack of criminal liability of a corporate entity does not exclude the possibility of civil liability for the damage caused or the administrative liability of the entity.

Otherwise, Polish criminal law does not provide that a parent company is liable for the actions of its subsidiaries.

What are the Penalties?

The penalty for bribery under the Criminal Code may be imprisonment for between six months and twelve years. The penalties for a criminal offence of paid patronage include imprisonment for between six months and eight years.

The court may also order the forfeiture of any object which derived from the offence or which served or was designed for committing the offence, any benefit which derived from the offence or the value of the objects or benefits which derived from the offence.

Under the Public Procurement Law, an entity may be fined with an administrative penalty of up to PLN 150,000 (depending on the value of the contract). Also, natural persons sentenced for certain specified criminal offences (in particular, in connection with a contract award procedure) are by law excluded from contract award procedures.

Under the Act on the Liability of Collective Entities for Punishable Acts (please see above for details) a corporate entity may be fined with an amount from PLN 1,000 to PLN 5,000,000 (approx EUR 250 to EUR 1,250,000). However, the fine may not exceed 3% of the entity's revenue earned in the financial year in which the offence was committed. The court is also competent to prohibit the corporate entity from carrying out promotions and advertising, benefiting from grants, subsidies or assistance from international organisations or bidding for public contracts. It can also decide to publicise the judgment. All the above-mentioned bans may be imposed for a period of one year to five years.

Russia

What is corruption?

Russian anti-corruption laws include Federal Law No. 273-FZ dated 25 December 2008 On Preventing Corruption (the "**Anti-corruption Law**") and Federal Law No. 115-FZ dated 7 August 2001 On Preventing Legalisation (Laundering) of the Proceeds of Crime and Financing of Terrorism.

The Anti-corruption Law defines corruption as follows:

"Corruption is (a) the abuse of public office, the giving or receiving of bribes, the abuse of powers, commercial graft or other illegitimate use by an individual of his/her official status contrary to the legal interests of society and the State in order to obtain private gain in the form of money, benefits, other property or services involving property, or other property rights for himself/herself or for third parties, or the illegal provision of such a benefit to the individual by other individuals; and (b) the servicing of actions mentioned in section (a) above on behalf of or for the benefit of a legal entity".

Individuals are subject to criminal, administrative, civil and/or disciplinary liability for bribery and other related offences[1]. Organisations are subject to administrative liability for providing, offering or promising unlawful remuneration (Article 19.28 of the Administrative Offences Code).

Bribery of public officials

Under the Criminal Code, the crime of bribery in relation to public officials is defined as:

- *"directly or indirectly accepting unlawful remuneration (in the form of monetary funds, securities or other property, services or property rights) by a public official, foreign public official or official of an international organisation in return for performing an act (or omitting to act) in favour of the bribe-giver or the persons they represent, if it falls within the authority of the bribe-taker, or, if not, facilitating such an act (or omission to act) by means of abuse of official position, including general patronage or connivance"* (Article 290 of the Criminal Code);
- *"directly or indirectly, giving unlawful remuneration to a public official, foreign public official or official of an international organisation"* (Article 291 of the Criminal Code);
- *"acting as an intermediary for corrupt actions, i.e. directly transferring a bribe upon instruction of the bribe-giver or the bribe-taker or otherwise facilitating making an agreement for receiving and giving bribes or its realisation"* (Article 291.1 of the Criminal Code).

The Plenum of the Supreme Court in one of its decrees[2] has clarified that a bribe occurs if financial gain or any other benefit is given to or accepted by a public official for performing duties that derive solely from his/her official position and which are of an organisational, management or administrative nature. However, if the benefit is not given directly to or accepted by a public official or his/her relatives, but is instead provided to another individual or organisation, and neither the public official nor the relatives obtains any financial gain or other benefit from it, then giving or accepting such a benefit does not constitute the crime of giving or accepting a bribe. In such cases the public official may nevertheless be prosecuted for abuse of office if his/her action (or omission to act) is tantamount to such abuse.

Commercial bribery

Bribery in business transactions is a crime under the Criminal Code, specifically:

- "*giving unlawful remuneration (in the form of money, securities or other property, services or property rights) to a person exercising management functions at a commercial or other organisation in return for performing an act (or omitting to act) for the benefit of the bribe-giver in relation to the bribe-taker's job duties*" (Article 204 of the Criminal Code); and
- "*acceptance of unlawful remuneration by a person exercising management functions at a commercial or other organisation*" (Article 204 of the Criminal Code).

An example of the bribe-taker could be a CEO, a member of the board of directors or the head of a particular department responsible for certain approvals.

Incitement to bribe

Any attempt to transfer money, securities or other property or services to a public official or a person exercising management functions at a commercial or other organisation without their consent for the purposes of falsifying evidence of a crime or blackmail is categorised as incitement of a bribe or commercial graft (Article 304 of the Criminal Code).

[1] The Criminal Code establishes the following crimes of bribery and other related offences: accepting a bribe (Art. 290), providing a bribe (Art. 291), acting as an intermediary for a bribe (Art. 291.1), commercial bribery (Art. 204), incitement of a bribe (Art. 304), abuse of powers (Art. 201), abuse of public office (Art. 285), fraud (Art. 159), embezzlement (Art. 160) and forgery (Art. 292).

[2] Decree of the Plenum of the Supreme Court of the Russian Federation No. 24 dated 9 July 2013.

Corruption as an administrative offence While managers and employees may be subject to criminal penalties for bribery as described above, the only regulatory implications for legal entities that are found to be involved in bribery are administrative penalties. In practice, Russian law-enforcement authorities tend to initiate investigations of organisations where a manager or employee is convicted of bribery.

Organisations are subject to administrative liability for providing, offering or promising unlawful remuneration to public officials, persons exercising management functions at a commercial or other organisation, foreign public officials or officials of international organisations. The penalties include an administrative fine and confiscation of the bribe (Article 19.28 of the Administrative Offences Code).

Criminal proceedings against an individual and administrative proceedings against the respective organisation may be based on the same facts and can be heard in parallel.

Does the law apply beyond national boundaries?

Yes. As prescribed in the Criminal Code, Russian citizens and stateless persons who permanently reside in Russia and who have committed a crime outside the borders of the Russian Federation are subject to criminal liability under the Criminal Code in the absence of a foreign court judgment relating to the crime.

Foreign nationals and stateless persons who do not permanently reside in Russia and who have committed a crime outside the borders of the Russian Federation are also subject to criminal liability under the Criminal Code if the following conditions are met (Article 12 of the Criminal Code):

- the crime is directed against the interests of the Russian Federation or against a Russian citizen or a stateless person who permanently resides in Russia; or
- if it is provided for by international treaties to which the Russian Federation is a party; and
- no verdict has been rendered by a foreign court in relation to the crime and they are brought to criminal liability in Russia.

The Administrative Offences Code provides that an organisation is subject to administrative liability if it commits an offence in Russia, unless prescribed otherwise by an international treaty to which Russia is a party (Art. 1.8 of the Administrative Offences Code). An organisation that has committed an offence outside the borders of the Russian Federation is subject to administrative liability if so prescribed by international treaty to which Russia is a party. The OECD Convention is an example of such an international treaty. While the OECD Convention requires parties to the Convention to establish jurisdiction of its nationals for offences committed abroad, it is unclear whether Russian legal entities would be subject to administrative liability in respect of offences committed abroad as a result.

Is there a difference between the treatment of corruption in the public and private sector, and how is the public sector defined?

As noted above, corruption in the public sector differs from corruption in the private sector in that in the former case the bribe-taker is a public official, foreign public official or official of an international organisation, which are defined in the Criminal Code.

A *"public official"* is any individual who, on a continual or temporary basis, or by special authority, performs functions of state representation or organisational, management or administrative duties at a Russian government authority, local authority, state or local enterprise, state corporation or division of the military.

A *"foreign public official"* is any individual who holds legislative, executive, administrative or judicial office in a foreign country, whether appointed or elected, and any person who exercises duties of public office of a foreign country, including at a public agency or public enterprise.

An *"official of an international organisation"* is an international civil servant or any person who is authorised by an international organisation to act on behalf of that organisation (a member of parliamentary assembly of an international organisation to which Russia is a party, an individual who holds judicial office at an international court, the jurisdiction of which is recognised by Russia, etc.).

The principal difference between the treatment of corruption in the public and private sectors is that corruption offences in the public sector may be prosecuted without any formal demand for prosecution sought by an injured party. On balance, in the private sector, where the harm caused by corruption offences is restricted to the interests of the organisation whose employee accepted a bribe, the actors can only be prosecuted if and as long as the organisation seeks prosecution. An exception to this general rule is when the prosecutor considers *ex officio* that the case should be prosecuted because the crime harmed

the interests of another organisation, the interests of a citizen or the public interest. Therefore, prosecutors have broad discretion in determining whether or not to prosecute a particular case.

