



**C L I F F O R D**  
**C H A N C E**

A Guide to Anti-Corruption Legislation  
in Asia Pacific 4<sup>th</sup> Edition

# Clifford Chance's Asia Pacific Anti-Corruption Group

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Clifford Chance's extensive on-the-ground anti-corruption team in Asia Pacific combines litigation, dispute resolution, compliance and corporate specialists. Our teams regularly advise on a range of issues including upstream (risk management and front-line compliance, advisory, M&A due diligence, and in-house training workshops) and downstream (investigations, crisis management, remedial actions, and defence work) legal support.

The firm's regional offering continues to expand, with experienced white collar and regulatory lawyers in each of our Asia Pacific offices, including Australia, Singapore, Hong Kong, PRC, South Korea and Japan, as well as a number of UK and US-qualified lawyers who are experts on the UK Bribery Act and US Foreign Corrupt Practices Act (FCPA). We also benefit from extensive resources throughout our global network with highly recognised capabilities in the US (FCPA practitioners), London (UK Bribery Act), Europe and the Middle East, and are able to manage multi-jurisdictional and complex anti-corruption enforcement risks.

Our anti-corruption team in Asia Pacific is led by Wendy Wysong, a specialist in white collar crime and a former US federal prosecutor, with expertise in US corruption laws, export controls, and economic sanctions and experience managing corruption risks in multiple jurisdictions. Wendy leads the group while maintaining offices in Hong Kong and Washington, DC.



## FOREWORD

by Wendy Wysong

Clifford Chance is pleased to provide the latest edition of our Guide to Anti-Corruption Legislation in Asia Pacific. Our lawyers continually strive to provide the most up-to-date guidance to help you comply with the anti-corruption laws and regulations in the countries of Asia Pacific. Compliance with the local laws of the countries in which you operate is equally as important as compliance with extraterritorial laws, such as the US FCPA and the UK Bribery Act.

As this Guide makes clear, Asia Pacific countries vary in their anti-corruption legislation and in their enforcement practices. There are different standards for criminal enforcement and civil liability in each of the jurisdictions that should be taken into account when developing your anti-corruption compliance programme. For example, countries define bribery differently and vary in how they view facilitation payments. Some countries provide exemptions for local customs and social or religious practices, whilst others implement a *de minimis* threshold for liability. If your programme does not encompass local standards, you risk running foul of local laws and triggering an enforcement action. These local enforcement actions can carry significant penalties, but perhaps more concerning, they draw the attention of international law enforcement authorities. Consequently, a company can find itself fighting multiple cross-border anti-corruption enforcement actions simultaneously rather than a single local prosecution.

It is our hope that the Clifford Chance Guide to Anti-Corruption Legislation in Asia Pacific will assist you in understanding the local laws that may apply to your company's operations. A company committed to compliance should think globally, but also act locally.

# Introduction

# Introduction

The purpose of this Guide is to provide an up-to-date overview of the anti-corruption regimes in Asia Pacific. Each section features a summary of the key pieces of local legislation and provides guidance on how businesses operating in each of the featured countries should best deal with anti-corruption compliance.

Given their extended extraterritorial effect and possible implications for international businesses and individuals operating in Asia Pacific, we have also included in annexures 1 and 2 the main features of the US FCPA and the UK Bribery Act

Corruption is a global phenomenon which presents an increasingly significant risk in Asia Pacific. Contracting with intermediaries and agents, providing corporate hospitality, giving charitable donations, hiring employees, dealing with State-owned enterprises, starting up operations abroad, or just carrying out daily business, all raise anti-corruption risks. 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. Maybe a customs official will demand an “expediting 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 obviously illegal everywhere in Asia Pacific, and all the countries included in this handbook (except Taiwan) have signed the United Nations Convention Against Corruption. As the global fight against corruption gains ever greater prominence,

countries in Asia Pacific have taken increasingly proactive steps to increase awareness of corruption, strengthen their anti-corruption frameworks, and improve cooperation with other regional and worldwide enforcement authorities.

However, what constitutes corruption still varies from jurisdiction to jurisdiction and significant differences remain, causing headaches for multinationals seeking to implement a global anti-corruption policy. For instance, private sector bribery is expressly criminalised in more and more countries, including Hong Kong, Singapore, the PRC, and in Malaysia, but not in Japan, Vietnam, India or Indonesia. Facilitation payments are exempt in Australia and in South Korea under certain conditions but not in other countries. Giving a bribe to a foreign public official is a criminal offence in Taiwan and Thailand but not in the Philippines. Such discrepancies amplify the murky grey area between acceptable corporate behaviour and corruption for companies doing business in Asia Pacific.

This Guide, based on contributions from Clifford Chance’s regional network in Asia Pacific as well as local partner firms, sets out the key elements of the bribery offences in each jurisdiction, looks at how the offences are treated in relation to intermediaries, private sector bribery, facilitation payments, gifts and hospitality, extraterritorial applicability, and identifies key developments in enforcement trends.

This Guide does not purport to be comprehensive or constitute any legal advice. It is only a guide. The information and the laws referred to are correct as at October 2015 but may change quickly. If you would like advice or further information on anything contained in this Guide, please contact Clifford Chance. This handbook is copyrighted material. No copying, distribution, publishing or other restricted use of this guidebook is permitted without the written consent of Clifford Chance.

# Contents

# Contents

Comparison table	9
Anti-corruption legislation in the People's Republic of China	11
Anti-corruption legislation in Hong Kong	19
Anti-corruption legislation in Japan	25
Anti-corruption legislation in Singapore	31
Anti-corruption legislation in Australia	37
Anti-corruption legislation in Thailand	41
Anti-corruption legislation in South Korea	49
Anti-corruption legislation in Indonesia	57
Anti-corruption legislation in Vietnam	63
Anti-corruption legislation in Malaysia	69
Anti-corruption legislation in Taiwan	75
Anti-corruption legislation in the Philippines	81
Anti-corruption legislation in India	87
Annexure 1: the US Foreign Corrupt Practices Act	97
Annexure 2: the UK Bribery Act	101
Recent articles by the Clifford Chance Asia Pacific anti-corruption team	107
Clifford Chance contacts in Asia Pacific	108

# Comparison Table



# Comparison Table

	Is bribery of foreign public officials criminalised?	Is private sector bribery criminalised?	Is bribery through an intermediary criminalised?	Is there any de minimis threshold?	Are facilitating payments exempted?
<b>PRC</b>	Yes	Yes	Yes	Yes	No
<b>Hong Kong</b>	Not expressly	Yes	Yes	No	No
<b>Singapore</b>	Not expressly	Yes	Yes	No	No
<b>Japan</b>	Yes	No	Yes	No	Not expressly exempted by law but tolerated in practice
<b>Australia</b>	Yes	Yes	Yes	No	Yes
<b>Thailand</b>	Yes	No, except in the context of a bidding	Yes by “instigating” or “supporting” the offence	No	Not expressly exempted by law but it is not an offence to provide a benefit to a public official to exercise his normal functions
<b>Indonesia</b>	No	Only if public interest involved	Only through “aiding and abetting” principles	No	No
<b>South Korea</b>	Yes	Yes	Yes	No, except through administrative guidelines	Yes, for foreign bribery offences only
<b>Vietnam</b>	No	No	Yes	Yes	No
<b>Philippines</b>	No	Yes, but only when it relates to an official act or function	Yes	No	No
<b>Malaysia</b>	Yes	Yes	Only for foreign bribery offences	No	No
<b>Taiwan</b>	Yes	No	Yes	No	No
<b>India</b>	The Prevention of Bribery of Foreign Public Officials and Officials of Public International Organisations Bill 2011 is under debate and is pending	No	Only through “aiding and abetting” principles	No	No
<b>US FCPA</b>	Yes	No	Yes	No	Yes
<b>UK Bribery Act</b>	Yes	Yes	Yes	No	No

# Anti-corruption legislation in the People's Republic of China

# Anti-corruption legislation in the People’s Republic of China

Contributed by Clifford Chance (Shanghai and Hong Kong offices)

## Key points:

Key legislation	<ul style="list-style-type: none"><li>■ Criminal Law</li><li>■ Opinions on Several Issues of Application of Law concerning the Handling of Criminal Cases of Commercial Bribery promulgated jointly by the Supreme People’s Court and the Supreme People’s Procuratorate on 20 November 2008 (the “<b>Opinions</b>”)</li><li>■ Anti-Unfair Competition Law (“<b>AUCL</b>”)</li><li>■ Provisional Measures on Prohibition of Commercial Bribery</li><li>■ The Interpretation of Several Issues Concerning the Application of Law for Handling Criminal Cases of Bribery promulgated jointly by the Supreme People’s Court and the Supreme People’s Procuratorate on 26 December 2012 (the “<b>2012 Interpretation</b>”)</li><li>■ Rules on the Standard for Filing Cases that are Directly Filed for Investigation to People’s Procuratorate (Trial) (the “<b>1999 Interpretation</b>”) which was promulgated on 9 September 1999</li></ul>
Private sector bribery	Yes
Extraterritorial effect	Yes
Exemption for facilitating payment	No
Defences	<p><b>Criminal Law:</b> Extortion payments with no quid pro quo.</p> <p><b>Anti-Unfair Competition Law:</b> Small gifts for marketing and promotional purposes.</p>

Penalties for individuals	<p><b>Criminal Law:</b></p> <ul style="list-style-type: none"><li>■ Bribing public officials or public entities: criminal detention, up to life imprisonment, confiscation of property and criminal fine;</li><li>■ Bribing non-public officials: criminal detention or imprisonment of up to 10 years and criminal fine;</li><li>■ Receiving bribes as a non-public official: criminal detention or imprisonment of up to 20 years and confiscation of property.</li></ul> <p><b>Anti-Unfair Competition Law:</b></p> <ul style="list-style-type: none"><li>■ A fine ranging from RMB10,000 (approx. USD1,600) to RMB200,000 (approx. USD31,500) and confiscation of illegal income.</li></ul>
Penalties for companies	<p><b>Criminal Law:</b></p> <ul style="list-style-type: none"><li>■ Unlimited criminal fine</li></ul> <p><b>Anti-Unfair Competition Law:</b></p> <ul style="list-style-type: none"><li>■ A fine ranging from RMB10,000 (approx. USD1,600) to RMB200,000 (approx. USD32,000) and confiscation of illegal income.</li></ul>

<b>Collateral consequences</b>	<p>The Supreme Procuratorate has set up a public database of convicted bribe payers (criminal), which has been connected to local databases, nationwide. In many industries and regions, the authority has set up blacklists that prohibit entities that have been convicted of bribery from being involved in public tenders.</p> <p><b>Blacklisted for public procurement in healthcare sector:</b></p> <p>In accordance with the Provisions on the Blacklisting of Commercial Bribery in Healthcare Procurement, which came into effect on 1 March 2014 and applies to the procurement of drugs, medical equipment and consumables, a company shall be blacklisted if its offence of paying bribes:</p> <ul style="list-style-type: none"><li>■ results in a conviction by a court judgment or is minor, therefore criminal penalties are exempted;</li><li>■ is minor, therefore the prosecutor decides not to prosecute;</li><li>■ results in the imposition of penalties by the Chinese Communist Party's Discipline and Inspection Commission or the Administrative Supervision Authority;</li><li>■ results in the imposition of administrative penalties by the authority of Finance, AIC, or Food and Drug Administration.</li></ul> <p>Penalties for blacklisted companies include being barred from procurement by public hospitals from the provincial level to the national level for two years, depending on the number of times it is blacklisted.</p>
<b>Anti-corruption treaties</b>	<ul style="list-style-type: none"><li>■ United Nations Convention Against Corruption</li><li>■ Member of the Financial Action Task Force</li></ul>

### What is the definition of a bribe?

Anti-bribery rules are mainly provided for in the Criminal Law and the AUCL.

A bribe under the Criminal Law refers to money or property in kind provided in return for “inappropriate interest”. It also refers to money or property in kind received or requested by the relevant individuals or entities for the purpose of securing/providing an illegitimate benefit by taking advantage of their positions. According to the Supreme People’s Court, a private sector “bribe” refers to cash payment or any economic interest that can be calculated in monetary value, such as gifts for the home, membership cards or tokens that include monetary value, trip expenses, etc.

The AUCL covers bribes paid to business operators or their staff. In accordance with the Provisional Measures on Prohibition of Commercial Bribery issued by the State Administration of Industry and Commerce (“**SAIC**”) to interpret the AUCL (“**AIC Measures**”), a bribe refers to any money or property in kind provided to an entity or an individual such as promotional fees, advertising fees, sponsorship, research fees, service fees, consultation fees or commissions etc., or other forms such as overseas trips.

The Criminal Law and relevant judicial interpretations, unlike the AUCL, set out the criminal threshold for investigation. A criminal investigation shall be commenced when the bribe offered to a public official by an individual is at least RMB10,000 (approx. USD1,600) or by an entity is at least RMB200,000 (approx. USD32,000); when the bribe offered to a state organ, state-owned enterprise, public institution, and association (“**Entity or Entities**”) by an individual is at least RMB100,000 (approx. USD16,000) or by an entity is at least RMB200,000 (approx. USD32,000).

However, these thresholds do not apply to the offence of offering a bribe to a public official or an Entity (i) if the purpose of the bribe is to secure an illegitimate benefit; (ii) if bribes were paid to three or more public officials or Entities; (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.

If all of the above-mentioned conditions are met, the value of the bribe offered by an Entity to Entities must be at least RMB100,000 (approx. USD16,000) to trigger a criminal investigation.

It is worth noting that the 2012 Interpretation solely mentioned the monetary threshold. It is therefore not entirely clear now whether the additional triggers mentioned above in relation to individuals offering bribery remain effective, where the dollar-amount threshold is not met.

Attempted bribery may be punishable if the payment does not actually take place because of an external event as opposed to when the offer is voluntarily withdrawn.

Soliciting and accepting bribes are equally criminalised under the Criminal Law.

### What is the definition of a public official and a foreign public official?

#### Domestic public official

Under PRC law, a public official refers to any person conducting public duties in State authorities, State-owned companies or enterprises, or any public organisations, as well as any person dispatched by a State authority, a State-owned company or enterprise or a public organisation to a non-State company or

enterprise or social organisation to perform public duties. In other words, public officials include not only those working in governmental authorities and State-owned entities, but also in other entities, provided that they perform public duties authorised by the State.

On 29 August 2015, the National People's Congress of China promulgated the ninth Amendment to the Criminal Law, which added a new provision to Article 390 (penalties for the crime of individual bribing government officials). This new provision targets giving bribes to “influential persons” who may exert influence on a current or former government official. Such “influential persons” include any close relative of, or any person who is closely associated with, a current or former government official.

### **Foreign public official**

The Eighth Amendment to the Criminal Law promulgated in 2011 has included the crime of bribing foreign public officials or officials of international organisations under Article 164. However, it does not provide a definition of foreign public officials or officials of international organisations.

### **Is private sector bribery covered by the law?**

Yes, as provided under Articles 163 and 164 of the Criminal Law. It is a crime for any individual from a private Entity (or any non-public official from a public Entity) to request or receive money or property in kind for the purpose of securing/providing an illegitimate benefit by taking advantage of his position. It is also a crime for any individual or Entity to provide money or property in kind to any person from a private company (or any non-public official from a public entity) with the intention of seeking an inappropriate interest.

The AUCL also covers private sector bribery from the perspective of administrative law. Under the AUCL, it is an offence to bribe any business operator or its staff for purchasing or selling goods to the business. The AIC Measures provide more a detailed interpretation on Articles 163 and 164.

### **Does the law apply beyond national boundaries?**

Yes, the Criminal Law has extraterritorial effect.

If a PRC citizen commits a crime under the Criminal Law outside the PRC, the Criminal Law is applicable to this crime unless the maximum penalty for the crime is less than three years of imprisonment. However, PRC public officials may be prosecuted for an offence committed abroad regardless of the maximum penalty.

Also, if a non-PRC citizen bribes anyone outside the PRC territory seeking inappropriate benefits, which harms the interest of the State of the PRC, and if the minimum penalty for the offence under PRC law is more than three years of imprisonment (the minimum penalty for bribing a public official with severe circumstances is five years imprisonment), the Criminal Law is also applicable unless the act is not a crime in the country where the offence is committed.

The AUCL may also have extraterritorial effect when, for example, both the payer and the receiver are incorporated in China, but, in practice, investigations of overseas transactions are not common.

### **How are gifts and hospitality treated?**

Under the Criminal Law, whether a gift is legitimate depends on the following factors: (i) the background of the gift (e.g., whether the parties are relatives or friends and the history of their personal relationship),

(ii) the value of the gift, (iii) the timing, form, and context of the gift, and (iv) whether the gift giver requested the receiver to act in a certain way in his relevant position or whether the receiver takes advantage of his position in the relevant entity. Hospitality, particularly if excessive or lavish, may be regarded as a bribe if the other elements of bribery are satisfied.

The AUCL and the AIC Measures are silent on how to distinguish legitimate gifts or items of hospitality from bribes. The scope of bribes under the AUCL and the AIC Measures includes “other forms” of bribes which is wide enough to cover any kind of gift and hospitality. However, advertising gifts of nominal value provided in accordance with the relevant market practice are exempted. In practice, reasonable and occasional hospitality is unlikely to be investigated or penalised.

### **How is bribery through intermediaries treated?**

Paying, receiving or soliciting bribes through an intermediary or a third party would not exempt the party who actually pays, receives or solicits the bribes from criminal liability. Also, it is a criminal offence to facilitate a bribe as an intermediary. For example, communicating an intention to give a bribe or transferring money between the bribe payer and the receiver is also a crime.

Similarly, the use of an intermediary is not likely to prevent a principal’s liability under the AUCL. The rules on principal-agent relationship under PRC civil law are likely to apply here, so that a principal may be held liable for an agent’s bribery committed under his authorisation or instruction. In addition, the agent’s non-authorised acts may be attributed to the principal when a bona fide third party would have reasonably believed that the agent was authorised.

### **Are companies liable for the action of their subsidiaries?**

As a general principle under PRC law, a company is legally independent from its subsidiary, and not liable for any of its subsidiary’s actions, unless the company itself is involved in such action. For instance, a parent company may be held liable if it authorised or instructed its subsidiary to commit the bribery or if it had knowledge that its subsidiary was involved in such a criminal conduct.

The AUCL and the AIC Measures are silent on a company’s liability for its subsidiary’s act. Even if, in principle, a company is legally independent from its subsidiary and therefore not liable for its subsidiary’s conduct, the rules on principal-agent relationship under PRC civil law may apply. In other words, if the subsidiary involved in a bribery conduct is used as an agent by the parent company, the latter may be held liable, as described in the answer to the previous question.

### **Is there an exemption for facilitating payments?**

No, there are no specific provisions or exemptions under the Criminal Law or the AUCL dealing with facilitation payments.

### **Is there a defence for having adequate compliance procedures?**

No, such a defence is not available under the Criminal Law or the AUCL. 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 bribery under the Criminal Law<sup>1</sup>. This exemption does not exist under the AUCL.

### **What are the enforcement trends in the business area?**

The PRC regulators are strengthening their investigation and prosecution of bribery cases, in particular in respect of



commercial sector bribery. In early 2013, the Chinese central government announced plans to pursue senior government officials for corruption. Since then, several central government officials including former Political Bureau members and senior managers in major state-owned companies such as those in oil and shipping sectors have been arrested and investigated. The investigations also covered transactions between those State-owned companies and multinationals.

Starting in 2013, the SAIC has been actively pursuing commercial sector bribery cases. The focus of the investigations was on medical products and the healthcare industry targeting major multinationals. The investigation in GSK's case is the most high profile case. As a result, multinationals are treating local investigations much more seriously, both in reaction to the significant fines being imposed by PRC authorities, but also given the likelihood of triggering extraterritorial investigations by US and UK authorities. This trend has also continued in 2015.

During 2013 and 2014, the banking industry was targeted by numerous investigations in and outside of China for irregularities in the employment of, and in entering business with, individuals closely associated with senior government officials for the purpose of gaining improper business benefits. In particular, several large investment banks have been investigated for hiring or conducting non-arm's length transactions with the sons and daughters of central government officials, reportedly for winning high-profit contracts from Chinese state-owned companies.

<sup>1</sup> Article 389 of the Criminal Law

# Anti-corruption legislation in Hong Kong

# Anti-corruption legislation in Hong Kong

Contributed by Clifford Chance (Hong Kong office)

## Key points:

<b>Key legislation</b>	Prevention of Bribery Ordinance (Cap. 201)
<b>Private sector bribery</b>	Yes
<b>Extraterritorial effect</b>	Yes with limitations
<b>Exemption for facilitating payment</b>	No
<b>Defences</b>	Statutory defences of (1) “lawful authority”, i.e., sourced in a positive rule of law that authorises an action; and (2) “reasonable excuse”, a deliberately vague term left for the courts to decide.
<b>Penalties for individuals</b>	<p><b>On indictment, maximum penalties for:</b></p> <ul style="list-style-type: none"><li>■ Possession of unexplained property: fine of HKD1,000,000 (approx. USD129,000) and imprisonment for 10 years;</li><li>■ Bribery in relation to any contract with a public body or for procuring withdrawal of tenders: fine of HKD500,000 (approx. USD64,500) and imprisonment for 10 years;</li><li>■ Soliciting or accepting an advantage: fine of HKD100,000 (approx. USD12,900) and imprisonment for one year;</li><li>■ Other bribery offences: fine of HKD500,000 (approx. USD 64,500) and imprisonment for seven years.</li></ul> <p><b>On summary conviction, maximum penalties for:</b></p> <ul style="list-style-type: none"><li>■ Possession of unexplained property: fine of HKD500,000 (approx. USD64,500) and imprisonment for three years;</li><li>■ Other bribery offences: fine of HKD100,000 (approx. USD12,900) and imprisonment for three years.</li></ul>

<b>Penalties for companies</b>	Same as the Penalties for individuals.
<b>Collateral consequences</b>	<p>The Organized and Serious Crimes Ordinance (“<b>OSCO</b>”) contains a restraint and confiscation regime in respect of proceeds of crime. The proceeds of the specified offence must be HKD100,000 (approx. USD12,900) or more for OSCO to apply.</p> <p>The Criminal Procedure Ordinance (“<b>CPO</b>”) is the main forfeiture legislation in respect of property that has come into the possession of a court or of a law enforcement agency arising from the commission of a criminal offence. It applies to property in the possession of the Independent Commission Against Corruption (“<b>ICAC</b>”).</p>
<b>Anti-corruption treaties</b>	<ul style="list-style-type: none"><li>■ United Nations Convention Against Corruption (as applied to Hong Kong by the PRC)</li><li>■ Member of the Financial Action Task Force</li></ul>

### What is the definition of a bribe?

The Prevention of Bribery Ordinance (“**POBO**”) adopts the neutral word “advantage” instead of “bribe”. What makes an “advantage” a “bribe” is the illegitimate purpose for which it is offered, solicited or accepted. “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. Our view is that, given the wide scope of “advantage”, the courts would be wary of applying the *de minimis* approach and of allowing themselves to be influenced by the insubstantial nature of the benefit in determining whether it is an advantage. However, evidence of the insignificance of the advantage may be regarded as relevant to the proof of the illegitimate purpose or the establishment of a defence.

Active bribery by giving, offering, and promising an advantage and passive bribery by soliciting or accepting an advantage are both criminal offences under the POBO.

### What is the definition of a public official and a foreign public official?

#### Domestic public official

Public servant is defined under the POBO to mean (1) any prescribed officer and (2) any employee of a public body. Prescribed officers include government officials. Public body is defined to mean 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. 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 constitute 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.

#### Foreign public official

The POBO does not expressly apply to foreign public officials, but case law shows that personnel employed by foreign governmental bodies in Hong Kong are also covered by the POBO. As such, while bribery of a foreign public official is an offence that case law has shown is captured by the broad definition of “agent” under the POBO, it is only an offence if the bribery takes place within Hong Kong.

### Is private sector bribery covered by the law?

Yes. Private sector bribery means any solicitation to, offer to or acceptance by, an agent, without the permission of the principal, of any advantage for doing or forbearing to do any act in relation to his principal’s affairs or business. The permission of the principal can be given before or reasonably after the offer or acceptance of such advantage. The principal-agent relationship includes where a person is employed by another or where a person is acting for another. A principal may therefore include, for example, an employer, an investor, a company director or a fund. These offences are punished by a fine of up to HKD500,000 (approx. USD64,500) and imprisonment of up to seven years.

### **Does the law apply beyond national boundaries?**

Section 4 of the POBO which criminalises bribery of Hong Kong public servants has extraterritorial effect, since there is express reference to the advantage being offered “whether in Hong Kong or elsewhere” in the section. For other corruption offences (i.e., under sections 5 (Bribery for giving assistance in regard to contracts), 6 (Bribery for procuring withdrawal of tenders), 7 (Bribery in relation to auctions), 8 (Bribery of public servants by persons having dealings with public bodies), and 9 (Corrupt transactions with agents) of the POBO), the position is less certain as there is no such inclusion of 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, the whole course of offer, solicitation or acceptance of illegal advantage should take place within the Hong Kong jurisdiction in order to be caught by the section. The same logic should therefore apply to sections 5 to 8 as well.

### **How are gifts and hospitality treated?**

Gifts and hospitality can qualify as a bribe given the wide definition of “advantage” under section 2 of the POBO.

Under the POBO, there is no specified monetary value or threshold that would generally be considered reasonable or customary for a gift accepted by a public officer in his public capacity or by a private sector agent. However, there are several types of entertainment, gifts, and advantages which are generally permitted under Hong Kong law. Examples of generally permitted exceptions include: promotional items of insignificant value, offered free of charge to clients in compliance with the practice of the industry; client meals of modest value that are held for general goodwill purposes; training programmes offered to clients

on a new product which involves meals, trips or accommodation being offered to the clients free of charge. Such hospitality and facilities provided must be reasonable and compatible with the professional or educational nature of the event. In deciding whether or not the advantage should be construed as a bribe, the substance, the position of the agent, the relationship between the donor and the agent, and whether or not an obligation might be created must all be considered.

The definition of “advantage” specifically excludes “entertainment”. “Entertainment” means provision of food or drink, for consumption on the occasion when it is provided, and of any other entertainment connected with, or provided at the same time. “Connected with” should not be construed too broadly and it is suggested that any entertainment which occurs at a place other than the premises at which the food or drink is being served is prima facie not connected with the provision of that food and drink. Case law has held that entertainment was never intended to be a prohibited advantage for the purposes of the POBO, no matter how lavish or corruptly offered. However, the acceptance of entertainment by a public servant may nonetheless be the subject of disciplinary proceedings.

### **How is bribery through intermediaries treated?**

A bribe through an intermediary is an offence under the POBO, in relation to both the bribe giver and the bribe receiver.

### **Are companies liable for the action of their 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 of the entity and its activities, rather than its form. 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 subsidiary, particularly a wholly owned subsidiary.

#### **Is there an exemption for facilitating payments?**

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

#### **Is there a defence for having adequate compliance procedures?**

There is no similar defence in the POBO. It does not seem that having a robust compliance programme could be admitted as a “reasonable excuse” defence under the POBO.

#### **What are the enforcement trends in the business area?**

Hong Kong’s anti-corruption law enforcement has followed the international trend in a number of areas. In particular, Hong Kong has seen a shift in emphasis from enforcement against individuals to enforcement against corporates. For example, there has been an increasing number of investigations into corrupt activities related to the banking industry, e.g., in respect of trading of warrants.

Hong Kong will see greater cooperation between international authorities in combating corruption, including the UK and the PRC. The courts in Hong Kong have consistently reiterated that they are intolerant of corruption. In more recent times, Hong Kong has increased its reliance on regulatory supervision in preventing corruption. The ICAC, for example, provides corruption prevention

advice to the private sector upon request and holds thematic seminars for business organisations to equip them with the legal knowledge and skills to prevent corruption and an annual symposium attended by international anti-corruption agencies, non-governmental organisations and private sector businesses.

# Anti-corruption legislation in Japan



# Anti-corruption legislation in Japan

Contributed by Clifford Chance (Tokyo office)

## Key points:

<b>Key legislation</b>	<ul style="list-style-type: none"><li>■ Japanese Criminal Code</li><li>■ Unfair Competition Prevention Act</li></ul>
<b>Private sector bribery</b>	Generally no, under a number of exceptions
<b>Extraterritorial effect</b>	Yes
<b>Exemption for facilitating payment</b>	No
<b>Defences</b>	No
<b>Penalties for individuals</b>  <b>Penalties for companies</b>	<ul style="list-style-type: none"><li>■ For bribing a domestic public official: imprisonment of up to 3 years or fine of up to JPY2.5 million (approx. USD25,000);</li><li>■ For bribing a foreign public official: imprisonment of up to 5 years and/or fine of up to JPY5 million (approx. USD50,000).</li><li>■ For bribing a domestic public official: nil;</li><li>■ For bribing a foreign public official: fine of up to JPY300 million (approx. USD3 million).</li></ul>
<b>Collateral consequences</b>	Suspension of the right to vote, ineligibility for directorship during the term of imprisonment; and possible ban from public tender for companies.
<b>Anti-corruption treaties</b>	<ul style="list-style-type: none"><li>■ United Nations Convention Against Corruption (signed but not ratified)</li><li>■ OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (“<b>OECD Anti-Bribery Convention</b>”)</li><li>■ Member of the Financial Action Task Force</li></ul>

### What is the definition of a bribe?

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.

### What is the definition of a public official and a foreign public official?

#### Domestic public official

The Criminal Code defines a public official as a national or local government official, a member of an assembly or committee or other employee engaged in the performance of public duties in accordance with laws and regulations.

As a result of this definition, a director or an employee of an enterprise, will generally not be considered a public official, unless for a certain enterprise he/she is categorised under an applicable law as a “quasi-public official” (*minashi koumuin*) and therefore, regarded as a “public official” under the Criminal Code. For instance, the employees of a state-owned enterprise are likely to be designated as quasi-public officials.

#### Foreign public official

The UCPA defines a foreign public official as meaning any of the following:

- an official of a foreign, national or local government;
- 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;
- 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

(directors, statutory auditor, liquidator and other persons engaged in management of the entity) of which are 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 a cabinet ordinance;

- an official of an international organisation consisting of governments or inter-governmental organisations (an “IO”); or
- 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.

As a result of this definition, a director or an employee of an enterprise will be considered as a foreign public official if the issued voting shares or subscribed capital of the enterprise owned by a state exceeds 50%.

### Is private sector bribery covered by the law?

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 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.

### 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.

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

### How are gifts and hospitality treated?

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

### **How is bribery through intermediaries treated?**

Liability for bribing public officials (domestic or foreign) is not just restricted to those who physically pay the bribe. Under the Criminal Code and the UCPA, an individual who expressly or impliedly consents that money given to an intermediary be used 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 recognised impliedly on the basis of the circumstances.

### **Are companies liable for the action of their subsidiaries?**

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

Corporate liability is nonetheless 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.

### **Is there an exemption for facilitating payments?**

Under the Criminal Code, there is no exemption for facilitating payments. The UCPA does not make an exemption for facilitation payments either. 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 a payment will not constitute bribery of the official, as it is not thought that there is an improper business advantage.

### **Is there a defence for having adequate compliance procedures?**

No such defence exists. However, the existence of a strong compliance programme may be taken into consideration by the courts in determining penalties against the company.

### **What are the enforcement trends in the business area?**

There have been few prosecutions in Japan for bribery of foreign public officials under the UCPA (possibly because it can be difficult to obtain adequate evidence to prosecute such crimes).

In response to the OECD Working Group on Bribery's ("**Working Group**") report in December 2011 relating to Japan's application of the OECD Anti-Bribery Convention, Japan publicly released in February 2014 a written response to the OECD. In the report, Japan disclosed certain enhancements, increased resources, and additional steps it was taking to investigate and prosecute foreign bribery more effectively. In particular, Japan reported taking several measures, including: raising the profile of its foreign bribery law, such as additional training for its prosecutors and police; strengthening the coordination with law enforcement authorities; enhancing the use of mutual legal assistance requests; including foreign bribery enforcement explicitly within the duties of economic and financial crimes prosecutors; focusing on suspicious transactions reports to detect foreign bribery cases; increasing awareness of foreign bribery law among Japanese companies; and utilising Japanese overseas missions to detect foreign bribery by Japanese companies. These developments have the potential for facilitating the more active detection, investigation and prosecution of foreign bribery cases. The prosecution of domestic public bribery is pursued aggressively by prosecutors as is prosecution of private sector bribery.