How are "facilitation payments" treated?

There is no specific exemption under Russian law for facilitation payments. Each payment must be assessed using the criteria for corruption offences, whether criminal or administrative.

What are the rules on tax and accounting in relation to corrupt payments?

The Information Letter of the Ministry of Finance dated 3 September 2012 On Tax Accounting of Corrupt Payments to Foreign Public Officials specifically states that corrupt payments are not tax-deductible as legitimate expenses. While the title of this Information Letter refers to "foreign public officials", it is arguable that the document contains general conclusions and thus also applies to corrupt payments to Russian public officials and officials of international organisations.

Are there special rules for public procurement?

The requirements for public procurement are set out in Federal Law No. 44 dated 5 April 2013 on the Contract System in Public and Municipal Procurement (effective from 1 January 2014). Certain general provisions of that law may serve to prevent corruption, e.g. the requirement that information on public procurement and the relevant contracts must be complete and accurate and must be published in the official system for disclosing such information, requirements applicable to monitoring, auditing and supervision in the sphere of procurement, etc.

There is no special statutory provision stipulating automatic debarment of potential contractors on grounds of committing acts of bribery or corruption. However, as it follows from the law, it is an obligatory requirement for potential contractors to not have any prior convictions for crimes in the economic sphere (e.g. commercial bribery).

Furthermore, the Administrative Offences Code establishes a number of specific administrative offences related to public procurement, whereby public officials can be held liable for breach of these general requirements.

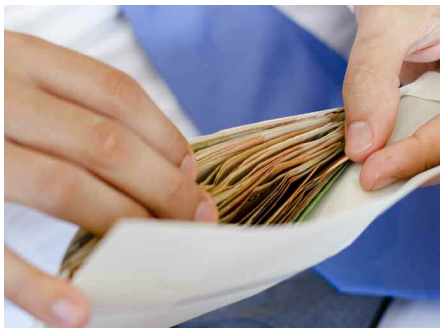
Are companies liable for the actions of their subsidiaries?

As a general principle under Russian law, a company is legally independent from its subsidiaries and not liable for any actions taken by them, unless the company itself has participated in such actions.

However, as noted above, a company may be subject to administrative liability if its manager or employee has been convicted of bribery.

What are the penalties?

The maximum penalties under the Criminal Code for corruption in relation to public officials are as follows: for accepting a bribe of RUB 1 million (approx. EUR 16,000) or more – imprisonment for up to 15 years, accompanied by a fine equal to 70 times the value of the bribe; for giving a bribe of RUB 1 million (approx. EUR 16,000) or more – imprisonment for up to 12 years, accompanied by a fine equal to 70 times the value of the bribe.



The maximum penalties under the Criminal Code for commercial bribery are as follows: for accepting a bribe, if the crime (i) was committed by a group of persons by prior conspiracy, or (ii) by an organised group, or (iii) was committed in return for performing an act known to be illegal (or omitting to act, as applicable), or (iv) involved extortion of the bribe – imprisonment for up to 12 years, accompanied by a fine equal to 50 times the value of the bribe; for giving a bribe, if the crime (i) was committed by a group of persons by prior conspiracy, or (ii) by an organised group, or (iii) in return for performing an act known to be illegal (or omitting to act, as applicable) – imprisonment for up to six years. Penalties for giving a bribe may also include a fine of up to 70 times the value of the bribe, but not in cases where the maximum penalty is imposed.

Where an organisation is found guilty of corruption, the maximum possible administrative penalty for a bribe of RUB 20 million (approx. EUR 320,000) or more is a fine equal to 100 times the value of the bribe (but in any case not less than RUB 100 million (approx. EUR 1.6 million)), accompanied by confiscation of the money, securities or other assets that constituted the bribe.

Singapore*

What is corruption?

Section 5 of the Prevention of Corruption Act (Cap 241, 1993 Rev Ed) (the "**PCA**") prohibits any person (by himself or by or in conjunction with any other person) from:

a) corruptly soliciting or receiving, or agreeing to receive for himself, or for any other person; or

b) corruptly giving, promising or offering to any person whether for the benefit of that person or of another person,

any gratification as an inducement to or reward for, or otherwise on account of –

i. any person doing or forbearing to do anything in respect of any matter or transaction (whether actual or proposed); or

ii. any member, officer or servant of a public body doing or forbearing to do anything in respect of any matter or transaction (whether actual or proposed), in which such a public body is concerned.

The term "person" covers companies as well as individuals.

A bribe is referred to under the PCA by use of the term "gratification", which is broadly defined to include the giving, promising or offering of:

a) money or any gift, loan, fee, reward, commission, valuable security or other property or interest in property of any description, whether movable or immovable;

b) any office, employment or contract;

c) any payment, release, discharge or liquidation of any loan, obligation or other liability whatsoever, whether in whole or in part;

d) any other service, favour or advantage of any description whatsoever, including protection from any penalty or disability incurred or apprehended or from any action or proceedings of a disciplinary or penal nature, whether or not already instituted, and including the exercise or the forbearance from the exercise of any right or any official power or duty; and

e) any offer, undertaking or promise of any gratification within the meaning of paragraphs (a), (b), (c) and (d) above.

The PCA also expressly prohibits certain corrupt dealings by or with "agents" in relation to their "principal's affairs or business" (section 6). These terms are defined so as to cover both the public and private sectors.

There is no *de minimis* threshold.

The PCA stipulates that evidence that any such gratification is customary in any profession, trade, vocation or calling is inadmissible in any civil or criminal proceedings under the PCA.

The Penal Code (Cap 224, 2008 Rev Ed) (the "**Penal Code**") criminalises bribery of public officials (sections 161 to 165). In particular, it is a criminal offence for:

- a public servant to accept or agree to accept any gratification, other than legal remuneration, as a motive or reward in respect of doing an official act;
- a person to accept or agree to accept any gratification as a motive or reward in order to influence a public servant, by corrupt or illegal means, to do an official act;
- a person to accept any gratification as a motive or reward for exercising personal influence over a public servant to do an official act; and for
- a public servant to obtain or agree to accept anything of value, without consideration, or with inadequate consideration, from a person concerned in any proceedings or business conducted by such public servant.

The term "gratification" is not expressly defined in the Penal Code. However the explanatory notes to the relevant section stipulate that the word is not restricted to pecuniary gratifications, or to gratifications estimable in money.

Does the law apply beyond national boundaries?

Yes, both the PCA and the Penal Code apply beyond national boundaries.

The PCA expressly provides that its provisions have effect in relation to citizens of Singapore, outside as well as within Singapore. Where an offence under the PCA is committed by a citizen of Singapore in any place outside Singapore, he/she may be dealt with in respect of that offence as if it had been committed within Singapore. The PCA also expressly provides that a person who abets the commission of an offence outside Singapore in relation to the affairs or business or on behalf of a principal residing in Singapore, shall be deemed to have committed the offence.

The Penal Code provides that any person liable by law to be tried for an offence committed beyond the limits of Singapore, is to be dealt with according to the provisions of the Penal Code for such act, in the same manner as if the act had been committed within Singapore. Further, the Penal Code expressly provides that every public servant who, being a citizen or a permanent resident of Singapore, when acting or purporting to act in the course

of his employment, commits an act or omission outside Singapore that if committed in Singapore would constitute an offence under the law in force in Singapore is deemed to have committed that act or omission in Singapore.

Is there a difference between the treatment of corruption in the public and private sector and how is the public sector defined?

Domestic public official

The PCA does not define "public official", but rather makes express reference to certain types of public officials, namely a "Member of Parliament", "public body" with the power to act under written law, and also a general reference to a "person in the employment of the Government or any department thereof". The PCA also contains express prohibitions with respect to dealings with "agents" in relation to his/her "principal's affairs or business". "Agent" is defined to include a person serving the Government or under any corporation or public body. "Principal" includes the Government or a public body. Where the defendant is a public official and the gratification is paid to or received by him, there is a rebuttable presumption that where the gratification has been paid or given to or received by a public official, that it has been paid or given and received corruptly.

The Penal Code provides a broad and exhaustive definition of "public servant". Moreover, it not only covers "public servants" but also persons "expecting to be a public servant".

It is likely that a director or an employee of a State-owned enterprise would be considered to be a public official under Singapore's anti-corruption legislation.

Foreign public official

The Singapore legislation does not expressly deal with bribery of foreign public officials. However, the drafting of the PCA prohibitions is sufficiently broad so as to include bribery of foreign public officials by Singapore citizens.