# Anti-corruption legislation in Singapore

# Anti-corruption legislation in Singapore

Contributed by Clifford Chance Asia\*

## Key points:

Key legislation	<ul style="list-style-type: none"> <li>■ Prevention of Corruption Act, (Cap 241, 1993 Rev Ed) (the “<b>PCA</b>”)</li> <li>■ Penal Code, (Cap 224, 2008 Rev Ed) (the “<b>Penal Code</b>”)</li> </ul>
Private sector bribery	Yes
Extraterritorial effect	Yes
Exemption for facilitating payment	No
Defences	None
Penalties	<p><b>For private sector bribery:</b></p> <ul style="list-style-type: none"> <li>■ Fine not exceeding SGD100,000 (approx. USD80,000);</li> <li>■ Imprisonment for a term not exceeding five years; or both.</li> </ul> <p><b>For public sector bribery:</b></p> <ul style="list-style-type: none"> <li>■ Fine not exceeding SGD100,000; (approx. USD80,000);</li> <li>■ Imprisonment for a term not exceeding seven years; or both.</li> </ul>
Collateral consequences	<p>Where a person is convicted for accepting gratification in contravention of the PCA, then, if the value of that gratification can be assessed, the amount of gratification accepted may be recoverable as a penalty.</p> <p>See also consequences under the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 65A, 2000 Rev Ed).</p>
Anti-corruption treaties	<p>United Nations Convention Against Corruption Member of the Financial Action Task Force</p> <p>Asia Pacific Economic Cooperation Anti-corruption &amp; Transparency Experts’ Task Force</p> <p>Asian Development Bank (ADB) /OECD Anti-Corruption Initiative for Asia and the Pacific</p>

\* Clifford Chance Asia is a Formal Law Alliance in Singapore between Clifford Chance Pte Ltd and Cavenagh Law LLP

### What is the definition of a bribe?

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 prohibits any person (by himself or in conjunction with any other person) from corruptly:

- bribing, i.e. giving, promising, or offering; or
- being bribed, i.e. soliciting, receiving, or agreeing to receive, for himself or any other person, any **gratification** as an (i) inducement to, or (ii) reward for, (iii) or otherwise on account of –
  - any person doing or forbearing to do anything in respect of any matter or transaction (whether actual or proposed); or
  - 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.
- The PCA also expressly prohibits certain corrupt dealings by or with “agents” in relation to their “principal’s affairs or business”. These terms are defined so as to cover both the public and private sector.
- 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.
- Under the Penal Code, “gratification” is again the term used but not expressly defined. However the explanatory notes to the relevant section stipulate that the word is not restricted to pecuniary gratifications, or to gratifications estimable in money.

### What is the definition of a public official and a foreign public official?

#### Domestic public official

The PCA does not define “public official”, but rather makes express reference by way of example, to certain types of public officials, namely a “Member of Parliament”, “public body” with the power to act underwritten law, and also a general reference to a “person in the employment of the Government or any department thereof.” As noted above, 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 as 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.

#### **Is private sector bribery covered by the law?**

Yes, private sector bribery is covered by the PCA but not the Penal Code.

#### **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, he/she is deemed to have committed that act or omission in Singapore.

#### **How are gifts and hospitality treated?**

As the statutory definition of “gratification” under the PCA is very wide, gifts and hospitalities (including sexual favours) will fall within its scope. Under the Penal Code, although the term “gratification” is not defined, the explanatory notes make clear that the term is not restricted to gratifications estimable in money, and would therefore presumably cover gifts and hospitality. In any event, Singapore Government policy makes clear that public officers are not permitted to:

- receive any gift in money or in kind from a person with whom he/she has official dealings. Any such gift must be rejected. If it is not practical to do so (e.g., it is a souvenir from a visiting dignitary) it can be accepted, but must then be surrendered to the head of the public officer’s department. Alternatively, the public officer can retain the gift if he/she pays for it at a value assessed by the Attorney-General; or
- accept any entertainment that will place him/her under any real or apparent obligation.

In practice, in the private sector, gifts and hospitality that are provided on a 'one-off' basis and are of a reasonable amount are unlikely to be prosecuted. There is no industry-specific anti-corruption legislation in Singapore.

#### **How is bribery through intermediaries treated?**

Liability of principals for bribery by intermediaries is expressly dealt with under the PCA, in that a person will be liable for actions taken by themselves and "in conjunction with any other person" (i.e., an intermediary). The Act does not specify the knowledge required of the principal of bribery committed by its intermediary in order for it to also be found liable.

The Penal Code does not make provision for the liability of the principal for acts of intermediaries.

#### **Are companies liable for the action of their subsidiaries?**

No, the 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 so as 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.

#### **Is there an exemption for facilitating payments?**

No, there is no exemption for facilitating payments under the PCA and Penal Code nor under any other law in Singapore. Indeed, 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.

#### **Is there a defence for having adequate compliance procedures?**

No, the legislation does not have any provisions akin to the UK Bribery Act's adequate procedures defence. Nevertheless, a robust anti-corruption programme would most likely be taken into consideration by the Singapore courts in any proceedings against a company.

#### **What are the enforcement trends in the business area?**

Singapore has earned a reputation for being one of the least corrupt nations in the world. The 2014 Corruption Perceptions Index (CPI) prepared by Transparency International (TI) ranked Singapore the 7th least corrupt country of the 175 countries surveyed. Singapore scored 85 on a scale where zero denoted a country with a very high risk of corruption and 100 denoted a very clean country. Singapore has also been ranked top in the annual poll by the Political and Economic Risk Consultancy (PERC) as the country where perceptions of corruption are most favourable among 16 major Asia-Pacific economics, a position it has maintained since 1995.

Corruption in Singapore remains low and under control. The number of complaints received by the Singapore Corrupt Practices Investigation Bureau ("CPIB") decreased by 7% from 792 in 2013 to 736 in 2014. This is the lowest number in the past 3 decades. The majority of cases related to the private sector— in 2014, 85% of the 136 cases registered for investigation involved private individuals giving, offering or receiving bribes. Only 15% of the cases registered for investigation in 2014 involved public officers. However, it is worth mentioning that, of the 85% of private sector cases, 13% involved public officers rejecting bribes offered by private individuals.

In January 2015, the Prime Minister of Singapore announced a number of key developments to the country's anti-corruption regime, including:

- The Government is reviewing the PCA with a view to keeping pace with international developments.
- The CPIB will have its manpower increased by 20% from its current strength of about 120.
- A Corruption Reporting Centre will be set up in the city centre to allow the public to report possible graft incidents more discreetly and at a more accessible location. This supplements the current avenues available to the public to report corruption to the CPIB.

These recent development demonstrate and enhance Singapore's commitment to maintaining the country's leading reputation for transparency, openness, and insusceptibility to corruption.

# Anti-corruption legislation in Australia

# Anti-corruption legislation in Australia

Contributed by Clifford Chance (Sydney and Perth offices)

## Key points:

<b>Key legislation</b>	Division 70 of the Criminal Code (Commonwealth): bribery of foreign public officials
<b>Private sector bribery</b>	Yes, but covered by State, Territory and Federal legislation such as the Corporations Act 2001
<b>Extraterritorial effect</b>	Yes
<b>Exemption for facilitating payment</b>	Yes
<b>Defences</b>	In certain circumstances where the conduct is lawful in the foreign public official's country For facilitation payments in certain circumstances
<b>Penalties for individuals</b>	10 years imprisonment and/or a fine of 10,000 penalty units (AUD1.8 million, approx. USD1.3 million)* *penalties increased as from 31 July 2015
<b>Penalties for companies</b>	A fine of not more than the greatest of the following: <ul style="list-style-type: none"><li>■ 100,000 penalty units (AUD18 million, approx. USD13 million);</li><li>■ if the value of the benefit can be determined, three times the value of the benefit attributable to the offence conduct;</li><li>■ if the court cannot determine the value of the benefit, 10% of the annual turnover of the 12 months ending in the month the offence occurred.</li></ul>
<b>Collateral consequences</b>	Proceeds of crime actions, Australian Taxation Office imposing tax adjustments and tax penalties
<b>Anti-corruption treaties</b>	United Nations Convention Against Corruption OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ( " <b>OECD Anti-Bribery Convention</b> ") Member of the Financial Action Task Force

### What is the definition of a bribe?

The legislative definition of “a bribe” is very broad and includes providing, offering to provide or causing a benefit to be provided, offered or promised to another person where that benefit is not legitimately due and was intended to influence the foreign public official in the exercise of the foreign public official’s duties in order to obtain or retain business or a business advantage. This legislation was recently amended to remove the necessity to prove as part of the offence an intention to influence a particular foreign official. It is unnecessary for the bribe to be successful. A “benefit” includes any advantage and is not limited to tangible property.

### What is the definition of a public official and a foreign public official?

#### Domestic public official

The Commonwealth Criminal Code defines a public official broadly to include:

- a Commonwealth public official;
- an officer or employee of the Commonwealth or of a State or Territory;
- an individual who performs work for the Commonwealth, or for a State or Territory, under a contract;
- an individual who holds or performs the duties of an office established by a law of the Commonwealth or of a State or Territory;
- an individual who is otherwise in the service of the Commonwealth or of a State or Territory (including service as a member of a military force or police force); and
- a member of the executive, judiciary or magistracy of the Commonwealth or of a State or Territory; and
- a member of the legislature of the Commonwealth or of a State or Territory; and

- an officer or employee of:
  - an authority of the Commonwealth; or
  - an authority of a State or Territory.

Various State and Federal laws also provide for their own definitions of public officials.

#### Foreign public official

A foreign public official is broadly defined to include:

- an employee or official of a foreign government;
- 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 of a public international organisation (such as the United Nations);
- an authorised intermediary of a foreign public official or someone who holds themselves out as an authorised intermediary.

A director or an employee of a foreign State-owned enterprise is likely to be considered a foreign public official.

### Is private sector bribery covered by the law?

Private sector bribery is covered by a variety of State, Territory and Commonwealth offences such as the Corporations Act 2001.

### Does the law apply beyond national boundaries?

The law has extraterritorial application, if the offence occurs wholly or partly in Australia, on board an Australian aircraft or ship or if the offence occurs outside Australia but the person is an Australian citizen, resident of Australia or a corporation under a law of the Commonwealth, State or Territory of Australia.

### **How are gifts and hospitality treated?**

Gifts and hospitality can qualify as a bribe as these are likely to be viewed as a “benefit” under the legislation. Whether or not there is an intention to influence a foreign public official when providing reasonable gifts and hospitality which relate to the promotion, demonstration or explanation of products or services will be relevant in determining whether the legislation applies.

### **How is bribery through intermediaries treated?**

A bribe paid to an intermediary of a foreign public official will be captured by the legislation. Bribes paid by an intermediary of an Australian company, citizen or resident will be captured if the principal is found to have aided, abetted, counseled or procured the offence. In order for such an offence to be made out, the person must have intended that his/her conduct aids, abets, counsels or procures the offence.

### **Are companies liable for the action of their subsidiaries?**

Ordinary criminal principles of derivative liability may apply in these circumstances to render a company liable for the action of its subsidiary.

### **Is there an exemption for facilitating payments?**

There is a defence if the benefit paid constituted a facilitation payment. To apply, the benefit must be “minor in value”, and be “offered for the sole or dominant purpose of expediting or securing performance of a routine government action of a minor nature”. The payments must be recorded in detail and the records kept for a period of seven years.

The practical application of this defence is likely to be narrow as there is no legislative or judicial guidance as to what constitutes a payment that is “minor in value”.

### **Is there a defence for having adequate compliance procedures?**

There is no specific defence, although the existence of a robust anti-corruption programme is likely to be taken into account in an enforcement action against the company and may assist in negating any allegations that a company was liable for the actions of its employee or subsidiary. Under Australian law, a company may be held criminally liable for an offence if the company’s culture directed, encouraged, tolerated or led to the offence, or if the company failed to create a culture that required compliance with the law.

### **What are the enforcement trends in the business area?**

Australia’s limited enforcement of offences under its foreign anti-corruption legislation introduced in 1999 has been the subject of much criticism. In April 2015, the OECD released its Follow up to the Phase 3 Report & Recommendations on Australia, which stated that Australia had made good progress in addressing a number of Phase 3 recommendations, noting in particular that the AFP (Australian Federal Police) had reviewed its overall approach to enforcement resulting notably in the establishment of a Fraud and (Anti-Corruption Centre). This Centre is an inter-agency group hosted by the AFP with officials from a variety of other agencies seconded to assist. This is likely to lead to greater enforcement activity in this area, with legislative reform foreshadowed in order to make such offences easier to prosecute. The Federal Government is currently conducting a review to consider, amongst other things, removing the facilitation payments defence.

At a national level, Australia has a variety of active anti-corruption bodies in various States and Territories which continue to investigate and enquire into corruption offences.

# Anti-corruption legislation in Thailand



# Anti-corruption legislation in Thailand

Contributed by Clifford Chance (Bangkok office)

## Key points:

<b>Key legislation</b>	<ul style="list-style-type: none"><li>■ The Thai Criminal Code covers offering and accepting bribes, as well as the role of an intermediary.</li><li>■ Organic Act on Counter Corruption (amended);</li><li>■ Act Concerning Offences Relating to the Submission of Bids to State Agencies; and</li></ul>
<b>Private sector bribery</b>	No specific legislation, except for a bribe taking place in the context of a public bidding process
<b>Extraterritorial effect</b>	Yes
<b>Exemption for facilitating payment</b>	No
<b>Defences</b>	None
<b>Penalties for individuals</b>	Depending on the severity of the offence; imprisonment up to life, fine up to THB400,000 (approx. USD11,000) or the death penalty.
<b>Penalties for companies</b>	The company could be held liable for an offence committed by its employee, agent, representative or affiliate if it appears that the company does not have appropriate measure to prevent the commission of the offence by such person or entity. Penalties include a fine of up to twice the value of the damages and benefits received by the person committing the offence.
<b>Collateral consequences</b>	All properties or pecuniary benefits given or received as a bribe (including all properties and benefits used in committing the offence) shall be forfeited, except for those belonging to third parties not involved in the commission of the offence.
<b>Anti-corruption treaties</b>	United Nations Convention Against Corruption

### What is the definition of a bribe?

Bribery is a criminal offence essentially prohibiting public officials from requesting or accepting a bribe as well as prohibiting any person from giving a bribe to public officials for performing wrongful actions. While the law does not provide a precise definition of bribery, it can be interpreted as meaning property or any other benefits, pecuniary or non pecuniary, received by a public official for performing or omitting to perform his functions, regardless of whether such action is a wrongful act. It shall also mean property or any other benefits, pecuniary or non pecuniary, given to a public official as to induce such official to wrongfully discharge, omit to discharge or delay the performance of any duty.

As for active bribery (bribe giver), giving, offering, and promising a gratification are all likely to constitute the offence. As for passive bribery (bribe receiver), soliciting, accepting or agreeing to accept the bribe are both equally criminalised.

There is no *de minimis* threshold, except for gifts and hospitality as explained below.

### What is the definition of a public official and a foreign public official?

#### Domestic public official

While the Thai Criminal Code does not provide a definition of “public official”, the Supreme Court held that the word “public official” means a person who is appointed by the Thai Government to perform official functions and also includes any official appointed by special law.

Members of the State Legislative Assembly, the Provincial Assembly and the Municipal Assembly, as well as judicial official also fall under the anti-bribery provisions of the Thai Criminal Code.

According to the Organic Act on Counter Corruption, the term “State official” includes in particular those holding a political position, Government or local official, persons performing duties in a State-owned enterprise or a State agency, local administrators and members of a local assembly not holding a political position, and officials under the law on local administration. It also includes a member of a Board, Commission, Committee, or sub-committee, employee of a Government agency, State-owned enterprise or State agency, and persons exercising the State’s administrative power in the performance of a particular act under the law, through the governmental bureaucratic channel, a State-owned enterprise, or any other State undertaking.