Private sector

Private sector bribery is covered by the PCA but not the Penal Code. Section 5 of the PCA prohibits bribing "any person", and therefore applies to bribes to any company or individual, be it in the public sector or the private sector. As noted above, the terms "agent" and "principal", in the context of the offence of corrupt dealings with agents, cover both the public and private sectors.

How are facilitation payments treated?

There are no specific provisions or exemptions in Singapore under the PCA and Penal Code or any other law in Singapore in relation to facilitation payments. Each payment must be considered by Courts according to whether it fulfils the criteria for the offence of bribery or corruption.

The PCA expressly prohibits the offering of any gratification to a member of a public body as an inducement or reward for the official's "performing, or... expediting... the performance" of any official act.

What are the rules on tax and accounting in relation to corrupt payments?

There are no specific provisions in Singapore which permit corrupt payments to be tax deducted.

Under the Companies Act (Cap 50, 2006 Rev Ed) every company and its directors and managers are required to keep such accounting and other records to sufficiently explain the transactions and financial position of the company and enable true and fair profit and loss accounts and balance-sheets to be prepared. Such records are to be kept in such a manner so as to enable them to be conveniently and properly audited. There are penalties for non-compliance with these requirements.

Are there special rules for public procurement?

Under Section 10 of the PCA, a person who, with an intent to obtain from the government or any public body a contract for performing any work, providing any service, doing anything, or supplying any article, material or substance, offers any gratification to any person who has made a tender for the contract, as an inducement or a reward for his withdrawing that tender or who solicits or accepts any gratification as an inducement or a reward for his withdrawing a tender made by him for that contract, shall be guilty of an offence and shall be liable on conviction to a fine or to imprisonment or to both.

Furthermore, there are heavier penalties for corruption in public procurement than for private sector corruption offences (see below).

Are companies liable for the actions of their subsidiaries?

No, Singapore legislation does not expressly provide for the liability of a parent company for the actions of its subsidiary.

Although the reference to "person" is sufficiently broad under the PCA and Penal Code to cover companies, based on a review of current reported case law,

no company has been prosecuted under the PCA and/or Penal Code to date in this regard.

What are the penalties?

The penalties for offences of corruption for private and public sectors are as follows:

I. For private sector bribery:

a) Fine not exceeding SGD 100,000;

b) Imprisonment for a term not exceeding five years; or both.

II. For public sector bribery:

a) Fine not exceeding SGD 100,000;

b) Imprisonment for a term not exceeding seven years; or both.

* Contributed by Cavenagh Law LLP, our Formal Law Alliance partner in Singapore.

Slovak Republic

What is corruption?

Slovak Act No. 300/2005 Coll., the Criminal Code, as amended (the "**Slovak Criminal Code**"), sets out several corruption offences in sections 328 to 336a, including: (a) accepting bribes, (b) offering bribes, and (c) indirect bribery.

In particular, the Slovak Criminal Code prohibits:

(i) accepting or requesting a bribe, or not refusing to be bribed, directly or via an intermediary:

  (a) in order for a person to act in a way that breaches the duties under his/her employment, position or function;

  (b) in connection with procuring matters in the public interest; and

  (c) as a foreign public official in connection with the performance of his/her official duties, or in connection with exercising his/her authority, in order to enable an undue advantage to be gained or maintained;

(ii) promising, offering or providing a bribe, directly or via an intermediary:

  (a) in order for a person to act in a way that breaches the duties under his/her employment, position or function;

  (b) in connection with procuring matters in the public interest; and

  (c) to a foreign public official in connection with the performance of his/her official duties, or in connection with exercising his/her authority, in order to enable an undue advantage to be gained or maintained;

(iii) accepting or requesting a bribe, or not refusing to be bribed, directly or via an intermediary, in order to exert influence on the exercise of the authority of a person under (i)(a) above, a public official under (i)(b) above or a foreign public official under (i)(c) above, or for having done so; and

(iv) promising, offering or providing a bribe, directly or via an intermediary, to a third party to exert its influence on the exercise of the authority of a person under (ii)(a) above, a public official under (ii)(b) above or a foreign public official under (ii)(c) above, or for having done so, or promising, offering or providing a bribe to another person for this purpose.

The Slovak Criminal Code (section 131(3)) defines a "bribe" as any kind of thing or performance of a property or non-property nature to which there is no legal entitlement (e.g. gifts, hospitality and invitations to events), regardless of its value.

Does the law apply beyond national boundaries?

Yes. The provisions of the Slovak Criminal Code have particularly broad extraterritorial reach. Among others, the Slovak Criminal Code applies to (i) an act committed within the territory of the Slovak Republic even if the breach of or threat to an interest protected under the Slovak Criminal Code took place or was intended to take place abroad, and (ii) an act committed abroad if the breach of or threat to an interest protected under the Slovak Criminal Code, or at least a part of the consequence of such act, took place or was intended to take place within the territory of the Slovak Republic. The Slovak Criminal Code also applies to conduct on board a Slovak aircraft or a Slovak ship abroad.

The provisions of the Slovak Criminal Code are also applicable to the most serious criminal offences (including certain corruption offences) committed against Slovak citizens abroad.

Is there a difference between the treatment of corruption in the public and private sector and how is the public sector defined?

Yes. The Slovak Criminal Code prohibits both bribery in the private sector in general and bribery in connection with procuring matters in the public interest. However, there are two main points to be noted with respect to public sector corruption, both of which reflect the more serious nature of the offences when compared with corruption in the private sector.

The first point is the use of the term "procuring matters in the public interest", which is very broad and encompasses, among other things, the decision-making of state authorities as well as activities by which social and similar rights are satisfied. In other words, "procuring matters in the public interest" means performing all tasks whose proper, due and impartial performance is in the interests of the public or in the interests of social groups. Private corruption, on the other hand, is limited to situations where a person acts or refrains from acting, and thus breaches his/her duties resulting from his/her employment, occupation, position or function.

The other point is related to the severity of the penalties for corruption offences; the maximum term of imprisonment is higher for public sector corruption (up to fifteen years) than for private sector corruption (up to twelve years).

Certain sections of the Slovak Criminal Code refer to the exertion of influence on "public officials"; this term is defined to include the president of the Slovak

Republic, members of the Parliament of the Slovak Republic as well as the European Parliament, members of the Slovak government, judges, other persons holding office in public authority institutions, e.g. employees of the Slovak Permanent Representation to the EU and the Slovak Embassies, and local administration, etc. (section 128(1) of the Slovak Criminal Code).

Moreover, the Slovak Criminal Code contains references to the exertion of influence on "foreign public officials". Pursuant to a recent amendment to the Slovak Criminal Code, effective from 1 September 2015, the scope of this term has been broadened and includes persons:

(i) holding office in the legislative body, executive body, judicial or arbitral organs, or in other public administration body of a foreign state (including the head of a foreign state);

(ii) holding office, employed by, or working at, an international organisation or supranational organisation formed by states or other subjects of international public law in its organ or institution, or authorised to act on its behalf;

(iii) holding office, employed by, or working at, an international judicial organ or authorised to act on its behalf;

(iv) holding office in an enterprise in which a foreign state has a decisive influence,

provided that the performance of the office is connected with competence in procuring public matters and the criminal offence was committed in connection with such competence, or by abusing such person's position (section 128(2) of the Slovak Criminal Code).

How are "facilitation payments" treated?

There is no specific exemption in Slovak law for facilitation payments. Each payment is judged according to whether or not it fulfils the criteria of a corruption offence.

What are the rules on tax and accounting in relation to corrupt payments?

Section 21(1)(c) of Slovak Act No. 595/2003 Coll., on Income Tax, as amended, expressly prohibits tax deductions for the payment of bribes.

Are there special rules for public procurement?

Slovak Act No. 25/2006 Coll., on Public Procurement, as amended, expressly prohibits participation in public procurement by persons who themselves or whose statutory body[1] (or member thereof) were effectively convicted of a corruption offence.

Are companies liable for the actions of their subsidiaries?

Under the Slovak Criminal Code only an individual (not a legal entity) may be held liable for a criminal offence set out by the Slovak Criminal Code (i.e. only an individual can be an offender). However, under the concept of "quasi criminal liability" of legal entities, if an individual commits (or even only attempts) or participates in an offence in close connection with the business of a legal entity[2] (for which the individual may separately be prosecuted), the corporation may be penalized through the imposition of "protective measures" (see below).

Therefore, companies may only be liable for the actions of their subsidiaries to the extent that an individual holding a position in a subsidiary who committed a criminal offence acted in close connection with the business of the parent company.

What are the penalties?

The penalties for a corruption offence under the Slovak Criminal Code include imprisonment for a term up to 15 years and/or a monetary penalty of up to approx. EUR332,000. The actual length of the term of imprisonment and/or the amount of the monetary penalty depends, among other things, on the scale and seriousness of the offence, the amount of the bribe etc.