The Act on Offences of Employees in Government Organisations or Agencies also provides that an “employee” in a government organisation or agency may be punished for receiving or soliciting bribes in the same way the public official are under the Thai Criminal Code. This includes presidents, vice presidents, directors, or any person who is working in any organisation, limited company, registered partnership, or any other agency where fifty percent or more of its capital is held by the Thai Government.

#### Foreign public official

Whilst Thailand is not a party to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Thailand recently enacted the Organic Act on Counter Corruption (No. 3) B.E. 2558 (2558) (the “**Amendment Act**”) (which came into force on 10 July 2015) with a view to criminalising bribery of “foreign public officials” and “officials of an international public organisation”.

*“Foreign public officials”* means any person holding a legislative, administrative or judicial office for a foreign country or any person exercising a public function for a foreign country, including for a state agency or state enterprise, whether appointed or elected, whether having a permanent or temporary position and regardless of whether such official receives a salary or other remuneration.

*“Officials of international public organisations”* means any official or agent of a public international organisation.

It is a criminal offence under the Amendment Act for any foreign public official or official of an international public organisation to (i) demand, accept or agree to accept any property or other benefit for himself/herself or for any other person in return for discharging or omitting to discharge any duty, regardless of whether such action is a wrongful act; or (ii) discharge or omit to discharge any duty in return for any property or other benefit which he/she has demanded, received or agreed to receive before taking office.

The Amendment Act also imposes sanctions on any person who (i) demands, accepts or agrees to accept any property or other benefit in return for inducing or having induced any foreign public official or official of an international public organisation by dishonest or unlawful means or by influencing with his/her unjust power to discharge or omit to discharge any duty in his/her office, in a manner to take advantage or cause any disadvantage to any person; or (ii) grants, offers to grant or promises to grant any property or other benefit to any foreign public official or official of an international public organisation with intent to persuade such official to wrongfully discharge, omit to discharge or delay the performance of any duty.

These sanctions under the Amendment Act also apply to domestic State officials.

The penalties imposed by the Amendment Act for the above offences include fines of between THB100,000 (approx. USD2,700) and THB400,000 (approx. USD11,000), imprisonment of between five years to lifetime, and the death penalty, depending on the severity of the offence.

### **Is private sector bribery covered by the law?**

Generally, private sector bribery is not a criminal offence under Thai law.

However, there is an exception under the Act Concerning Offences Relating to the Submission of Bids to State Agencies, which imposes criminal penalties on any person who gives, offers, or undertakes to give a bribe to any other person or another bidder for the benefit of the submission of bids with state agencies. In addition, the person or another bidder who demands, receives, or consents to the receipt of such bribe shall also be liable as a joint offender.

As from 1 January 2015, any person or legal entity involved in a project with government agencies which has a value of more than THB500,000 (approx. USD13,900) must prepare and submit a revenue and expense account for the project to the Revenue Department.

### Does the law apply beyond national boundaries?

Generally, Thai anti-bribery laws only apply to offences committed in Thailand.

However, offences partially committed in Thailand (and partially abroad) shall be deemed to have been wholly committed in Thailand and will be prosecuted by Thai courts. The same applies when the consequences of the offence committed abroad affect Thailand. The co-principal, supporter, or instigator of the offence committed in Thailand or deemed to have been committed in Thailand shall be prosecuted by the Thai courts as well. Additionally, the Thai courts also have jurisdiction to prosecute passive bribery committed abroad by a Thai public official or judicial official.

To ensure that the new sanctions under the Amendment Act will be enforced effectively, the National Anti-Corruption Commission ("NACC"), which was established under the Organic Act on Counter Corruption as the main authority responsible for preventing and suppressing corruption in the government sector in Thailand, is now empowered to: (i) inquire and decide whether any foreign public official, official of an international public organisation or person, has committed any offence under the Amendment Act; (ii) inquire and decide on any offence which is within the authority of the NACC but committed outside Thailand; and (iii) coordinate with foreign countries for the purpose of performing its duties under the Organic Act on Counter Corruption, including lending support to foreign countries pursuant to the regulations for international cooperation in criminal matters.

### How are gifts and hospitality treated?

Gifts and hospitality are treated separately from a bribe. Any State official as mentioned above is allowed to receive property or any other benefit as a gift if the gift is given on a traditional, customary,

or cultural occasion, or on an occasion where it is required by the customs practised in society only:

- from a relative if the value of the gift is proportionate to the life standing of that official;
- from any person or entity (other than a relative) if the value of the gift does not exceed THB3,000 (approx. USD80) on each occasion; or
- on an occasion where the gift is given to the public in general (and not only to the public official).

The State official can receive a gift which does not comply with the above conditions or which has a value exceeding THB3,000 (approx. USD80) if the State official reports the gift to his relevant superior and is granted specific permission to keep it.

### How is bribery through intermediaries treated?

Any person causing an intermediary to bribe a public official shall be liable as an instigator of a bribery offence. If the intermediary commits the offence, the instigator shall receive the punishment as a principal. However, if, despite the principal's instruction, the offence is not committed, the instigator shall only be liable for one-third of the punishment provided for the principal bribery offence.

A person who demands or accepts property or any other benefit in return for inducing or having induced (by dishonest or unlawful means, or by using his influence) a public official to exercise or not to exercise any of his functions, which is advantageous or disadvantageous to any person, shall be held criminally liable as an intermediary. If the intermediary has given, offered or agreed to give such bribe to an official he shall be liable as a bribe-payer and the punishment shall be increased.

By the intermediary's demand, the person giving such bribe to the intermediary is not criminally liable unless such intermediary has given, offered or agreed to give such bribe to a public official. In this case, such person shall be punished as a supporter in committing bribery by receiving two-thirds of the punishment that are provided for the main bribery offence.

#### **Are companies liable for the action of their subsidiaries?**

Under Thai law, a subsidiary is treated as a separate legal entity from the parent company, and is generally not liable for an offence committed by its parent company. However, the parent company can be held liable for an offence committed by its subsidiary where the subsidiary acted as an agent or intermediary for the benefit of the parent company. Additionally, the parent company can be punished (i) as a principal, if the parent company has jointly committed any offence with its subsidiary, (ii) as an instigator if the parent company has caused its subsidiary to commit any offence or (iii) as a supporter if the parent company has assisted its subsidiary to commit any offence.

Pursuant to the Amendment Act, a parent company could be held liable for an offence committed by its affiliate if it appears that the parent company does not have appropriate measures in place to prevent the commission of the offence by its affiliate. Penalties include a fine of up to two times the damages or benefits received by the person committing the offence.

#### **Is there an exemption for facilitating payments?**

Under the Thai Penal Code, a person who gives property or any other benefit to a public official to exercise his normal functions shall not be subject to criminal liability. However, the public official who accepts such property or benefit for any purpose whatsoever

(whether to exercise his duty in a wrongful or lawful manner) will be criminally liable.

#### **Is there a defence for having adequate compliance procedures?**

No, each payment of a bribe must be considered according to whether it fulfils the criteria for the offence of bribery. Having a clear internal policy designed to prevent bribery is not a defence for bribe-payers and/or bribe-takers. A company cannot avoid criminal liability for an offence committed by its agent if the company's agent acts within the scope of his authority and the scope of the company's objectives and the company receives a benefit from such acts.

#### **What are the enforcement trends in the business area?**

Corruption is a significant problem in Thailand. Bribery is often found in transactions between the commercial business sector and government authorities. Small payments to public officials to expedite administrative formalities are also widespread. A large number of cases have been brought under the Thai Criminal Code or other applicable laws and most of these cases have involved public officials. Since there is no criminal liability for bribery in the private sector, bribery still exists in many private business transactions.

However, Thailand is currently making greater efforts against corruption and bribery after ratifying the United Nations Convention Against Corruption. In fact, since the announcement of a military coup in Thailand in May 2014, the National Council for Peace and Order ("**NCPO**", which is the *de facto* supreme governmental authority) has issued various notifications and orders with a view to overseeing and combating corruption in the government sector.

For example, since 30 June 2014, all state enterprises in Thailand (i.e. government organisations or business units owned by the government and companies or partnerships which are more than 50 percent owned by the government) are required to report to the following occurrences to the NCPO: (i) any investment or new project with a value exceeding THB100 million (approx. USD2.7 million); and (ii) any transaction with a value exceeding THB100 million (approx. USD2.7 million) which is unusual or not in the ordinary course of business.

On 5 January 2015, the NCPO appointed a separate national anti-corruption commission ("**National Commission**", which is under direct supervision of the NCPO and chaired by General Prayuth Chan-ocha, Head of the NCPO) to serve as the central point for cooperation between the public sector and the private sector in preventing and suppressing corruption in the government sector. In order to ensure effective administration by the NCPO in preventing and tackling the problem of corruption and malfeasance in public office, the NCPO requires that all public sector and government agencies must lay down measures or approaches to prevent and solve the problem of corruption and malfeasance in public administration and government agencies. Where an accusation is made, or there is cause to suspect, that any civil servant or government officer has committed or is involved in corruption and unlawful practices, the head of the relevant government office and agency shall take measures in accordance with the relevant laws and regulations, and ensure that disciplinary, administrative and legal measures are enforced strictly and promptly. Failure to comply with the above requirements could result in the head of that government office or supervisor being disciplined or held liable for committing a criminal offence. In connection with this, a new criminal court division was set up in June 2015 to directly handle such corruption cases.



# Anti-corruption legislation in South Korea



# Anti-corruption legislation in South Korea

Contributed by Clifford Chance (Seoul office)

## Key points:

<b>Key legislation</b>	<ul style="list-style-type: none"><li>■ Korean Criminal Code ("<b>Criminal Code</b>")</li><li>■ The Aggravated Punishment of Specific Crimes Act ("<b>Specific Crimes Act</b>")</li><li>■ The Aggravated Punishment of Specific Economic Crimes Act ("<b>Specific Economic Crimes Act</b>")</li><li>■ The Creation and Operation of the Anti-corruption and Civil Rights Commission and the Prevention of Corruption Act</li><li>■ Code of Conduct for Public Officials of Korea ("<b>CoC</b>")</li><li>■ Combating Bribery of Foreign Public Officials in International Business Transactions Act ("<b>Foreign Bribery Act</b>")</li><li>■ The Anti-Corruption and Conflicts of Interest Act (the "<b>Graft Act</b>").<sup>1</sup></li></ul>
<b>Private sector bribery</b>	Yes
<b>Extraterritorial effect</b>	No
<b>Exemption for facilitating payment</b>	Yes
<b>Defences</b>	If the value of a benefit is in line with normal customs or normal practices, it is not considered a bribe. However, the courts apply a narrow interpretation to the concept of normal customs or practices and apply a very low monetary threshold.
<b>Penalties for individuals</b>	<p>For public sector bribery:</p> <ul style="list-style-type: none"><li>■ A bribe-taker may be subject to (i) up to life imprisonment; and (ii) a fine of two to five times the value of the bribe, depending on the size of the bribe.</li><li>■ A person who gives a bribe to a domestic public official may be subject to (i) imprisonment of up to five years; or (ii) a fine up to KRW20 million (approx. USD16,900);</li><li>■ A person who gives a bribe to a foreign public official may be subject to (i)</li></ul>

\* Please note that the Graft Act comes into force on 27 September 2016. Accordingly, the key points summarised in this chapter reflect the law as of 27 September 2016, on the basis that, once in force, the Graft Act will make significant changes to the laws on public sector bribery (for example by, subject to limited exceptions, making it a criminal offence for a public official to receive over KRW 1 million (approx. USD 1,000)).

	<p>imprisonment of up to five years; or (ii) a fine up to KRW20 million (approx. USD16,900). If the profits derived from the unlawful activity exceed KRW10 million (approx. USD8,450), the bribe-giver will be subject to (i) imprisonment of up to five years; or (ii) a maximum fine of twice the pecuniary benefit of the bribe.</p> <p>For private sector bribery:</p> <ul style="list-style-type: none"> <li>■ A bribe-taker may be subject to (i) up to life imprisonment; and (ii) a fine of two to five times the value of the bribe, depending on the size of the bribe. A bribe-giver may be subject to (i) up to 5 years imprisonment; and (ii) a fine of up to KRW30 million (approx. USD25,400).</li> </ul>
<b>Penalties for companies</b>	<ul style="list-style-type: none"> <li>■ For bribing a domestic public official: N/A</li> <li>■ For bribing a foreign public official: a fine up to KRW1 billion (approx. USD847,000) provided, if the value of the bribe exceeds KRW500 million (approx. USD424,000) the fine is doubled.</li> </ul>
<b>Collateral consequences</b>	<ul style="list-style-type: none"> <li>■ Any benefits given to public officials or persons who knew of the bribery are forfeited. If the benefits cannot be forfeited, an equivalent amount is to be recovered from the bribe-taker.</li> <li>■ Under the Contracts to Which the State is a Party Act ("State Contracts Act"), a company can be debarred from government procurement contracts for up to two years if an employee has, in relation to a bidding, conclusion of a contract with a relevant government authority and execution thereof, offered a bribe to a public official of such relevant government authority.</li> <li>■ The Defence Acquisition Program Act has a similar provision with respect to defence procurement contracts, which restricts a company's participation in bidding and execution of contracts with a relevant government authority for up to one year.</li> <li>■ Restrictions on public tender</li> <li>■ Money laundering effects</li> </ul>
<b>Anti-corruption treaties</b>	<p>United Nations Convention Against Corruption</p> <p>OECD Convention on Bribery of Foreign Public Officials in International Business Transactions</p> <p>Member of the Financial Action Task Force</p>

### **What is the definition of a bribe?**

A “bribe” is defined as any unjust benefit received in connection with one’s duties. This is interpreted broadly to cover any valuable advantages received by the recipient and therefore includes money as well as other types of tangible and intangible advantages such as gifts and acts of hospitality. Similarly, the requirement of a benefit being received in connection with one’s duties has been broadly construed by the South Korean courts. Under CoC, this definition is not limited to benefits received during the exercise of legitimate and formal duties of a public official, but also includes benefits received by (i) a public official who handles, or is related to other, affairs concerning his office; (ii) a public official who assists with ancillary duties; and (iii) a public official who may influence a person in an official or public decision-making capacity.

There is no minimum monetary threshold for a bribe under statute or in case precedent. However, the CoC, which provides guidelines for administrative and disciplinary proceedings against public officials, provides that a public official is prohibited from receiving any cash, gifts or entertainment from anyone who may directly or indirectly benefit from the performance of public duties. There are exceptions to this provision, which include, among others, (i) food or items of value up to KRW30,000 (approx. USD25) and (ii) cash or gifts of value up to KRW50,000 (approx. USD42) for commemorative events such as weddings and funerals.

Under the Criminal Code and the Specific Crimes Act, a public official who solicits, promises to accept or accepts a bribe in connection with his duties may be subject to a criminal sentence. An individual who gives, offers or promises to give a bribe to a domestic public official may also be charged with a criminal offence under the Criminal Code.

### **What is the definition of a public official and a foreign public official?**

#### **Domestic Public Official**

Although the Criminal Code does not define “domestic public official”, it is commonly understood to include any employee of a government entity such as a government agency or ministry. In addition, specific statutes provide that certain individuals are deemed to be public officials (“Deemed Public Officials”) under the anti-corruption law. For example, the maximum criminal sentence imposed by the Criminal Code on arbitrators who receive bribes is the same as that imposed on domestic public officials. The Specific Crimes Act considers managers of government-controlled organisations or companies to be Deemed Public Officials and provides a list of specific entities falling under the category of government-controlled organisations or companies. An organisation or company is “government-controlled” if the amount of the paid-in capital invested by the government exceeds 50 percent, or the government is able to exercise substantial control over the organisation through statutory supervision or as a shareholder.