Under the concept of "quasi criminal liability" of legal entities the Slovak courts may impose protective measures on legal entities of (i) seizure of a monetary sum of up to EUR1,660,000, or (ii) seizure of property.

[1] "Statutory body" is a term used in Slovak law to designate a person legally authorised to act on behalf of a company in all matters.
[2] The term "close connection with the business of a legal entity" includes the commission (or attempt) of an offence by an individual, among others, as the statutory body or a manager of the legal entity, or under a power of attorney.

Spain

What is corruption?

The Criminal Code of Spain provides for two types of corruption:

(i) corruption between individuals, set out in Article 286 *bis* of the Criminal Code; and

(ii) corruption between, on the one hand, a civil servant or authority who solicits or accepts the benefit or advantage and, on the other hand, an individual who receives the solicitation from the civil servant or proposes the bribe to the civil servant. This latter type is referred to in the Spanish Criminal Code as "bribery" ("*cohecho*"), rather than "corruption" ("*corrupción*").

The relationship between the personal elements set out in both offences is assessed differently, depending on who takes the initiative, and that is also reflected in the punishment imposed, which differs depending on each case.

Corruption between individuals

The Criminal Code distinguishes between two types:

1. active corruption, which consists of promising, offering or granting an unfair benefit or advantage to another individual in order for the individual making the promise, offer or grant to obtain, in turn, a benefit for him/herself or for a third party, to the detriment of others; and
2. passive corruption, which consists of receiving, soliciting or accepting an unfair benefit or advantage, to the detriment of others.

For the purposes of both these offences both the individuals involved must be "*the executives, directors, employees or collaborators of a commercial enterprise, company, association, foundation or organisation*".

Bribery

In the case of bribery, the Criminal Code identifies the following three main types of offences:

1. Active bribery, which can be further subdivided into two types:
   1.1 Where the individual takes the initiative in the corruption, and
   1.2 Where the individual responds to the solicitation made to him/her.
2. Passive bribery in breach of inherent duties ("*cohecho pasivo propio*"): where the conduct of the civil servant or authority is sanctioned when they receive or solicit, personally or through an intermediary, gifts, favours or remuneration of any kind, or when they accept offers or promises to do one of the following:
   2.1 to commit an act, while carrying out the duties of the public office, which is contrary to the duties inherent to the post held, or
   2.2 to not carry out the duties or to unfairly delay the performance of the duties which the authority or civil servant must carry out.
3. Passive bribery in compliance with inherent duties: where the following actions by the civil servant or authority are sanctioned:
   3.1 Receiving or soliciting, personally or through an intermediary, gifts, favours or remuneration of any kind, or accepting offers or promises to carry out an act inherent to the public office or in reward for an act already performed;
   3.2 Accepting, personally or through an intermediary, a gift offered in view of the office held or duties performed, not including punishment for small gifts, considered inherent to a friendly or good neighbourly relationship.

These provisions also apply to European Union officials.

Bribery of foreign public officials

There is a separate offence in the Criminal Code for bribery of foreign public officials.

"*Those who by offering, promising or granting any undue pecuniary or other kind of benefit, corrupt or attempt to corrupt foreign civil servants or international organisations, personally or through an intermediary, for their own benefit or that of a third party, or who attend to requests in that regard, in order for them to act or abstain from acting in relation to the exercise of public functions to obtain or retain a contract, or other irregular benefit in carrying out international economic activities, shall be punished with imprisonment from two to six years...*"
(Article 445 of the Criminal Code)

For these purposes a foreign civil servant is (i) any person who holds a legislative, administrative or judicial office in a foreign country, either appointed or elected; (ii) any person who exercises a public duty for a foreign country, including a public body or a public company; and any officer or agent of an international public organisation.

Does the law apply beyond national borders?

The general rule regarding the scope of the Spanish Criminal Code is that these criminal laws are binding upon all residents of Spain and any individual who commits an unlawful act in Spanish territory. Furthermore, Article 23 of the Organic Law on the Judiciary (LOPJ) defines cases in which Spanish jurisdiction may apply, even though the offence was committed outside Spain:

[1] In this context, authority means an individual public official with authority to enforce the law and to give orders to others for that purpose (e.g., a policeman, a judge, a dean or provost of a university, a mayor of a city or town, or a Cabinet minister).

- When the offence is committed outside Spain by a Spanish citizen or a naturalised citizen of Spain, provided that: the act constitutes an offence in the place where it was committed, the injured party or the Public Prosecutor presses charges and the offender has not already been sentenced and served time for the same offence outside Spain;
- When the offence is committed outside Spain by a citizen of Spain or any other country, if interests especially relevant to the Spanish State are harmed. These interests are expressly listed and include bribery but not corruption between individuals or private parties; and
- When the offence is committed outside Spain by a citizen of Spain or any other country, if interests especially relevant to all of humanity are harmed (the principle of universal jurisdiction).

Therefore, non-Spanish citizens who have committed the offence of corruption between private parties outside Spain may not be prosecuted in Spain. If the offence is committed by a Spanish citizen, it will only be prosecuted if the act constitutes an offence in the place where it was committed and if charges have been brought by the victim or by the Public Prosecutor.

An amendment to the Spanish Criminal Code involving the addition of a new Article 286 six is currently pending approval before the Spanish Parliament. This new article would allow the offence of corruption between individuals to be prosecuted in Spain, provided that the offence was committed:

i. in Spanish territory,
ii. by a Spanish citizen or by a person whose usual residence is in Spain,
iii. by a legal entity, company, organisation, group or entity having its registered address or head office in Spain, or
iv. by an executive, director, employee or collaborator of a commercial enterprise, company, association, foundation or organisation having its registered address or head office in Spain.

Is there a difference between the treatment of corruption in the public and private sector and how is the public sector defined?

The public sector is defined as the series of administrative bodies, institutions, companies and individuals who carry out a certain activity on behalf of the State or in order for the State to operate. Until 2010, there was no difference in the treatment of corruption offences committed in the public sector versus in the private sector. However, since this amendment, cases of corruption involving the public sector are now treated differently under the Spanish Criminal Code.

As an indication of the importance of this issue to the Spanish legislator, this difference in the treatment of corruption in the two sectors is evident in terms of the extent of and manner of committing the offence of bribery, and in terms of the punishment imposed, which is more severe for bribery than for corruption between individuals.

How are "facilitation payments" treated?

The Criminal Code mentions facilitation payments in Article 420, stating that offenders will be sentenced to prison from two to four years, be fined a daily amount during 12 to 24 months and be specially barred from employment and holding public office for three to seven years.

An offence of making facilitation payments would thus be committed if a person were to offer or give (or an authority or civil servant were to receive or solicit) gifts, favours or remuneration or any kind of offer or promise to carry out an act inherent to the office of the recipient.

What are the rules on tax and accounting in relation to corrupt payments?

Tax deduction on expenses incurred as a result of making bribery payments may not be deducted from taxes. Anyone attempting to claim such a deduction would be committing an administrative tax infringement or a tax offence (in the latter case, if the amount of the attempted deduction exceeded EUR 120,000).

Furthermore, should the amount which a taxpayer has earned from a bribe become known, there is debate as to whether or not taxes are payable on this income, even if it was earned illegally. The opinion of the Spanish Supreme Court tends to be that this income is usually subject to other legal measures as a consequence of the criminal proceedings – mainly, its seizure – and that it should therefore not be taxed when its seizure has been ordered.

Are there special rules for public procurement?

Yes. The Public Sector Contracts Law, approved through the Royal Legislative Decree 3/2011, of 14 November, governs agreements for consideration, regardless of their legal status, between the bodies, organisations and entities listed in Article 3 of the above mentioned Law, as being part of the public sector. Legal entities that have been convicted of corruption offences may be debarred from tendering for public sector contracts.

Are companies liable for the actions of their subsidiaries?

According to Article 31 *bis* of the Spanish Criminal Code, "*legal entities shall be held criminally accountable for offences committed in their name or on their behalf, and to their benefit, by their legal representatives and de facto or de jure administrators*" and for "*offences*

committed when performing corporate activities on behalf of the company and in its benefit, by parties who, while subject to the authority of the legal entities mentioned in the preceding paragraph, were able to perpetrate the acts because due control was not exercised over them, in view of the specific circumstances of the case". Among the possible offences which entail this liability by the legal entity are bribery and corruption between individuals.

Organic Law 1/2015 (which came into force on 1 July 2015), amending the Criminal Code, aims to clarify what constitutes "due control", and introduced grounds for an exemption from criminal liability for legal persons able to demonstrate that they possess and have efficiently implemented a crime prevention or compliance programme which meets specified requirements.