#### **Foreign Public Official**

Under the Foreign Bribery Act, the scope of a “foreign public official” is broad as it includes: (i) a person who provides a legislative, administrative or judiciary service for a foreign government; (ii) a person to whom a business of a foreign government was delegated; (iii) a person who works for a public statutory institution/organisation; (iv) a person who works for a corporation in which the investment made by a foreign government accounts for more than 50 percent of the paid-in capital, or which is controlled by a foreign government; and (v) a person who works for a public international organisation. Under the Foreign Bribery Act, the acts of giving, offering, or promising

a bribe to a foreign public official for the purposes of obtaining improper benefit in connection with the international commercial transactions are all punishable. Unlike the analogous crime of bribing a domestic public official, it is necessary to prove the specific intent/purpose of the bribe-giver behind the physical act of bribing in order to establish criminal liability.

### **Is private sector bribery covered by law?**

The Criminal Code prohibits the giving of economic benefits to, and accepting of such economic benefit by, a person who is entrusted with conducting the business of either an individual or a legal entity, if such benefits are related to an improper request made in connection with his duties.

In principle, the difference between private sector bribery and public sector bribery is the requirement of proof of an “improper request”: whereas the request must amount to a crime of bribery in the private sector (e.g. a request to award a bid in exchange for cash), this is not necessarily required for public sector bribery (so long as the economic benefits are connected to the public official’s duties). However in practice, the courts have not strictly insisted on this requirement being satisfied in recent private sector bribery cases.

The Specific Economic Crimes Act also expressly prohibits the giving, offering and promising of unlawful economic benefit to, and soliciting of, accepting of or promising to accept such unlawful economic benefit by, the employees of financial institutions. A “financial institution” includes both government-controlled as well as private financial institutions, including commercial banks, securities companies, etc. The Specific Economic Crimes Act does not require that an improper request be made.

### **Does the law apply beyond national boundaries?**

It is generally understood that South Korean anti-corruption laws do not have an extraterritorial effect. They are only applicable to the crimes committed by Korean nationals (regardless of where the crimes occur) and/or in Korea (regardless of nationalities of the persons/entities who commit the crimes).

### **How are gifts and hospitality treated?**

There is no statutory provision which distinguishes between gifts/hospitality and bribes. However, the CoC sets out certain exceptions which are not deemed to be bribes which include:

- food or items of value provided within the extent of normal practices;
- transportation, accommodation and meals which are provided by the host of official events to all of its attendants, provided that such event is related to the recipient’s official duties;
- promotional items or souvenirs that are distributed to numerous and unspecified persons; and
- cash and valuables provided in order to aid a public official who is in under a financial strain due to a disease or a disaster.

The CoC sets out a threshold of KRW30,000 (approx. USD25) for “food or items of value provided within the extent of normal practices” and of KRW50,000 (approx. USD42) for cash or gifts for commemorative events such as weddings and funerals (see above).

In addition to these general rules, there are some specific business sector regulations allowing for specific exceptions to the prohibition of giving or accepting benefits under certain conditions. The regulated business sectors include the Pharmaceutical and Healthcare sector (Medical Service Act),

the Insurance sector (Insurance Business Act), the financial investment sector (Financial Investment Services and Capital Markets Act) and the Defence sector (Code of Conduct of the Acquisition Program Administration).

### **How is bribery through intermediaries treated?**

The Criminal Code and the Specific Crimes Act contain provisions that specifically deal with third party bribery. Together, they prohibit a domestic public official from directing a bribe to a third party upon acceptance of an unjust request in connection with his duties.

Furthermore, if an instigator gives a bribe to an intermediary to deliver to a domestic public official on behalf of the instigator, both the instigator and the intermediary are punishable by the same penalties applicable to a bribe-giver without any intermediaries under the Criminal Code. Whether or not the bribe is actually delivered to the public official will not affect the statutory penalties applicable to the instigator. Further, knowledge of the specific acts of the intermediary is not a required element of the bribery; the instigator's act of instructing the intermediary to deliver the bribe will be sufficient. Where no directions were given by the instigator, there is no relevant common law authority but it is generally understood that a person with the knowledge of such acts may be liable as an accomplice to the offence of bribery and may be liable to half of the maximum penalties for the offence of bribery.

Under the Foreign Bribery Act, a bribery offence committed by employees, officers or agents will be attributable to their legal entity which employed or appointed them unless it proves that it has taken significant measures to prevent the bribery. In case of using a third-party intermediary, the liabilities of the legal entity will generally depend on the degree of its involvement in the offence

committed by its employees, officers or agents. However, there exists no established common law authority as of September 2015.

### **Are companies liable for the action of their subsidiaries?**

Companies will not be held liable for the action of their subsidiaries in cases of bribery to domestic public officials.

As for bribing foreign public officials, companies will not be liable for the actions of their subsidiaries unless the parent companies are directly involved in the criminal conduct or the subsidiary acted as an agent or intermediary for the benefit of the parent company.

### **Is there an exemption for facilitating payments?**

Article 3.2(2) of the Foreign Bribery Act permits the offering of small amounts of cash or benefit to a foreign public official to secure their routine and fair performance of government action.

### **Is there a defence of having adequate compliance procedures?**

The Foreign Bribery Act applies to both the individual offender and the company which employed or appointed the concerned individual. However, the company shall not be found guilty if it had exercised reasonable care and supervision in order to prevent the commission of offence. The judges will take into consideration the effort made by the company to prevent criminal acts from being committed within the organisation when determining the liability of the company. Thus, the Korean courts would carefully examine the company's internal compliance programme (or lack thereof) when ruling on a corruption case involving a corporate entity even if, strictly speaking, having such a programme in place would not necessarily exempt the company from criminal liability.

### What are the enforcement trends in the business area?

Awareness of, and compliance with, anti-corruption laws in South Korea is improving. For example, many Korean companies are putting in place anti-corruption or anti-bribery policies and compliance programs.

The most important recent trend is that that, on 27 March 2015, the Graft Act, was enacted to reinforce the existing anti-bribery regime. This comes into force on 27 September 2016 and will drastically change the regulatory landscape with respect to public sector bribery. It is also indicative of what is an avowed effort by the South Korean government to combat bribery.

The Graft Act makes several fundamental amendments to the existing regime. First, it broadens the definition of “public officials” to include school teachers and employees of media and press organisations. Second, and most importantly, it removes the requirement to prove a direct link between something of value provided to a public official and a “favour” provided by a public official in return. Accordingly, the Graft Act criminalises the taking, demanding or promising to receive something with a value exceeding (i) KRW1 million (approx. USD847) per occasion; or (ii) KRW3 million (approx. USD2,540) annually (“**Threshold Value**”) by a public official or his/her spouse, regardless of whether the benefit was given in relation to the public official’s official duties. The underlying intent is that a gift to a public official with a value above the Threshold Value must be a bribe.

Under the Graft Act, the bribe-giver as well as the public official will be subject to a fine up to KRW30 million (approx. USD25,400) or imprisonment of up to three years.

There are, of course, exceptions to this rule, which generally relate to a benefit above the Threshold Value that is: (i) permissible by other laws, (ii) acceptable under normal social customs, (iii) provided by relatives or (iv) required pursuant to legitimate private transactions (such as payment of debt under a loan agreement to which the public official is a party).

Another noteworthy change is that the Graft Act prohibits the mere act of improperly soliciting a public official (i.e., a request that they act beyond or in violation of their authority) irrespective of whether money is involved, i.e., improper solicitation itself is punishable regardless of whether something of value was given or promised in exchange for the public official’s improper act.

Under the Graft Act, (i) a person who improperly solicits a public official may face a fine up to KRW20 million (approx. USD16,900) and (ii) the public official may be subject to a fine up to KRW20 million (approx. USD16,900) or imprisonment of up to two years.

It should be noted, however, that improper solicitation is punishable under the Graft Act only if such solicitation is for the benefit of a third party. In other words, if a person improperly solicits a public official for his or her benefit, that person is not subject to penalty under the Graft Act.

Finally, the Graft Act punishes a corporate entity for violations of the Graft Act by its employees with fines up to the same amount to which an individual is subject. However, a corporate entity is exempted from such punishment if it had undertaken reasonable care and supervision in order to prevent the commission of an offence.



# Anti-corruption legislation in Indonesia



# Anti-corruption legislation in Indonesia

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## Key points:

<b>Key legislation</b>	<ul style="list-style-type: none"><li>■ Law No. 31 of 1999 on Eradication of Corruption Crimes as amended by Law No. 20 of 2001 ("<b>Indonesian Anti-corruption Law</b>");</li><li>■ Law No. 11 of 1980 on Bribery ("<b>Indonesian Anti-bribery Law</b>"); and</li><li>■ Law No. 7 of 2006 on Ratification of the United Nations Convention Against Corruption, 2003 ("<b>UNCAC</b>").</li></ul>
<b>Private sector bribery</b>	Yes, under the Indonesian Anti-bribery Law, but only to the extent that the bribery is intended to cause a person to do something or refrain from doing something in contravention of his or her duties or obligations impacting public interest.
<b>Extra-territorial effect</b>	Yes, in accordance with the Indonesian Anti-corruption Law.
<b>Exemption for facilitating payment</b>	No
<b>Defences</b>	<p>There are no specific defences to violations of the Indonesian Anti-corruption Law and the Anti-bribery Law, although general principles of criminal law may be applicable to reduce penalties or defeat the application of specific allegations (e.g. the defendant proves that he didn't commit bribery as charged, or such bribery was committed as a result of force or intimidation, etc).</p> <p>If a gratification recipient (that is, a public official) submits the required report to the Corruption Eradication Commission ("KPK") within the stipulated time period and obtains the KPK's permission, then such gratification will not be categorised as bribery.</p>
<b>Penalties for individuals</b>	Depending on the seriousness of the offence, penalties include imprisonment ranging from one year to 20 years and a fine ranging from a minimum of IDR50 million (approx. USD4,300) up to IDR1 billion (approx. USD86,000) or life imprisonment. In certain extreme conditions, the death penalty may be imposed.

<b>Penalties for companies</b>	<p>Penalties imposed on companies include the maximum fine plus 1/3.</p> <p>In addition to the company, the company's management, that is, the board of directors, the board of commissioners, and any relevant officers may be penalised.</p>
<b>Collateral consequences</b>	<p>Seizure of goods used for, or obtained from, the corruption (including any company owned by the perpetrator), payment of compensation at a maximum value of the property obtained from the corruption, one-year closure of the company or a part of the company business, and revocation of all or certain rights and/or government issued facilities/benefits.</p>
<b>Anti-corruption treaties</b>	<p>UNCAC</p>

### What is the definition of a bribe?

The following acts constitute “bribery” under the Indonesian Anti-corruption Law and the Indonesian Anti-bribery Law:

- giving or promising something to a public official or state apparatus: (i) with the aim of persuading him or her to do something or refrain from doing something within his or her authority, which would contravene his or her obligations; or (ii) because of, or in relation to, something in violation of his or her obligations, whether or not it is done because of his or her position;
- receiving a gift or promise by a public official or state apparatus, where the public official or state apparatus is aware or should have been aware that such gift or promise: (i) is intended to entice him or her to do something or refrain from doing something in relation to his or her position; or (ii) is as a result of him or her doing something or refraining from doing something, which would contravene his or her obligations;
- giving a gift or a promise to a public official in relation to the authority attached to his or her position or because the donor believes that such authority is deemed to be attached to that position;
- receiving a gift or promise by a public official or state apparatus where the public official or state apparatus is aware or should have been aware that such gift or promise is given in relation to the authority attached to his or her position, or according to the donor it has some relationship to his or her position;
- giving or promising something to a judge or a court advocate to influence his or her decision or opinion (as applicable) in a pending case;
- receiving a gift or a promise by a judge or court advocate where the judge or advocate is aware or should have been aware that such gift or promise is given to influence his or her

decision or opinion (as applicable) in the pending case;

- giving a gratification to a public official or state apparatus in relation to his or her position and which would contravene his or her duties or obligations.

“Gratification” is a gift in the broadest sense, and can include money, goods, discounts, commission, interest free loans, travel tickets, lodgings, tours, free medication, and other benefits.

### What is the definition of a public official and a foreign public official?

#### Domestic public official

A domestic public official (or government official) is broadly defined under various laws in Indonesia. The term includes government employees, members or employees of the legislative and judicial branches of the government, any person performing “government” functions (which may in certain circumstances include private sector employees), employees of state-owned enterprises, any person who receives a salary from the state or local government budget, any person who receives a salary from companies which receive assistance from the state or local government budget, and any person who receives a salary from other companies which use capital or facilities from the state or the public.

#### Foreign public official

The current Indonesian Anti-corruption Law does not expressly define a foreign public official or criminalise bribery of foreign public officials.

### **Is private sector bribery covered by the law?**

Private sector bribery is not specifically criminalised in Indonesia, although certain acts of private sector bribery may fall within the definition of bribery under the Indonesian Anti-bribery Law if they impact the public interest. There has been very limited enforcement of this provision against private sector individuals. Private sector bribery may still be subject to traditional doctrines of embezzlement, theft, agency, and with other civil liability offences.

### **Does the law apply beyond national boundaries?**

Yes, the Indonesian Anti-corruption Law applies beyond national boundaries.

Accordingly, any person or company outside Indonesia's jurisdiction who bribes or facilitates the corrupt act of an Indonesian public official will be punished to the same extent as any person or company who commits bribery or facilitates a corrupt act in Indonesia. Moreover, any Indonesian public official who is found to have accepted a bribe outside Indonesia for projects related to or within Indonesia may be regarded to have committed bribery.

### **How are gifts and hospitality treated?**

Gifts and hospitality (although not specifically mentioned) fall under the definition of "gratification" in the Anti-corruption Law.

As mentioned above, public officials may accept "gratification" (including birthday and wedding gifts) as long as the public officials report the gratification to the KPK and obtain permission to keep the gratification. The recipients of the gratification must report to the KPK within 30 working days of receipt of the gratification. The KPK has 30 working days in which to decide

whether the public officials can keep the gratification or whether the gratification will become state property.

Any gifts given to public officials in respect of their position, which contravene their duties and obligations and which are not disclosed to KPK will be deemed to be bribes.

There is no de minimis threshold in the Indonesian Anti-corruption Law. However, where the gratification amounts to IDR10 million (approx. USD910 ) or more, it is for the recipient to prove that it is not a bribe and where the amount is below, it is for the prosecutor to prove that it is a bribe.

### **How is bribery through intermediaries treated?**

Any use of an intermediary by a person or company to pay a bribe does not exempt the person or company from liability for bribery. The company will be liable for bribery if the bribery is committed by individuals based on an employment relationship or other relationship, acting individually or together, in such company's environment.

Moreover, any person who aids, abets, or conspires is also liable for the commission of the crime (bribery).

### **Are companies liable for the action of their subsidiaries?**

As a general principle, a parent company is treated as a separate legal entity from any subsidiary, and generally, is not liable for any of its subsidiary's actions, unless the parent company itself is involved in the criminal conduct. This will however depend on the extent of the parent company's involvement in the criminal conduct. For instance, a parent company may be held liable if it authorised or instructed its subsidiary to commit the bribery or if it had knowledge that its subsidiary was involved in such criminal conduct.

**Is there an exemption for facilitating payments?**

No, the Indonesian Anti-corruption Law does not provide any exception for facilitating payments.

**Is there a defence for having adequate compliance procedures?**

The Indonesian Anti-corruption Law does not set out any provisions as to whether having adequate compliance procedures can be relied upon as a defence.

**What are the enforcement trends in the business area?**

While Indonesia is typically awarded a low score by Transparency International's Corruption Perception Index, its ranking is improving year-on-year (for 2014, Indonesia's ranking improved to 107 out of 175 countries compared to 114 out of 175 countries in 2013).

As reported in the media and other publicly available sources, the primary enforcement efforts to date have focused on areas of financial loss to the State, such as government procurement, payments to government officials to procure certain decisions, tax avoidance measures and payments to judges.

The government and the KPK are actively seeking to combat corruption, particularly bribery, and through their concerted efforts, an increasing number of high ranking public officials (including the former head of the Special Task Force for Upstream Oil and Gas Business Activities, SKK Migas), high ranking police officers, and senior judges (including the former chief judge of the Constitutional Court), have been prosecuted for bribing or accepting bribes. Increased national and international co-operation and intelligence sharing between the regulators has also resulted in greater enforcement.