Parent companies may be held directly legally liable for their own actions or omissions, or for the actions or omissions of their subsidiaries, according to the percentage stake held in them by the parent company and the degree to which they control the subsidiaries' decisions.

What are the penalties?

For offences involving either active or passive corruption between individuals, offenders may be sentenced to a term of imprisonment of between six months and four years, be specially barred from being active in the industry or business for between one and six years and be fined up to three times the value of the benefit or advantage obtained.

Where the offence is committed by a legal entity, it may be fined a daily amount for one to three years, if the offence entails a prison term of more than two years; and otherwise fined a daily amount for six months to two years, in other cases.

For offences involving bribery, the punishment depends on the type of offence committed. Articles 419 to 425 of the Criminal Code set out the potential sanctions as follows:

For passive corruption offences:

- Passive bribery in breach of inherent duties, that is, performing an act in violation of the duties inherent to one's post or unjustifiably failing to perform an act which the authority or civil servant should have performed, entails a prison term of three to six years, a daily fine for 12 to 24 months and special barring from employment and holding public office for seven to 12 years.
- Passive bribery in compliance with inherent duties, that is, performing acts not in breach of the duties inherent to one's post, entails a prison term of two to four years, a daily fine for 12 to 24 months and special barring from employment and holding public office for three to seven years.
- Passive bribery in compliance with inherent duties for accepting gifts offered in accordance with the post or duty, entails a prison term of six months to one year and suspension from employment and holding public office for one to three years.

For active corruption offences:

Active bribery entails the same punishment, both in terms of the imprisonment and fines corresponding to the authority or civil servant, except in cases in which the act is related to a procurement, granting or auction process tendered by the Public Administration, in which case the individual or legal entity will also be barred from obtaining grants or public aid and tax and Social Security incentives and from being awarded public sector contracts, for between three and seven years.

For cases in which a legal entity is found liable for the offence:

The legal entity will be fined a daily amount during two to five years or three to five times the benefit obtained, if the offence entails a prison term of more than five years; or fined a daily amount during one to three years or two to four times the benefit obtained, if the offence entails a prison term of two to five years; or fined a daily amount during six months to two years or three times the benefit obtained, in the rest of the cases.

In addition, the judge may also order that:

- the legal entity be wound up,
- its activities be suspended for not more than five years,
- its premises and establishments be closed for not more than five years,
- the court intervene in the entity's administration, in order to safeguard the rights of the employees or creditors, for not more than five years, and
- the entity be prohibited from carrying out, in the future, the activity during the exercise of which the offence was committed, concealed or favoured.

The exonerating circumstances established in Article 20 of the Spanish Criminal Code may apply to these offences, as well as the exemption set forth in Article 426, in cases where the individual who has accepted the solicitation for a gift or remuneration reports this fact to the authorities.

Turkey*

What is corruption?

The principal offences of corruption are set out in the Turkish Criminal Code (Law No. 5237). Article 252 of the Turkish Criminal Code defines bribery as offering or promising an undue benefit, directly or through a third party, to a public official for taking or failing to take an action in connection with the duties carried out by such public official.

"Public official" is defined widely; any individual who is involved in a public function continuously, temporarily or provisionally can be considered as a public official (i.e. whether appointed, elected or otherwise involved).

The offence also applies to benefits offered or promised to individuals, whether or not they are public officials, acting in the name of the following entities ("Similar Entities"):

- professional organisations (e.g. professional authorities, chambers of commerce, unions, trade exchanges etc.);
- corporations that have public institution/entity shareholders or professional organisation shareholders;
- foundations that carry out their activities within the public institutions/entities or professional organisations qualified as the same;
- associations incorporated with the aim of public benefit (*kamu yararına çalışan dernekler*);
- co-operatives; and
- publicly traded joint stock companies.

In line with the OECD Convention, there is also a specific offence of bribing a foreign public official. The Criminal Code (Article 252(9)) qualifies the following as foreign public officials: (i) public officials elected or designated in a foreign country; (ii) judges, jury members and other officers working for international or supranational or foreign state courts; (iii) international or supranational parliament members; (iv) those who conduct public transactions for a foreign country, including public bodies and public enterprises; (v) citizen or foreigner arbitrators appointed within the scope of arbitration method used for the purpose of settlement of a legal dispute; and (vi) officers or representatives of international or supranational organisations incorporated based on an international agreement.

Turkish jurisprudence's interpretation of the concept of "benefit" is wide and extensive. Any economic or social benefit that is provided for the purpose of enticing a public officer to perform or not to perform his/her official duties is considered a benefit within the scope of the bribery offence.

It is not necessary to prove that the benefit was actually obtained or retained. In working out whether a benefit is not legitimately due for the purpose of the bribery offence, the following factors are disregarded:

- the fact that the benefit may be, or be perceived to be customary, in the circumstances;
- the value of the benefit; and
- any official tolerance of the benefit.

There is also a specific offence of corruption in connection with public tenders (*ihaleye fesat karıştırma*). The Criminal Code (Article 235) defines this offence as engaging in mischief (defined as certain fraudulent or corrupt acts) during (i) tenders relating to the purchase, sale or rental of goods and services on behalf of public institutions or corporations; or (ii) construction tenders.

Does the law apply beyond national boundaries?

Yes. The anti-bribery provisions of the Turkish Criminal Code apply to activities outside Turkey if (i) they are committed by a Turkish national, or (ii) they involve bribery of a Turkish public official, in both cases if such activities relate to a matter to which Turkey, a legal entity incorporated in accordance with the laws of Turkey, a Turkish public entity or a Turkish citizen is a party.

Is there a difference between the treatment of corruption in the public and private sector and how is the public sector defined?

Under the Turkish Criminal Code, the offence of bribery is limited to bribery of public officials, and those acting in the name of the Similar Entities as well as members of these entities described above.

In the public sector, granting a benefit to a public official will constitute a criminal offence on the basis of the principle that this will influence the dealing of a public official in favour of a person in an illegitimate manner. The bribing and the bribed parties are considered to be committing the same offence under the Turkish Criminal Code. These offences can only be prosecuted if there is a demand for prosecution, unless the relevant public prosecutor considers *ex officio* that the case should be prosecuted.

How are "facilitation payments" treated?

Article 250 of the Turkish Criminal Code specifically criminalises the receipt of payments by public officials for the purpose of expediting the performance of a routine governmental action. However, it does not provide for criminal liability for the person making such a payment.

What are the rules on tax and accounting in relation to corrupt payments?

Under Turkish tax laws, expenses are not tax-deductible if they were made in connection with (international or domestic) criminal or administrative offences, in particular, corruption offences. Claiming tax deductions for such payments may lead to criminal liability.

False or fraudulent accounting in connection with corruption offences may, under certain circumstances, lead to criminal liability as well.

Are there special rules for public procurement?

Pursuant to Article 17 of Public Procurement Law (Law No. 4734), conducting or attempting to conduct the procurement process by means of fraudulent and corrupt acts, promises, threats, unlawful influence, undue interest, agreement, malversation, bribery or other actions, is prohibited in a public tender process.

In addition to penalties that may be imposed by the court under the Turkish Criminal Code, Articles 58 and 59 of Public Procurement Law (Law No. 4734) provide that persons involved in such prohibited activities shall be excluded from participation in the procurement proceedings (tenders) of all public institutions and authorities that are included within the scope of Public Procurement Law (Law No. 4734) by a court judgment, for a period of at least one year and up to three years. The prohibition judgement shall become effective on the date of its publication in the Official Gazette.

Are companies liable for the actions of their subsidiaries?

The Turkish Criminal Code and the Turkish Commercial Code (Law No. 6102) provide that directors or board members of commercial companies shall be liable for the conduct of their employees, agents and officers if they expressly or tacitly authorised or permitted the commission of the offences. Additionally, companies also have financial liability for offences committed by their directors, employees or agents.

In addition, Article 43/A of the Misdemeanours Law (Law No 5326) stipulates that a private legal person may be fined in respect of a bribery offence committed by: (i) a representative of the legal person; (ii) an entity that is an organ of the legal person; or (iii) a person who is not a representative of the private legal person but who has duties within the commercial activities of such legal person, in each case, for the benefit of the relevant private legal person.

What are the penalties?

The maximum penalty for a bribery offence under the Turkish Criminal Code is 12 years imprisonment (for both the receiver and the payer of the bribe).

This penalty may also be imposed on:

- a third party (whether or not a public official) who is indirectly provided with the benefit (e.g. a relative of the public official etc.) or who accepts such benefit; and
- a person (whether or not a public official) who acts as an intermediary in the bribery.

The penalty shall be halved where a benefit is requested by a public official from a person and such request is not accepted, or vice versa; whereas the penalty for bribery shall be increased (from one third up to one half) if a party to the bribe is a judicial officer, arbitral judge, court appointed expert, notary public, or (sworn) chartered accountant.

The penalty for a corruption offence relating to tenders is imprisonment of between five to 12 years. This penalty may be increased by one half where damage or loss is suffered by a public institution or corporation as a result of the offence. Additionally, as above, persons are excluded from public tenders for a specified period.

Where an organ or representative of a legal entity, or a person performing duties for a legal entity, commits a corruption or bid-rigging offence for the benefit of the legal entity, the legal entity may be subject to an administrative fine of between TRY10,000 and TRY 2 million. In addition, where a bribe has led to a benefit for a legal person, further measures may be imposed, e.g. a licence or authorisation may be revoked, and assets or benefits may be confiscated.

* Nothing in this Guide should be interpreted or construed as legal advice in relation to the laws of Turkey. Turkish law advice is provided based on a co-operation agreement between Clifford Chance and Yegin Ciftci Attorney Partnership

Ukraine

What is corruption?

The offences relating to bribery and corruption are contained in several legislative acts in Ukraine. The relevant acts include the Law of Ukraine "On Preventing Corruption" No. 1700-VII dated 14 October 2014 (the "**Anti-Corruption Law**"), the Criminal Code of Ukraine No. 2341-III dated 5 April 2001 (the "**Criminal Code**") and the Code of Ukraine on Administrative Offences No. 8073-X dated 7 December 1984 (the "**Code of Administrative Offences**").

The corruption offences cover various actions committed by public officials, company officers and individuals which include the promise, offering or giving of an undue advantage to public officials or company officers. Undue advantage can consist of cash or other assets (including intangibles), as well as the provision of services or other benefits.

Bribery

Active bribery

An individual may be held criminally liable for promising, offering, and/or giving an undue advantage to a public official or a company officer if such undue advantage was promised, offered and/or given to induce a public official or company officer to act or refrain from acting in the exercise of his or her official duties.

Passive bribery

Both public officials and company officers may be held criminally liable for receiving any undue advantage or accepting an offer of such advantage in return for the public official or company officer acting or refraining from acting in the exercise of his or her official duties.

Illicit enrichment

In addition to the above, if any public official or company officer receives any undue advantage and there is no intent to induce the public official or company officer to exercise his or her official duties in a particular manner, this would still constitute an offence of illicit enrichment in Ukraine.

Trading in influence

Active trading in influence

It is a criminal offence to promise, or give an undue advantage to any person who offers or agrees to influence any public official in his or her decision making, or any third party designated by such person.

Passive trading in influence

Receiving or soliciting any undue advantage from any person in return for agreeing to exert influence over any public official is also considered a criminal offence in Ukraine.

Other related corrupt acts

Extortion

If a public official elicits any promise, offering, giving or receiving of an undue advantage from someone with the intention of later reporting that person, the public official commits a crime of extortion (so-called "provocation of a bribe").

Undue advantage to relatives

Under Ukrainian law it does not matter whether a public official or a company officer receives the undue advantage or his or her relatives. Either is considered a criminal offence.

Failure to react to corrupt activities

If a public official or a company officer becomes aware of any corrupt acts and fails to notify the relevant state authorities (for public officials) or management and compliance officer of the company (for company officers), this also constitutes an administrative offence under the Code of Administrative Offences.

Does the law apply beyond national boundaries?

Yes. The Criminal Code applies to offences committed abroad by Ukrainian citizens and stateless persons permanently residing in Ukraine, as well as to corrupt acts partially committed in Ukraine (e.g., in cases where a corrupt payment is made outside Ukraine but relates to an act which occurs in Ukraine) by foreigners and stateless persons not residing permanently in Ukraine. Ukrainian criminal law also applies to criminal conduct which occurs on board a Ukraine registered aircraft or vessel (with certain reservations).

Is there a difference between the treatment of corruption in the public and private sector and how is the public sector defined?

The Ukrainian anti-corruption laws apply equally to the public and private sectors by imposing restrictions on corrupt acts with the participation of a wide range of individuals, including officers of private companies.

In the public sector, the anti-corruption restrictions apply to:

- officials of state and local government authorities (e.g., members of Parliament, deputies of local councils, ministers, judges and other public officials);
- individuals who render public services (e.g., public notaries, auditors, receivers in bankruptcy); and

- officers of public legal entities (e.g., officers of state-owned enterprises and public universities).

In the private sector, the restrictions apply primarily to officers of legal entities. We note that not all employees of legal entities are considered officers. To be an officer an employee should have:

- organisational and regulatory powers (i.e., be entitled to manage other employees of the entity and be responsible for some field of work); or
- administrative and asset management powers (i.e., be entitled to manage and/or dispose of assets).

The major difference between the anti-corruption regulations in the public and private sectors is that penalties applicable to corrupt activities involving public officials are heavier than those involving company officers.

How are facilitation payments treated?

There are no exemptions under Ukrainian law for facilitation payments and in most cases such payments would constitute a corruption offence.

What are the rules on tax and accounting in relation to corrupt payments?

The laws of Ukraine require that every company should keep financial records that correctly record and explain its transactions, financial position and performance and so technically such payments should be recorded in the accounts of the company. Under Ukrainian law payments are not tax deductible if they were made in furtherance of illegal acts, including corruption offences. If such expenses are deducted from taxable income, this may, under certain circumstances, lead to further criminal liability of the company's officers for tax evasion.

Are there special rules for public procurement?

The Ukrainian anti-corruption laws apply to the public procurement procedures.

In accordance with Article 67 of the Anti-Corruption Law, any agreement concluded as a result of corrupt activities is considered as null and void.

Are companies liable for the actions of their subsidiaries?

Under Ukrainian law parent companies are legally independent from their subsidiaries and as such are not liable for any actions taken by the subsidiaries, except in certain limited cases relating to the insolvency of a subsidiary, when a parent company can be liable.

At the same time, the Anti-Corruption Law makes shareholders (both individuals and legal entities) responsible for monitoring corruption risks and taking measures to address such risks. It is currently unclear what type of liability, if any, can be imposed on shareholders for failure to perform this obligation.

What are the penalties?

Penalties for corruption offences vary significantly.

For individuals such penalties include:

- fines of up to UAH 25,500 (approximately EUR 1,100);
- the confiscation of property;
- the debarment from certain positions and types of activities for up to three years;
- the restriction of freedom for a period of up to five years; and/or
- imprisonment for a period of up to 12 years.

For companies:

- If a company officer or any of the company's authorised representatives commits a corruption offence and the company receives an undue advantage, a court may impose on the company a fine of up to the double amount of the undue advantage.
- If a company does not receive any undue advantage, or its amount cannot be assessed, a fine of up to UAH 850,000 (approximately EUR 36,200) may be imposed on it.
- In limited cases (e.g., where misuse of office results in unlawful acquisition of firearms) a company which benefits from a corruption offence may be subject to the confiscation of property and mandatory liquidation.

United Kingdom

What is corruption?

The Bribery Act 2010, which came into force on 1 July 2011, creates new statutory offences of bribing and being bribed. The Bribery Act offences of bribing another person are set out in section 1.

"(1) A person ("P") is guilty of an offence if either of the following cases applies.

(2) Case 1 is where:

(a) P offers, promises or gives a financial or other advantage to another person, and

(b) P intends the advantage:

(i) to induce a person to perform improperly a relevant function or activity, or

(ii) to reward a person for the improper performance of such a function or activity.

(3) Case 2 is where:

(a) P offers, promises or gives a financial or other advantage to another person, and

(b) P knows or believes that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity.

(4) In case 1 it does not matter whether the person to whom the advantage is offered, promised or given is the same person who is to perform or has performed, the function or activity concerned" (section 1, Bribery Act).

A person will be performing a function or activity if he is performing a function of a public nature, or an activity connected with a business, or if the activity is performed in the course of his employment or by or on behalf of a body of persons (whether corporate or unincorporate). It will be performed "improperly" where the person performing the function or activity is in breach of an expectation:

(i) that it will be performed in good faith;

(ii) that it will be performed impartially; or

(iii) as to the manner in which, or the reasons for which, the function or activity will be performed that arises from the position of trust the person is in.

Section 2 of the Bribery Act sets out the offences relating to being bribed. It makes it an offence for a person to request, agree to receive or accept a financial or other advantage in relation to, or where acceptance is, the improper performance of a relevant function or activity (using the same definition of improper performance of a function as for the section 1 offence). It is also an offence to perform a relevant function improperly, or to request or acquiesce in improper performance by someone else, where a financial or other advantage is involved.

Does the law apply beyond national boundaries?