# Anti-corruption legislation in Vietnam

# Anti-corruption legislation in Vietnam

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## Key points:

<b>Key legislation</b>	<ul style="list-style-type: none"><li>■ Criminal Code;</li><li>■ Law on Anti-corruption;</li><li>■ Law on Cadres and Public Officials;</li><li>■ Law on Public Employees;</li><li>■ Decision 64 of the Prime Minister dated 10 May 2007 on giving, receipt and hand-over of gifts by state budget-funded organisations and cadres, public employees and public officials ("<b>Decision 64</b>");</li><li>■ Decree 59 of the Government dated 17 June 2013 implementing the Law on Anti-corruption ("<b>Decision 59</b>"); and</li><li>■ Law on dealing with Administrative Offences.</li></ul>
<b>Private sector bribery</b>	No – only in relation to certain specified industry sectors.
<b>Extra-territorial effect</b>	No
<b>Exemption for facilitating payment</b>	No
<b>Defences</b>	Certain circumstances are regarded as mitigating factors when determining penalties, but a robust compliance procedure is not an express mitigating factor.
<b>Penalties for individuals</b>	<ul style="list-style-type: none"><li>■ Criminal penalties (up to life imprisonment for giving bribery and up to death penalty for receiving bribery); and</li><li>■ Administrative penalties (up to VND1 billion fine (approx. USD45,000)).</li></ul>
<b>Penalties for companies</b>	<ul style="list-style-type: none"><li>■ Administrative penalties (up to VND2 billion fine (approx. USD90,000)).</li><li>■ Criminal penalties are proposed to apply to companies under a proposed amendment to the Penal Code.</li></ul>

<b>Collateral consequences</b>	<ul style="list-style-type: none"><li>■ Individuals subject to debarment from opening or managing companies, holding official posts for a certain period of time;</li><li>■ Bribery assets may be confiscated;</li><li>■ Possible revocation of official acts related to bribe.</li></ul>
<b>Anti-corruption treaties</b>	United Nations Convention Against Corruption



### What is the definition of a bribe?

A bribe is defined as money, asset or other “material benefit” in any form, which has a value of VND2,000,000 (approx. USD90) or more (or less than VND2,000,000 (approx. USD90) if serious consequences arise or if the act of bribery was committed repeatedly) and which is either provided, offered, or promised to a person holding an official position or position of power “with the intent of taking advantage of his/her official position or power in order to perform or refrain from performing certain acts for the benefit of, or as requested by, the person who offers the bribe”. Case law suggests that bribery under Vietnamese law can be with monies, properties, or other material interest which have a relevant economic value.

Active bribery (i.e. giving, offering, and promising a gratification) and passive bribery (i.e. receiving bribes, soliciting, or accepting a gratification), are both criminalised.

### What is the definition of a public official and a foreign public official?

#### Domestic public official

The notion of “public officials” under the Law on Anti-corruption includes the following :

- Cadres: Vietnamese citizens elected, approved and appointed to hold official positions or titles for a given term of office in State agencies;
- Public officials: Vietnamese citizens recruited and appointed to ranks, positions or titles in State agencies with an indefinite term of office; leaders and managerial officials in public non-business units of the State agencies, except professional officers working in the Army and the Public Security forces;
- Public employees: Vietnamese citizens recruited under employment contracts to work in public non-business units,

which provide public services (e.g., schools or hospital);

- Professional officials working in the army and in the public security forces;
- Persons being leaders or managerial officials in State-owned enterprises or being representatives of the State’s capitals at companies; and
- Persons assigned to exercise a duty or an official task and having a power in exercising such duty or official task.

General directors, deputy general directors, members of the board of management, members of the inspection committees, chief accountants, and heads and deputy heads of professional departments or sections of State-owned enterprises are not regarded as public officials. However, in practice, the authorities may adopt a broader interpretation when enforcing the laws and consider employees holding such other positions in a State-owned enterprise as public officials.

#### Foreign public official

Vietnamese law does not expressly cover bribery of foreign public officials.

### Is private sector bribery covered by the law?

Vietnamese anti-bribery law does not cover private sector bribery except when it takes place in relation to certain specific industry sectors that have a ‘public’ dimension, such as audit and accounting, medical examination and treatment, and construction. However, it is unclear how these specific prohibitions are enforced in practice.

In addition, there seems to be inconsistency between the legal provisions and actual implementation. According to news

provided by the press, the court and the police have handled private sector bribery cases in which individuals receiving the bribes are officers of private companies. This seems to be inconsistent with our understanding of Vietnamese anti-bribery law.

Currently, clearer provisions on bribery in the private sector are being considered to be included in a proposed amendment to the Penal Code but these provisions are only at the discussion stage.

### **Does the law apply beyond national boundaries ?**

While Vietnamese law is not entirely clear in this respect, it is unlikely that a Vietnamese company or individual would be subject to criminal liability if such company or individual gives bribes to a foreign public official. The definition of public officials refers to Vietnamese public officials only.

However, a Vietnamese citizen who pays a bribe to a Vietnamese official abroad may be subject to criminal or administrative liability under Vietnamese law.

### **How are gifts and hospitality treated?**

Generally speaking, the giving/receiving of gifts and hospitality can qualify as a bribe under Vietnamese law if it satisfies the elements of a bribery offence as described above.

Decision 64 provides regulations on the receiving and giving of gifts by organisations, units, and “staff, public officials and officials”. Under this Decision, a gift includes, among other things, cash, “valuable papers” (such as shares, bonds, certificate of deposits, promissory note etc.), goods, properties, tourism benefits, medical services, education, and training.

Decision 64 prohibits “staff, public officials and officials” from directly or indirectly receiving gifts in the following circumstances: (i) where the public official has responsibilities and/or power over the gift giver’s activity; or (ii) where the gift-giving is not justified by a clear and legitimate purpose; or (iii) where the gift-giving is related to acts of corruption.

Subject to the prohibited circumstances mentioned above, Decision 64 allows a public official to receive gifts if (i) he/she is sick or on certain occasions such as a wedding, funeral, traditional ceremonies, or New Year holiday; and (ii) the value of such gift is less than VND500,000 (approx. USD22).

Decision 64 also provides that “staff, public officials, and officials” may receive gifts that do not relate to their public duties without having to report them to the relevant authority. However, Decision 64 provides that they can only receive such valid gifts in accordance with applicable laws and must “sign” to acknowledge receipt of the gift(s). It is not clear what document the person receiving a valid gift must sign.

The giving of reasonable gifts/hospitality relating to the promotion, demonstration, or explanation of products or services, which is subject to Decision 64, will also be exempt if it falls under any of the circumstances listed above.

### **How is bribery through intermediaries treated?**

The Criminal Code imposes criminal penalty on the person receiving the bribe even if such person receives the bribe through an intermediary. Therefore, a principal offering the bribe through an intermediary should still be liable, but only if the principal had actual knowledge of the offence.

### **Are companies liable for the action of their subsidiaries?**

Generally, companies are not liable for the actions of their subsidiaries because under Vietnamese laws (i) only individuals can be subject to criminal liability (companies can only be administratively sanctioned), and (ii) a subsidiary is usually regarded as a separate legal person from its parent company and is therefore responsible for its own conduct only.

### **Is there an exemption for facilitating payments?**

There is no express exemption for facilitating payments if the person is offering/making the facilitating payment with the intention of requiring the public official to perform or refrain from performing certain acts. Under the Criminal Code, a person receiving a bribe (including a facilitating payment) may still be subject to criminal liability even if the ensuing action is in accordance with laws.

### **Is there a defence for having adequate compliance procedures?**

The laws of Vietnam do not expressly provide that having adequate compliance procedures in the context of anti-corruption is an express defence or a mitigating factor. That being said, if the anti-corruption programme or compliance procedures help to prevent or reduce the consequence of the violation then that can be taken into account by the court as a mitigating circumstance.

### **What are the enforcement trends in the business area?**

While the Vietnamese Government has repeatedly indicated its willingness to tackle corruption in many circumstances, corruption still remains widespread in Vietnam and the Vietnamese Government's efforts have not resulted in substantive improvements. That being said, the number of corruption cases handled by the court has increased in recent years and we expect this trend to continue.

# Anti-corruption legislation in Malaysia

# Anti-corruption legislation in Malaysia

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## Key points:

Key legislation	Malaysian Anti-corruption Commission Act (“ <b>MACC Act</b> ”)
Private sector bribery	Yes
Extra-territorial effect	Yes
Exemption for facilitating payment	No
Defences	There is no statutory defence under the MACC Act. However, the Guidelines for Giving and Receiving Gifts in the Public Service permit those in public service to accept gifts up to a maximum value if they are reported.
Penalties for individuals	For more serious bribery, imprisonment up to 20 years and a fine of not less than five times the sum/value of the gratification where it is capable of being valued or is of a pecuniary nature, or MYR10,000 (approx. USD4,400), whichever is higher. There is also a general penalty of a fine up to MYR10,000 (approx. USD4,400) or imprisonment up to two years or both.
Penalties for companies	No additional penalty specific to companies
Collateral consequences	No
Anti-corruption treaties	United Nations Convention Against Corruption

### What is the definition of a bribe?

The MACC Act makes it an offence when “*any person who by himself, or by or in conjunction with any other person corruptly solicits or receives or agrees to receive for himself or for any other person; or corruptly gives, promises or offers to any person whether for the benefit of that person or of another person, any gratification as an inducement to or a reward for, or otherwise on account of any person doing or forbearing to do anything in respect of any matter or transaction, actual or proposed or likely to take place; or any officer of a public body doing or forbearing to do anything in respect of any matter or transaction, actual or proposed or likely to take place, in which the public body is concerned.*” Active bribery therefore includes the act of giving, offering, and promising gratification under the conditions mentioned above. Passive bribery includes accepting and soliciting a gratification.

Instead of the word “bribe”, the MACC Act uses the word “*gratification*”, which includes both pecuniary and non-pecuniary bribes. Generally, gratification is defined as money, donation, gift, any valuable thing of any kind, any forbearance to demand any money or money’s worth or valuable thing, any other service or favour of any kind or any offer, undertaking or promise of any such gratifications. The MACC Act does not contain any provision for a *de minimis* threshold.

### What is the definition of a public official and a foreign public official?

#### Domestic public official

Under the MACC Act, “officer of a public body” is defined as any person who is a member, an officer, an employee or a servant of a public body. This includes a member of the administration, a member of Parliament, a member of a State Legislative Assembly, a judge of

the High Court, Court of Appeal or Federal Court, and any person receiving any remuneration from public funds, and where the public body is a sole corporation, includes the person who is incorporated as such.

The courts have adopted a broad approach in defining and determining who falls within the definition of “*an officer of a public body*”. In the MACC Act, the term “public body” includes any company or subsidiary company over which or in which any public body has controlling power or interest. Following this interpretation, it appears that a director or even an employee of a State-owned enterprise, more commonly known as a Government-linked Company (“**GLC**”) in Malaysia, falls under the scope of the MACC Act as they could be considered an officer of a public body.

#### Foreign public official

Under the MACC Act, a foreign public official includes “*any person who holds a legislative, executive, administrative or judicial office of a foreign country whether appointed or elected; any person who exercises a public function for a foreign country including a person employed by a board, commission, corporation, or other body or authority that is established to perform a duty or function on behalf of the foreign country; and any person who is authorised by a public international organisation to act on behalf of that organisation*”.

### Is private sector bribery covered by the law?

The MACC Act does not make a distinction between private sector bribery and bribery of public officials. The provision dealing with the offence of accepting gratification has general application and so, it applies to any person regardless of whether the bribery was between two private individuals or whether a public officer was involved.

### Does the law apply beyond national boundaries?

Yes, the MACC Act has extraterritorial effects, as it applies when an offence is committed outside Malaysia by a Malaysian citizen or a permanent resident.

Additionally, dealing with, using, holding, receiving, or concealing a gratification or advantage which forms the subject matter of offences under the MACC Act can be prosecuted in Malaysia even if committed abroad.

### How are gifts and hospitality treated?

Gifts and hospitality would generally fall under the definition of “*gratification*” under the MACC Act. Additional guidance on giving and receipt of gifts can be found in the Public Officers (Conduct and Discipline) Regulations as amended by the Public Officers (Conduct and Discipline) (Amendment) Regulations 2002 (the “**Regulations**”) and the Guidelines for Giving and Receiving Gifts in the Public Service (the “**Guidelines**”). The Guidelines serve to support the Regulations and set out more specific situations, where gifts from the private sector or any other persons may be prohibited or may require the approval of the Secretary General or the Security Office, depending on their value.

Accordingly, a public official is generally not allowed to receive or give gifts, or allow their spouse or any other person to receive or give on their behalf any gift, whether in tangible form or otherwise, from or to any person, association, body, or group of persons if the receipt or giving of such present is in any way connected, either directly or indirectly, with his official duties. However, there are exceptions for certain personal celebrations such as retirement, transfer, or marriage. There is also an exception if the circumstances make it difficult for the officer to refuse the gift. For example, the Guidelines provides that an officer would be

allowed to receive a gift given to him when carrying out public duties at a seminar, symposium, workshop, or any official event and the public officer was not informed of the presentation of the gift beforehand. However, the officer is required to submit a written report detailing the gift.

### How is bribery through intermediaries treated?

The MACC Act expressly states that “any person who by himself, or by or in conjunction with any other person” bribes a foreign public official will be guilty of an offence under the MACC Act, but there is no similar express reference in the section dealing with domestic public officials, suggesting that bribery through intermediaries of domestic public officials is not prohibited.

Additionally, it should be noted that the MACC Act expressly makes it an offence for intermediaries (referred to as “agents” in the MACC Act) who “*corruptly accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gratification as an inducement or a reward for doing or forbearing to do*”. Based on this prohibition, if a person acts as an intermediary (i.e. for or on behalf of any other person as an agent), this would amount to an offence under the MACC Act. This would also appear to cover the bribery of both a foreign public official and a domestic public official.

### Are companies liable for the action of their subsidiaries?

The MACC Act does not contain any specific provision which deals with the liability of parent companies for their subsidiaries’ conduct. In such situations, general company law principles (e.g. lifting of the corporate veil) would apply. The general rule is that the parent company and its subsidiaries are separate legal entities and are legally autonomous. Accordingly, the parent company’s liability would depend on the facts surrounding the case.

### Is there an exemption for facilitating payments?

No, the MACC Act does not provide for any exemptions in relation to facilitating payments.

### Is there a defence for having adequate compliance procedures?

The MACC Act does not provide for the defence of having adequate compliance procedures. It is unclear whether a robust anti-corruption programme would be a mitigating factor in a breach as this would depend on the position taken by the Courts on a case by case basis.

### What are the enforcement trends in the business area?

The Malaysian Anti-Corruption Commission ("**MACC**") provides for two investigatory approaches in relation to its enforcement operations: the proactive-based investigation and the intelligence-based investigation.

Based on the MACC's latest published Annual Report (the "**2013 Annual Report**"), the deployment of proactive-based operations not only contributed to arrests and charges against offenders involved in corruption, malpractices and abuse of power, but also managed to dismantle large-scale and syndicated corruption. In 2013, an investigation led by the MACC resulted in the arrest of a total of 509 individuals under section 16 and section 17 of the MACC Act, comprising 177 individuals who were public officials, 71 individuals who were from the private sector, and 261 who were members of the public.

A recent case of interest was the arrest by MACC in July 2013 of two former senior officers of Petroleum Nasional Berhad ("**Petronas**"), a Malaysian government-owned national oil and gas company, both of whom were charged for accepting bribes

of up to RM426,000 (approx. USD 100,000) for the approval of Petronas' official documents and money laundering of up to RM385,000 (approx. USD 90,000) during their tenure as Senior Managers of Petronas.

The MACC's latest Annual Report also highlights a case which involved a chartered arbitrator from the Kuala Lumpur Regional Centre for Arbitration (the "**KLRCA**") charged for soliciting bribes amounting to RM6 million (approx. USD 1,420,000) as inducement to settle an arbitration matter involving a local company and an international company. This was the first investigation successfully carried out by the MACC with the cooperation of the KLRCA and Malaysian Bar Council.

Another notable recent case involved charges against the former chief operating officer and the director of Koperasi Permodalan Felda Quality Foods Sdn. Bhd., a subsidiary of the Malaysian Federal Land Development Authority, for a criminal breach of trust amounting to RM30 million (USD 7,000,000). These charges arose as a result of the MACC's former investigations relating to earlier charges in December 2012 of 134 counts of cheating a bank officer involving the same individuals.