Yes. Even where no part of an offence takes place within the UK, a person may be prosecuted in the UK if that person has "a close connection" with the UK. A person has a close connection with the UK if he is:

"*(a) a British citizen,*

(b) a British overseas territories citizen,

(c) a British National (Overseas),

(d) a British Overseas citizen,

(e) a person who under the British Nationality Act 1981 was a British subject,

(f) a British protected person within the meaning of that Act,

(g) an individual ordinarily resident in the United Kingdom,

(h) a body incorporated under the law of any part of the United Kingdom,

(i) a Scottish partnership" (section 12(4), Bribery Act).

In addition, under section 7, a commercial organisation may be prosecuted in the UK for failing to prevent bribery, even where no part of the underlying bribery offence (see below) took place in the UK, where the commercial organisation is incorporated in the UK (wherever it carries on business), or where it is incorporated outside the UK but carries on a business, or part of a business, in the UK.

Is there a difference between the treatment of corruption in the public and private sector and how is the public sector defined?

The offences of bribing and being bribed apply equally to bribery in the public and the private sector. Section 6 of the Bribery Act sets out a separate offence of bribing a foreign public official.

This offence has four elements:

(i) a person, directly or through a third party, offers, promises or gives any financial or other advantage to a foreign public official (or to another person at the official's request or with his assent);

(ii) the person intends to influence the foreign public official in his capacity as such;

(iii) the person intends to obtain or retain business, or an advantage in the conduct of business; and

(iv) the official is neither permitted nor required by written law to be influenced in

his capacity as a foreign public official by the offer, promise or gift.

Foreign public official is defined as an individual who:

"*(a) holds a legislative, administrative or judicial position of any kind, whether appointed or elected, of a country or territory outside the United Kingdom (or any subdivision of such a country or territory),*

(b) exercises a public function:

(i) for or on behalf of a country or territory outside the United Kingdom (or any subdivision of such a country or territory), or

(ii) for any public agency or public enterprise of that country or territory (or subdivision), or

(c) is an official or agent of a public international organisation."

How are "facilitation payments" treated?

There is no exemption in UK law for facilitation payments, and there is a high risk that such payments will fall within the statutory definition of a bribery offence. The Serious Fraud Office website states that "[a] facilitation payment is a type of bribe and should be seen as such". Prosecution will be more likely, however, where such payments are systemic.[1]

What are the rules on tax and accounting in relation to corrupt payments?

Section 1304, Corporation Tax Act 2009 (an Act which restates, with minor changes, previous legislation on corporation tax) provides that crime-related payments may not be deducted when calculating income for corporation tax purposes. This means that corrupt payments, whether made in the UK, or overseas, are not tax deductible. It is also a general rule (section 1298, Corporation Tax Act 2009) that expenses incurred by companies in providing business entertainment or gifts may not be deducted for corporation tax purposes (subject to certain limited exceptions). Company legislation requires every company to keep accurate accounting records. False or fraudulent accounting is an offence under the Theft Act 1968. Companies must have an external audit unless they fall within an exemption. Listed companies are subject to additional corporate governance provisions.

Are there special rules for public procurement?

Regulations[2] implementing EU public procurement Directives[3] require contracting authorities to treat as ineligible any bidders they know to have been convicted of corruption or bribery. The Bribery Act 2010 (Consequential Amendments) Order 2011 makes the section 1 offence and the section 6 offence (of the Bribery Act) underlying offences requiring rejection of a contractor bidding for a public sector contract.

However, reflecting the fact that the corporate offence entails a failure to act, rather than a criminal intent, companies convicted of the section 7 offence of failing to prevent bribery will be subject to discretionary exclusion rather than the mandatory ban.

Are companies liable for the actions of their subsidiaries?

Section 7 of the Bribery Act makes it an offence for a commercial organisation to fail to prevent bribery.

"*(1) A relevant commercial organisation ("C") is guilty of an offence under this section if a person ("A") associated with C bribes another person intending:*

(a) to obtain or retain business for C, or

(b) to obtain or retain an advantage in the conduct of business for C.

(2) But it is a defence for C to prove that C had in place adequate procedures designed to prevent persons associated with C from undertaking such conduct."

Where a subsidiary has committed an offence under section 1 or section 6, the parent company will be liable where the subsidiary was performing services for or on behalf of the company (this is the test for whether a person is "associated"), and where the bribery was intended to obtain business or an advantage in the conduct of business for the company, unless it has adequate procedures in place.

Statutory guidance on the adequate procedures companies are expected to have in place and which, if implemented will serve as a defence to the section 7 offence, was published in March 2011 and is available online at the following link: http://www.justice.gov.uk/guidance/docs/bribery-act-2010-guidance.pdf

What are the penalties?

The maximum penalty under the Bribery Act is imprisonment for a term not

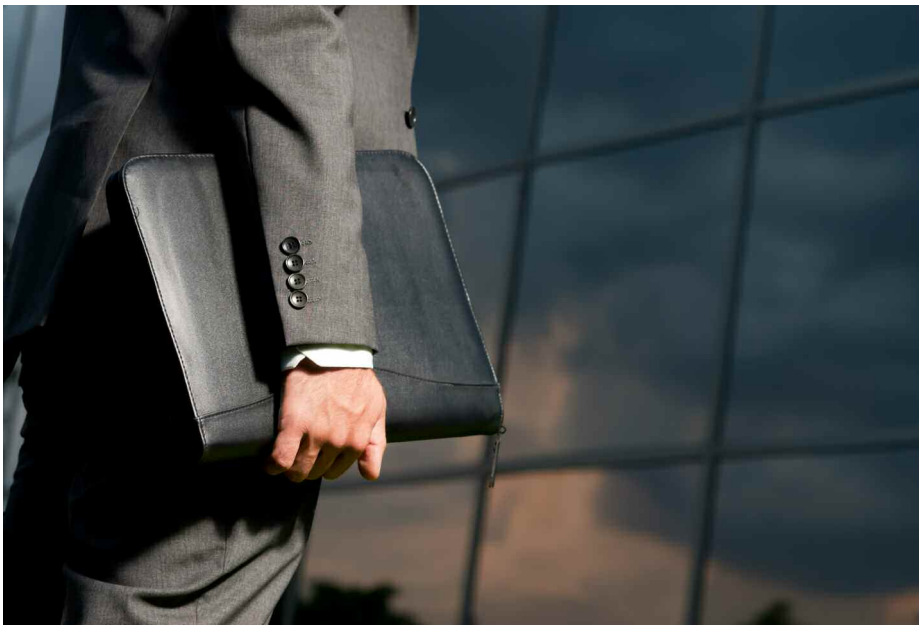
[1] Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions, 30 March 2011.
[2] Public Contracts Regulations S1 2015/102, Utilities Contracts Regulations S1 2006/6, as amended.
[3] Directive on public procurement (2014/24/EU) and Directive on procurement in the utilities sector (2014/25/EU).

exceeding ten years or a fine, with no upper limit, or both.

Upon conviction, the offender may be ordered to pay a sum equal to the "benefit" received from the commission of the offence. A confiscation order is also enforceable against property in the possession of third parties who have received a gift from the defendant, up to the value of the gift. The court may also issue a restraint order when criminal proceedings have been or are about to be instituted to prevent dissipation of assets; this may remain in force until a confiscation order is made and fully satisfied.

Persons convicted of corruption are excluded from bidding for public sector contracts, and contracts obtained through corruption may be set aside.

The Financial Conduct Authority also has powers to intervene or discipline FCA regulated firms, if they have fallen short of the FCA's requirements: this could include, e.g., a failure to have effective anti-corruption procedures in place.



United States

What is corruption?

It is a crime under US law to bribe both domestic and non-US government officials, and to engage in private commercial bribery. Bribery, however, falls under several distinct federal and state criminal statutes. In general, prohibited conduct involves paying, offering, attempting or promising to pay, public officials improperly to influence their official acts, or, in the private context, influencing the conduct of an employee, agent, or fiduciary in relation to his employer's or principal's affairs, without consent of the employer or principal. US law also generally recognises the concept of aiding and abetting a violation and conspiring to engage in violative conduct as separate criminal offences.

Non-US Government Officials

The Foreign Corrupt Practices Act of 1977, as amended ("**FCPA**"), 15 U.S.C. sections 78dd-1, et seq., in general terms prohibits certain parties from making a payment, promise to pay, or an authorisation of a payment, or the provision of anything of value, directly or indirectly, to a non-US government official to improperly influence that official or to secure an improper advantage. The statute is enforced by both the US Department of Justice ("**DOJ**") and the US Securities and Exchange Commission ("**SEC**"), which has civil jurisdiction over certain companies and individuals.

The FCPA prohibits US "issuers"[1], "domestic concerns"[2], US individuals, and any person acting within the United States, from using the instrumentalities of interstate commerce in furtherance of:

"*[A]n offer, payment, promise to pay, or authorisation of the payment of any money, or offer, gift, promise to give, or authorisation of the giving of anything of value to:*

(1) any foreign official for purposes of:

(A)(i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or

(B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality, in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person;

in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person;

(2) any foreign political party or official thereof or any candidate for foreign political office for purposes of:

(A) (i) influencing any act or decision of such party, official, or candidate in its or his official capacity, (ii) inducing such party, official, or candidate to do or omit to do an act in violation of the lawful duty of such party, official, or candidate, or (iii) securing any improper advantage; or

(B) inducing such party, official, or candidate to use its or his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person; or

(3) any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office, for purposes of:

(A) (i) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, (ii) inducing such foreign official, political party, party official, or candidate to do or omit to do any act in violation of the lawful duty of such foreign official, political party, party official, or candidate, or (iii) securing any improper advantage; or

(B) inducing such foreign official, political party, party official, or candidate to use his or its influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person"
(15 U.S.C. 78dd-1(a)(1)-(3)).

US Government Officials

There are a number of US federal criminal statutes that address various iterations of domestic federal public corruption. The primary domestic public bribery statute, 18 U.S.C. section 201, criminalises bribery of US federal public officials. Similar to the FCPA, the statute generally prohibits payments, offers and promises to make

[1] An "issuer" is defined as any company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 ("Exchange Act") or that files reports with the SEC under section 15(d) of the Exchange Act. 15 U.S.C. section 78dd-1(a).

[2] A "domestic concern" is defined as any individual who is a citizen, national, or resident of the United States, or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States, or a territory, possession, or commonwealth of the United States. 15 U.S.C. section 78dd-2(h)(1)(A)-(B).

payments intended improperly to influence an official act. Unlike the FCPA, however, the statute also applies to the corrupt official. Specifically, the statute imposes criminal penalties on anyone who:

"*(1) directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent:*

(A) to influence any official act; or

(B) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(C) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of the lawful duty of such official or person;

(2) being a public official or person selected to be a public official, directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for:

(A) being influenced in the performance of any official act;

(B) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(C) being induced to do or omit to do any act in violation of the official duty of such official or person;

(3) directly or indirectly, corruptly gives, offers, or promises anything of value to any person, or offers or promises such person to give anything of value to any other person or entity, with intent to influence the testimony under oath or affirmation of such first-mentioned person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorised by the laws of the United States to hear evidence or take testimony, or with intent to influence such person to absent himself therefrom;
(4) directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity in return for being influenced in testimony under oath or affirmation as a witness upon any such trial, hearing, or other proceeding, or in return for absenting himself therefrom; shall be fined under this title or not more than three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than 15 years, or both, and may be disqualified from holding any office of honour, trust, or profit under the United States" (18 U.S.C. section 201(b)(1)-(4)).

Local Government Officials

Bribery of state and local public officials is prohibited by individual state law. For example, California Penal Law section 67 provides:

"Every person who gives or offers any bribe to any executive officer in this state, with intent to influence him in respect to any act, decision, vote, opinion, or other proceeding as such officer, is punishable by imprisonment in the state prison for two, three or four years, and is disqualified from holding any office in this state."

Private Commercial Bribery

Private commercial bribery primarily is a matter of individual state law. Most states have enacted individual commercial bribery statutes that render it a crime for a person to bribe employees of private businesses or for an employee to accept such a bribe. For example, New York Penal Law prohibits conferring a benefit upon an agent or fiduciary without the consent of the latter's principal, with the intent to influence his conduct in relation to his principal's affairs. (N.Y. Penal Law section 180.00).

An individual who commits an act in violation of any state's anti-bribery law, including bribery of local government officials and private commercial bribery, also may be liable under the federal Travel Act (18 U.S.C. section 1952) or the federal mail and wire fraud statutes (18 U.S.C. sections 1341 and 1343). The Travel Act makes it a crime to travel in interstate commerce or use the mail or any interstate facility with the intent to commit bribery under the law of the state in which the act was committed. Similarly, the federal mail and wire fraud statutes generally prohibit the use of the mail or other instrumentalities of US commerce in furtherance of a payment in violation of a state anti-bribery law.

Does the law apply beyond national boundaries?

Yes. The FCPA's anti-bribery prohibitions have broad extraterritorial reach. The prohibitions apply to violative acts by issuers, domestic concerns, and their agents and employees that occur entirely outside US territory, and acts by any US citizen or resident, wherever they occur. In addition, any person (including foreign companies or persons) may be liable under the FCPA if an act in furtherance of a prohibited bribe, including, for example, a single telephone call, occurs within the United States.

Is there a difference between the treatment of corruption in the public and private sector and how is the public sector defined?

Yes. Private commercial bribery primarily is covered at the individual state level, although the federal Travel Act and certain other federal criminal statutes may apply derivatively. Federal and non-US public corruption is governed by federal statute.

As noted above, there are separate statutes prohibiting bribery of non-US government officials, US federal government officials, and local government officials, respectively. The FCPA specifically applies to corruption involving any "foreign official", defined under the FCPA as:

> "*any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organisation, or any person acting in an official capacity for or on behalf of any such governmental, department, agency, or instrumentality, or for or on behalf of any such public international organisation.*" (15 U.S.C. section 78dd-1(f)(1)(A))

The term "foreign official" has been interpreted broadly to include officials of government-owned commercial enterprises, even if the individual would not be considered a government official under the relevant local law.

Under the federal domestic public bribery statute, a "public official" is defined to include the following:

"*Member of Congress, Delegate, or Resident Commissioner, either before or after such official has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror*" (18 U.S.C. section 201(a)(1)).

In general, the state bribery statutes apply to bribery of public servants, including any public officer or employee of the state or of any political subdivision thereof or of any governmental instrumentality within the state, or any person exercising the functions of any such public officer or employee. The term public servant usually includes a person who has been elected or designated to become a public servant.

How are "facilitation payments" treated?

The FCPA has an express exception for facilitation or expediting payments – relatively insignificant payments made to facilitate or expedite performance of a "routine governmental action". Routine governmental actions do not include "any decision by a foreign official whether, or on what terms, to award new business to or to continue business with a particular party, or any action taken by a foreign official involved in the decision-making process to encourage a decision to award new business to or continue business with a particular party". (15 U.S.C. section 78dd-1(f)(3)(B) and section 78dd-2(h)(4)(B)).

What are the rules on tax and accounting in relation to corrupt payments?

The US Internal Revenue Code, 26 I.R.C. section 162(c), precludes any tax deduction for a payment to a foreign government official or employee that is unlawful under the FCPA.

The accounting provisions of the FCPA require US issuers to "make and keep books, records, and accounts, which, in

reasonable detail, accurately and fairly reflect the transactions and dispositions" of assets. (15 U.S.C. section 78m(b)(2)(A)). Issuers further are required to devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that, among other things, all transactions are recorded in a way that maintains accountability for assets. (15 U.S.C. section 78m(b)(2)(B)(ii)). In this regard, issuers that have been charged with making prohibited payments in violation of the FCPA also have been charged with failing to properly record the payments on their books and records as a bribe and for failure to maintain adequate internal controls to detect and prevent illicit payments.

Are there special rules for public procurement?

The Federal Acquisition Regulations ("FAR"), which comprise the extensive federal regulatory framework for US government procurement, provide for the suspension or debarment of a contractor or subcontractor from continuing to do business with the US Government if it has engaged in certain improper conduct, including the commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, or receiving stolen property (48 C.F.R. section 9.406-2(a)(3)).

Are companies liable for the actions of their subsidiaries?

Under US law, parent companies can be held liable for the violative acts of their non-US affiliates if, for example, they are found to have known of, or to have authorised, the prohibited payment. Knowledge, for these purposes, includes circumstances constituting wilful blindness toward, and conscious disregard of, the affiliate's prohibited conduct.

What are the penalties?

Under the FCPA, companies can be subject to a criminal fine of up to USD 2,000,000 per bribery violation and as much as USD 25,000,000 for deliberately misrecording in books and records. Individuals are subject to criminal fines of up to USD 250,000 and imprisonment of up to five years per bribery violation and USD 5,000,000 and 20 years' imprisonment for deliberately misrecording in books and records. Also, under the Alternative Fines Act, courts may impose significantly higher fines than those provided for under the FCPA (18 U.S.C. section 3571 (d)).The SEC also may impose civil sanctions for violations of the FCPA within its jurisdiction, including fines, disgorgement of profits, and prejudgment interest.

Under the US domestic public bribery statute, companies and individuals may be fined for USD 20,000 or up to three times the monetary equivalent of the bribe (whichever is greater), and, in the case of individuals, imprisoned for up to 15 years.

Penalties for state bribery statutes differ from state to state. For example, depending on the circumstances, an individual in New York may be imprisoned for up to 25 years for a bribery conviction.

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