# Anti-corruption legislation in Taiwan

# Anti-corruption legislation in Taiwan

Contributed by LCS & PARTNERS

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## Key points:

Key legislation	<ul style="list-style-type: none"><li>■ Criminal Law</li><li>■ Anti-corruption Statute</li></ul>
Private sector bribery	Not criminalised but punishable under other laws.
Extra-territorial effect	Yes
Exemption for facilitating payment	No
Defences	None
Penalties for individuals	<ul style="list-style-type: none"><li>■ For active bribery, the penalty depends on whether the requested activity violates the public official's duties, regardless of whether such public official actually takes any action to fulfil the requests of the bribe. If the bribe is paid to induce a violation of the public official's duties, the penalties are imprisonment of one to seven years and a fine of up to NTD3 million (approx. USD91,000). If the bribe is paid to induce an act or an abstention that does not violate the public official's duties, then the penalties are imprisonment for up to 3 years and/or a fine of up to NTD 500,000 (approx. USD 15,200).</li><li>■ For passive bribery by a public official, the penalty also depends on whether the requested activity violates the public official's duties, regardless of whether such public official actually takes any action to fulfil the requests of the bribe. If the bribe is paid to induce a violation of the public official's duties, the penalties for the public official are imprisonment of no less than ten years to life and a fine of up to NTD100 million (approx. USD3 million). If the bribe is paid to induce an act or an abstention that does not violate the public official's duties, then the penalties are imprisonment for no less than seven years and a fine of up to NTD60 million (approx. USD1.8 million).</li></ul>

Penalties for companies	None specified under the Criminal Law and the Anti-corruption Statute, but violations of other laws are possible depending on the specific activity.
Collateral consequences	Money-laundering impact
Anti-corruption treaties	APEC Anti-corruption and Transparency Working Group APEC Guidelines on Enhancing Governance and Anti-corruption

### What is the definition of a bribe?

With respect to a bribe taker, bribery occurs when a public official corruptly demands, solicits, receives, accepts, or agrees to receive or accept any bribe or other unjust enrichment in return for actions or abstentions that are in connection with his/her official duties.

With respect to a bribe giver, bribery occurs when a person tenders, promises to give, or gives a bribe or other unjust enrichment to a public official in return for that official's actions or non-actions that are in connection with his/her official duties.

The term "bribe" is not statutorily defined. Both bribes and unjust enrichment are considered as bribes under the Criminal Law and are determined by the court on a case-by-case basis without any de minimis threshold. According to the Taiwanese court, a bribe refers to money or any property that has monetary value and unjust enrichment refers to any tangible and intangible interests that can meet one's needs or satisfy one's desire (for example, food, sexual hospitality, or the discharging of a debt).

When determining whether bribery has occurred, the court will take into consideration the underlying actions of the public official, the relationship between the giver and receiver, the types and value of the bribe, the timing of the gratification, etc.

### What is the definition of a public official and a foreign public official?

#### Domestic public official

The term "Public official" is defined under the Criminal Law. It refers to persons:

- serving an organisation of the State or a local self-governance body with statutory function and authority, and others engaged

- in public affairs with statutory function and authority; or
- entrusted by an organisation of the State or a self-governance body in accordance with the law to handle the public affairs that fall within the authority of the organisation.

A director or an employee of a State-owned enterprise would not necessarily be considered a public official unless he or she is engaged in public affairs according to the law with a statutory function and authority, or he or she is engaged according to the law in the discharge of trusted public affairs.

#### Foreign public official

Although the Anti-corruption Statute punishes the active bribery of a public official from a foreign country under certain circumstances (including cross-border trade, investment or other commercial activities), there is no definition of foreign public official under Taiwanese law. The Anti-corruption Statute does not punish passive bribery by a foreign public official, but other criminal laws will apply.

### Is private sector bribery covered by the law?

No, private sector bribery is not currently criminalised. However, in Taiwan, a company's employees, representatives, and managers have the duty of candour and honesty, and cases of private sector bribery may be punishable under other laws for breach of that duty.

### Does the law apply beyond national boundaries?

Yes, both the Criminal Law and the Anti-corruption Statute apply beyond national boundaries.

- The Criminal Law shall apply to an offence committed or having a result within the territory of Taiwan. Accordingly, a Taiwanese public official is punishable under the Criminal Law

for bribes inside and outside the territory of Taiwan. Any person giving a bribe outside the territory of Taiwan to Taiwanese public officials or foreign officials (with respect to cross-border trade or investment or other commercial activities) shall be punishable under the Anti-corruption Statute, regardless of whether such action is punishable under the law of the jurisdiction where the crime was committed.

### How are gifts and hospitality treated?

The term “bribe” is not statutorily defined, therefore gifts and hospitality might constitute a bribe or unjust enrichment if they are paid to public officials in return for their actions or non-actions in connection with their official duties.

The “Governmental Officials’ Honest and Upright Guidelines” (“**Guidelines**”) provides guidelines on the standards of gifts and hospitality that public officials can or cannot accept.

According to the Guidelines, a public official should not accept gifts from people with whom he/she has material interests that are in connection with his/her official duties except for certain limited circumstances. As for gifts from people with whom he/she does not have material interests and who are not his relatives or friends of usual contact, the value of the gifts shall not exceed NTD3,000 (approx. USD90) and the gifts shall be given in the ordinary course of social interaction. In addition, the value of the gifts given from the same resource within the same year shall not exceed NTD10,000 (approx. USD300). Otherwise, the public official shall report receiving such gifts to his/her supervisor.

As for hospitality, a public official may not attend social gatherings with people with whom he/she has material interest in relation to his/her his duty except for certain limited exceptions as follows:

- The attendance is required due to civil etiquette;
- The event is held in relation to a traditional festival and is open to the public;
- Bonus or recognition from his supervisor; and
- The event is held for an engagement, marriage, birth, moving to a new residence, inauguration, remote transfer, retirement, or resignation and does not exceed the normal standard of social etiquette.

Public officials shall refrain from attending social gatherings with people with whom he/she does not have material interest concerning his/her duties if his/her attendance is not appropriate considering his/her position and public duties.

### How is bribery through intermediaries treated?

To be held liable for bribery through intermediaries under Taiwan legislation, the principal must have an intentional liaison and act in participation with the intermediaries. Therefore, to impute the action of the intermediaries to the principal, the principal must have knowledge of the bribery and have participated in the criminal acts, for example, provide the funding, etc.

### Are companies liable for the actions of their subsidiaries?

Taiwan legislation does not expressly provide for the liability of parent companies for the actions of their subsidiaries in connection with bribery and the issue will be decided by the court on a case-by-case basis.

### Is there an exemption for facilitating payments?

No, there is no exemption for facilitating payments under Taiwan law

**Is there a defence for having adequate compliance procedures?**

No, Taiwan legislation does not have any provisions similar to the UK Bribery Act's adequate compliance procedures defence.

**What are the enforcement trends in the business area?**

In May 2015, the Act to Implement the United Nations Convention against Corruption was passed in Taiwan. The effective date for the Act will be determined by the Executive Yuan of the Taiwan government. Separately, back in 2013, legislators in Taiwan proposed the "Prevention of Bribery in the Private Sector Act" with the intention of criminalising private sector bribery. As long as either the Act to Implement the United Nations Convention take effect or the proposal for the Prevention of Bribery in the Private Sector Act is promulgated, bribery in the private sector will then be criminalised in Taiwan.

# Anti-corruption legislation in the Philippines



# Anti-corruption legislation in the Philippines

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## Key points:

Key legislation	<ul style="list-style-type: none"><li>■ The Revised Penal Code</li><li>■ The Anti-Graft and Corrupt Practices Act</li><li>■ The Code of Conduct and Ethical Standards for Public Officials and Employees</li><li>■ The Anti-Plunder Act</li><li>■ An Act Making Punishable for Public Officials and Employees to Receive, and Private Persons to Give, Gifts on Any Occasion, Including Christmas</li><li>■ The Anti-Red Tape Act</li></ul>
Private sector bribery	Yes, but only when it relates to an official act or function.
Extra-territorial effect	Yes, but only for public officers abroad who accept bribes in the exercise of their public functions.
Exemption for facilitating payment	No
Defences	Bribe given as a result of force or intimidation. Under certain conditions, the bribe or gift giver may also apply for informant's immunity by voluntarily providing information on the offence and testifying against the public officials.
Penalties for individuals	<ul style="list-style-type: none"><li>■ Direct Bribery under the Revised Penal Code: imprisonment of up to 10 years; fine of not less than three times the value of the gift; and disqualification from office, practice of profession/calling and/or the right to vote during the term of the sentence;</li><li>■ Indirect Bribery under the Revised Penal Code: imprisonment of up to six years and public censure;</li></ul>

	<ul style="list-style-type: none"><li>■ Qualified Bribery under the Revised Penal Code: imprisonment of 20 to 40 years or death (the imposition of the death penalty is currently suspended.);</li><li>■ Violation of the Anti-Graft and Corrupt Practices Act: imprisonment of six years and one month to 15 years; perpetual disqualification from public office; disqualification from transacting business with the Philippine Government; and confiscation or forfeiture in favour of the Philippine Government of the gift or wealth acquired, subject to the right of the complaining party to recover the amount or thing given to the offender under the circumstances provided by law;</li><li>■ Prohibited acts or transactions under the Code of Conduct and Ethical Standards for Public Officials and Employees: imprisonment of up to five years; fine not exceeding PHP5,000.00 (approximately USD115); and/or disqualification to hold public office;</li><li>■ Plunder under the Anti-Plunder Act: imprisonment of 20 to 40 years or death (the imposition of the death penalty is currently suspended) and forfeiture of ill-gotten assets in favour of the Philippine Government; and</li><li>■ Violation of An Act Making Punishable for Public Officials and Employees to Receive, and Private Persons to Give, Gifts on Any Occasion, Including Christmas: imprisonment of one year to five years and perpetual disqualification from public office.</li></ul>
<b>Penalties for companies</b>	The company's officers, directors or employees who participated in the crime or offence shall suffer the penalties described above.
<b>Collateral consequences</b>	Rejection or revocation of registration of the company's securities if a company officer, director or controlling person, among others, is convicted of an offence involving moral turpitude or fraud. Bribery is an offence involving moral turpitude.
<b>Anti-corruption treaties</b>	United Nations Convention Against Corruption United Nations Convention Against Transnational Organized Crime

### What is the definition of a bribe?

Generally, a bribe includes any offer, promise, or gift received by or given to a public official or employee in connection with the performance of his official duties. This may be money, property, services, or anything of value.

There is no *de minimis* threshold for the bribe, but the fact that a gift was of an insignificant value is taken into account by the courts, among other circumstances, when considering whether or not it should qualify as a bribe. Both the bribe giver (by giving, offering or promising a benefit to a public official or employee) and the bribe receiver (by soliciting or accepting a prohibited benefit) are liable.

### What is the definition of a public official and a foreign public official?

#### Domestic public officials

The term “public official” has several definitions under Philippine law.

Under the Revised Penal Code, a public official is “any person who, by direct provision of the law, popular election or appointment by competent authority, shall take part in the performance of public functions in the Government of Philippine Islands, or shall perform in said Government or in any of its branches public duties as an employee, agent or subordinate official, of any rank or class.”

Under the Anti-Graft and Corrupt Practices Act, a public official includes “elective and appointive officials and employees, permanent or temporary, whether in the classified or unclassified or exempt service receiving compensation, even nominal, from the government” of the Philippines. The term “government”

here refers to the national government, local governments, government-owned and controlled corporations, and all other branches and agencies of the Philippines.

As a rule, officials or employees of government-owned and controlled corporations (“**GOCCs**”) with original charters (i.e., those chartered by special law as distinguished from GOCCs organised under the Corporation Code) are considered as public officials or employees. In addition, the Supreme Court also considers presidents, directors, trustees or managers of GOCCs, regardless of their nature, to be public officials under the anti-bribery laws.

#### Foreign public officials

Philippine anti-bribery laws refer to Philippine public officials only. There is no indication that it applies to foreign public officials.

### Is private sector bribery covered by the law?

Philippine anti-bribery laws have very narrow application to bribery between private persons, as they must somehow involve public officials or functions, such as employing a family member of a public official when one has business before the official or giving a gift to a private person at the request of a public official to secure a government permit or license.

The Revised Penal Code also proscribes the bribery of “assessors, arbitrators, appraisal and claim commissioners, experts or any other persons performing public duties.” Thus, the bribery of these private persons in connection with the performance of their duties as assessors, arbitrators, etc., falls within the coverage of Philippine anti-bribery laws.

### **Does the law apply beyond national boundaries?**

Generally, Philippine anti-bribery laws are territorial in their effect. However, the Revised Penal Code provides for extraterritorial effect for its anti-bribery provisions when a bribery offence is committed abroad by a Philippine public official or employee in the exercise of their functions.

### **How are gifts and hospitality treated?**

Under the Code of Conduct and Ethical Standards for Public Officials and Employees, a gift will not qualify as a bribe if it is an unsolicited gift of nominal or insignificant value and is not given in anticipation of, or in exchange for, a favour from a public official or employee.

Similarly, under the Anti-Graft and Corrupt Practices Act, a gift will not qualify as a bribe if it is an unsolicited gift of small or insignificant value offered or given as a mere token of gratitude or friendship according to local customs or usage.

However, the Act Making Punishable for Public Officials and Employees to Receive, and Private Persons to Give, Gifts on Any Occasion, Including Christmas makes it illegal for any public official or employee to receive, and for private persons to give, or offer to give, any gift or other valuable thing on any occasion, when such gift, present or other valuable thing is given by reason of his official position, regardless of whether or not the same is for (a) a past favour or (b) the giver hopes or expects to receive a favour or better treatment in the future, from the concerned public official or employee in the discharge of his official functions. This prohibition also includes parties or other entertainment organised in honour of the official or employee or of his immediate relatives.

As a result, a gift will not be considered as a bribe where: (a)

it is unsolicited; (b) its value is nominal or insignificant; (c) it is not given as or for a favour; (d) it is not given by reason of official position, or in connection with the performance of official duties; and (e) it is given in accordance with local customs or usage.

There are no clear-cut statutory or jurisprudential standards on what would be considered nominal or insignificant value, or what would be acceptable in accordance with local customs or usage. These matters are decided by the courts on a case by case basis.

### **How is bribery through intermediaries treated?**

The principal's use of an intermediary to pay a bribe does not exempt the principal from liability for bribery. If the principal instructed or induced the intermediary to pay the bribe, then the former is liable for bribery.

### **Are companies liable for the action of their subsidiaries?**

As a principle, the parent company and subsidiary companies are separate and distinct legal entities, and the act of one is not necessarily imputable to the other. However, under Philippine jurisprudence, the officers, directors, or employees of the parent company may be held liable for the criminal acts of the officers, directors, or employees of the subsidiary if the evidence shows that the former planned or otherwise endorsed the criminal acts committed by the latter. However, mere knowledge of the crime is not sufficient to impose criminal liability.

### **Is there an exemption for facilitating payments?**

There is no exemption for facilitating payments under Philippine law.

### **Is there a defence for having adequate compliance procedures?**

There is no such defence under Philippine law. However, a company's anti-corruption programme or procedure may be provided as evidence before the court to show that the employee who allegedly committed the bribery was not authorised to commit such act on behalf of the company.

### **What are the enforcement trends in the business area?**

The current Administration under Philippine President Benigno Aquino III has made it a priority to combat corruption in government. In line with this, the new Ombudsman has promised to step up efforts in the investigation and prosecution of corruption cases. At this time, we are unaware of any data showing a discernible trend in terms of increased conviction rates in corruption cases, although we note that a number of high profile corruption cases have been filed under the current administration. This includes the pending criminal complaint for plunder filed against former Philippine President Gloria Macapagal-Arroyo and the recent indictment of three incumbent members of the Philippine Senate also for the crime of plunder. The incumbent Vice President is also under investigation for corruption by the Ombudsman.

# Anti-corruption legislation in India

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## Key points:

<b>Key legislation</b>	<ul style="list-style-type: none"><li>■ Indian Penal Code, 1860 (“<b>IPC</b>”)</li><li>■ Prevention of Corruption Act, 1988 (“<b>PCA</b>”)</li><li>■ The Prevention of Corruption Amendment Bill, 2013</li><li>■ Central Civil Services (Conduct) Rules 1964</li><li>■ All India Services (Conduct) Rules 1968</li><li>■ Indian Foreign Service (Conduct and Discipline) Rules 1961</li><li>■ Central Vigilance Commission Act 2003</li><li>■ Right to Information Act 2005</li><li>■ Whistle Blowers Protection Act, 2014</li><li>■ The Lokpal and Lokayuktas Act, 2013 n The Companies Act, 2013</li><li>■ The Foreign Contribution (Regulation) Act, 2010</li></ul>
<b>Private sector bribery</b>	Yes. While not defined as a bribery offence, the Companies Act contemplates penalising fraud by any person in relation to affairs of a company or any corporate body. Fraud has been defined to include any act, omission, concealment of any fact or abuse of position committed by any person or any other person with the connivance in any manner, with intent to deceive, to gain undue advantage from, or to injure the interests of, the company or its shareholders or its creditors or any other person, whether or not there is any wrongful gain or wrongful loss.
<b>Extra-territorial effect</b>	<ul style="list-style-type: none"><li>■ Indian Penal Code, 1860 – Yes.</li><li>■ PCA – Yes (to Indian citizens only)</li><li>■ PCA Amendment Bill, 2013– Yes (to Indian citizens only)</li><li>■ Lokpal Act, 2013 – Yes (to Indian public servants outside India)</li><li>■ Central Vigilance Commission Act 2003 – Yes, (to Indian citizens only)</li></ul>
<b>Exemption for facilitating payment</b>	No

## Defences

- It may be possible for persons accused to argue that the gratification received had no connection with any official act.
- The PCA Amendment Bill which was recently approved by the Union Cabinet and is currently to be tabled in Parliament, provides that the companies may take the defence of showing that they had in place adequate procedures to prevent misconduct on the part of their employees. Further, it is a defence if the person in charge of the commercial organisation can prove that the offence was committed without his knowledge or if he has exercised due diligence to prevent the commission of the offence.
- The Whistle Blowers Act provides that the head of the department in certain cases and the company may not be punished if they can prove that the offence was committed without their knowledge or if they have exercised due diligence to prevent the commission of the offence.
- **PCA:**

The PCA provides for a penalty of imprisonment for a period between five to seven years as well as a fine for the following offences:
- A public servant who takes gratification other than legal remuneration with regard to an official act.
- Taking gratification, in order, by corrupt or illegal means, to influence public servant.
- Taking gratification, for exercise of personal influence with a public servant.
- Abetting the aforementioned offences and offences relating to a public servant obtaining a valuable thing, without consideration from the person concerned in the proceeding or business transacted by such public servant.
- Abetting the offences relating to taking gratification, in order, by corrupt or illegal means, to influence a public servant and taking gratification, for exercise of personal influence with a public servant is punishable with imprisonment for a period between six months and five years as well as a fine.
- The PCA penalises criminal, misconduct by a public servant with imprisonment for a period between seven and ten years as well as a fine.
- Habitually committing offences under the PCA is punishable with imprisonment for a period between seven and ten years as well as a fine.



PCA provides that the punishment for an attempt to commit an offence will be imprisonment which may extend up to five years as well as a fine. Under section 24 of the PCA, immunity has been granted to a person against a prosecution if the person has made a statement in the course of any proceeding initiated against a public servant, stating that he has offered or agreed to offer any gratification or other valuable thing to any public servant.

- There does not appear to be any immunity under the PCA simply for making a disclosure. In this regard, The Delhi High Court (Bhupinder Singh v CBI, 2008 CriLJ 4396) has considerably narrowed the scope of immunity and has held that there is no blanket immunity given to the bribe giver and the only immunity available would be where the bribe-giver approaches the appropriate law enforcement agency and pays a bribe in order to entrap the public servant.

- **PCA Amendment Bill:**

The PCA Amendment Bill proposes to make certain changes to the penalty and has also made additions to the offences which will be subject to penalty. The PCA Amendment Bill proposes the enhancement of the penalty to imprisonment of not less than three years which may extend to seven years, as well as a fine for certain offences.

- **The Whistle Blowers Act:**

- The Whistle Blowers Act will provide for the following penalties:
- If the organisation or concerned official furnishes incomplete or incorrect or misleading comments/explanations/reports to the competent authority, such officer or organisation will be liable for a penalty which may extend to two hundred and fifty rupees each day until the report is furnished but will not exceed an amount of INR50,000 (approximately USD840). The penalty for revealing the identity of the complainant is imprisonment for a term which may extend to three years as well as a fine which may extend to INR50,000 (approximately USD840 USD). Any person who makes false or frivolous disclosures will be punished with imprisonment for a term which may extend to two years as well as a fine which may extend to INR30,000 (approximately USD500).

	<ul style="list-style-type: none"> <li>■ <b>Lokpal Act:</b> <ul style="list-style-type: none"> <li>- The Lokpal Act provides that a body called the Lokpal is to be established under the Lokpal Act which will inquire into allegations of corruption against certain public functionaries.</li> <li>- Under the Lokpal Act, making a false and frivolous or vexatious complaint will be punishable with imprisonment for a term which may extend to one year and with a fine which may extend to one hundred thousand rupees (approximately USD1,675)</li> </ul> </li> <li>■ <b>Companies Act:</b> <p>The Companies Act provides that the penalty in a case of fraud by any person against a company is imprisonment for a term of six months up to ten years and a fine that will be at least the amount involved in the fraud but may extend to three times that amount.</p> </li> </ul>
<b>Penalties for companies</b>	<ul style="list-style-type: none"> <li>■ Under the PCA, the penalties for companies include levy of fines. In certain cases, officers in charge of a company may be held personally responsible for an offence and may be liable to imprisonment.</li> <li>■ The PCA Amendment Bill provides that the investigating agencies have the authority to confiscate the bribe or the assets purchased with the bribe and such asset/ property can be forfeited to the government on conviction.</li> <li>■ The Whistle Blowers Act provides that every person who was in charge of the company at the time when the offence was committed will be liable to be punished based on the proceeding undertaken against such person.</li> </ul>
<b>Collateral consequences</b>	Tax, money-laundering, ban from public tender, class-action
<b>Anti-corruption treaties</b>	<p>United Nations Convention Against Corruption  Member of the Financial Action Task Force  United Nations Convention against Transnational Organized Crime.  Member of the trilateral India-Brazil-South Africa Cooperation Agreement ("IBSA")</p>

### What is the definition of a bribe?

The term “bribery” has not been defined under the Prevention of Corruption Act, 1988 (“**PCA**”). However, it has been defined specifically in the context of offences relating to elections under the Indian Penal Code, 1860 (“**IPC**”) as an act of giving gratification to any person with the object of inducing him or any other personnel to exercise any electoral right or of rewarding any person for having exercised any such right.

The PCA criminalises the receipt or solicitation of illegal gratification by “public servants” and the payment of such gratification by other persons, as a motive for the public servant doing or forbearing to do any official act or for showing or forbearing to show, in the exercise of his official functions, any favour or disfavour to any person or for rendering or attempting to render any service or disservice to any person specified in the section.

The term “gratification” is not restricted to pecuniary gratifications or to gratifications quantifiable in money, but can include anything that would satisfy an “appetite” or “desire.” The term can cover even insignificant amounts paid to influence a public servant, so long as it is beyond the legal remuneration to which the public servant is entitled.

The provisions of the PCA Amendment Bill, as they currently stand, seek to further expand the scope of the offences.

### What is the definition of a public official and a foreign public official?

#### Domestic public official

The expression “public servant” has a wide import under the PCA and includes not only persons in the service or pay of the government or remunerated by the government for the performance of any public duty, but also persons in the service or pay of a local authority or of a corporation established by or under central, provincial or state legislation, or an authority or a body owned, controlled or aided by the government or a government company; judges, court appointed arbitrators, senior office bearers of certain registered cooperative societies that receive, or have in the past received, any financial aid from any government of India or from any corporation owned, controlled or aided by the government.

“Government company” here means any company in which at least 51 per cent of the paid-up share capital is held by the central government or any state governments (or both), as well as the subsidiaries of such a company.

In light of the above definition, an employee of a company that is controlled by the central or state government, or 51 percent of whose shares are held by the central or state government, would be a public servant and his actions would fall within the purview of the PCA.

#### Foreign public official

There are no Indian laws that apply to bribery of foreign public officials. “The Prevention of Bribery of Foreign Public Officials and Officials of Public Interest Organisations Bill, 2011” (“Prevention of Bribery Bill”) which was introduced in the lower house of the Indian parliament has lapsed on the dissolution of the lower house of the parliament.

### **Is private sector bribery covered by the law?**

While there is no specific law that covers “private sector bribery”, the Companies Act, 2013 contemplates punishments for “fraud” in relation to a company.

“Fraud” in relation to affairs of a company or any body corporate, has been defined to include any act, omission, concealment of any fact or abuse of position committed by any person or any other person with the connivance in any manner, with intent to deceive, to gain undue advantage from, or to injure the interests of, the company or its shareholders or its creditors or any other person, whether or not there is any wrongful gain or wrongful loss.

Any person who is found to be guilty of fraud, shall be punishable with imprisonment for a term which may extend to ten years and shall also be liable for a fine which may extend to three times the amount involved in the fraud.

### **Does the law apply beyond national boundaries?**

The PCA extends to Indian citizens outside India. A reading of the provisions of the PCA along with the statement of its extent makes it clear that this statute is intended to apply to situations where an Indian “public servant” accepts illegal gratification from any person, whether in India or abroad.

The PCA does not apply to the payment of bribes or other illegal gratifications to foreign public officials.

### **How are gifts and hospitality treated?**

There are various rules which govern different government employees with regard to the acceptance of gifts and hospitality. These rules provide for restrictions on public officials from accepting offerings and gifts or any other pecuniary or non-

pecuniary benefits including free transport, boarding, and hospitality from any person unless such acceptance is sanctioned by the government. In certain cases such as weddings or funerals where it is a religious and social practice to accept gifts, the public official may accept gifts from near relatives or personal friends who have no official dealing with him. In the event any such offering is accepted by the public official, acceptance of gifts exceeding a certain threshold, depending on the post of the public official, is required to be disclosed by the public official as per the applicable rule governing his conduct as a public official. The motive and intent of all such offerings is key in determining whether an offence has been committed. Strictly speaking, the term gratification can cover an insignificant amount paid to influence the public servant, as long as it is not within the legal remuneration of the public servant. It has been laid down by the Supreme Court of India that the quantum of amount paid as gratification is immaterial and that conviction will ultimately depend upon the conduct of the delinquent public official and the proof established by the prosecution regarding the demand and acceptance of such illegal gratification (AB Bhaskara Rao v Inspector of Police, CBI, Visakhapatnam 2011 (4) KLT(SN) 35

The PCA presumes to be a bribe the act of giving or offering to give any gratification or any valuable thing by an accused person as a motive or reward to a public official for doing or forbearing to do any official act without consideration or for a consideration which he knows to be inadequate unless the contrary is proved. Hence, it is important to highlight the intent with which the gratification or valuable thing was given or attempted to be given to the public official.

There is no de minimis threshold regarding the receipt of offering by public officials. However, conduct rules applicable to certain

kinds of public officials permit such officials to accept gifts and hospitality within certain prescribed limits, and accordingly gifts and hospitality that meet such prescribed criteria will be permitted. Such permissible limits vary depending on the rules applicable to the public official in each case. As an example, the The All India Services (Conduct) Rules, 1968 (“**AIS Rules”1968**”) have been amended by the All India Services (Conduct) Amendment Rules, 2015 (“**Amendment Rules”2015**”) to increase the threshold of the value of the gifts which are permitted to be accepted by the member of the service. The Amendment Rules, 2015 that apply to certain government officials provides an exception for the receipt by officials of “casual meals” or “casual lifts” or gifts worth up to a de minimis amount of 5,000 rupees (USD 76) as against the earlier amount of 1000 rupees (USD 17).

### How is bribery through intermediaries treated?

The PCA provides that whoever accepts or obtains or agrees to accept or attempts to obtain from any person, for himself or for any other person, any gratification whatever as a motive or reward with regard to taking gratification, in order, by corrupt or illegal means, to influence a public servant or taking gratification, for exercise of personal influence with public servant will be considered guilty of a punishable offence. Hence, any person guilty of specific influence peddling will be punishable irrespective of whether such person exercised the influence directly or through another person on the public official.

The PCA further provides that the payer of the illegal gratification as an “abettor” will also be punishable. The offence of abetment is an independent, distinct and substantive offence. In this regard it is important to note that the mens rea or mental state of the bribe giver is important, and it is irrelevant that the public servant had

no authority to commit the particular offence, or refused to accept the bribe. The mere offering of illegal gratification with the object to offer gratification is considered sufficient to aggravate the offence, even if no money or other compensation is produced.

### Are companies liable for the action of their subsidiaries?

Indian law does not hold a company liable for the acts of its subsidiaries. In the case of a conviction of a company, Indian law provides that all officers of the company in charge of the company at the time when the offence was committed will be held to be officers in default and shall be liable for the acts of the company.

However, the Supreme Court of India has held that, with regard to a company, the “corporate veil may be lifted where a statute itself contemplates lifting the veil, or fraud or improper conduct is intended to be prevented, or a taxing statute or a beneficial statute is sought to be evaded or where associated companies are inextricably connected as to be, in reality, part of one concern”. (Life Insurance Corporation of India v. Escorts Limited and Ors., AIR 1986 Supreme Court 1370). Hence, the Indian courts have the power to lift the corporate veil and look into the internal workings of a company in cases where it is of the view that doing so is essential in order to prevent fraud or improper conduct and to affix liability.

### Is there an exemption for facilitating payments?

Payments made to get even lawful things done promptly are prohibited and the PCA has been enforced with respect to facilitation payments. The Supreme Court of India has held, that it has “little hesitation in taking the view that ‘speed money’ is the key to getting lawful things done in good time and ‘operation signature’ be it on a gate pass or a pro forma, can delay the

movement of goods, the economics whereof induces investment in bribery”, and that, if speed payments are allowed, “delay will deliberately be caused in order to invite payment of a bribe to accelerate it again.” (Som Prakash v State of Delhi, AIR 1974 Supreme Court 989).

### **Is there a defence for having adequate compliance procedures?**

There are no provisions under Indian laws that provide for an “adequate procedures” defence.

However, the PCA Amendment Bill seeks to provide that if a commercial organisation can prove that it had in place adequate procedures designed to prevent persons associated with it from undertaking offensive conduct, it will not be penalised.

### **What are the enforcement trends in the business area?**

Recent cases have demonstrated a strong and substantive enforcement activity.

A grassroots anti-corruption movement has led to the enactment of the Lokpal Act and the Whistle Blowers Protection Act. The Whistle Blowers Protection (Amendment) Bill, 2015 is pending in the lower house of the Parliament, which deals with whistleblowers within government. Securities and Exchange Board of India has, introduced whistleblowing requirements with regard to independent directors in listed companies.

In addition, the Companies Act, 2013 (Act), and rules thereunder contain a provision making it mandatory for listed companies to establish a “vigil mechanism” for reporting of “genuine concerns”. Rules issued by the Ministry of Corporate Affairs extend this to companies, which accept deposits from the public; and

companies which have taken money from banks and public financial institutions of more than INR 500 million. The 2013 Act also imposes an obligation on the directors of companies to devise proper systems to ensure compliance with the provisions of all applicable laws and that such systems were adequate and operating effectively. There are fines and imprisonment mandated for violation of the aforesaid provisions.

The Companies Act additionally provides statutory backing to the Serious Fraud Investigation Office (“**SFIO**”) for the purpose of investigating the affairs/frauds relating to a company. Further, the statute contemplates that once a case is assigned to SFIO, it shall be the sole authority to investigate such case and all the papers, documents and the information shall be transferred to SFIO.

According to media reports, the Indian legislature has also proposed to re-introduce the Prevention of Bribery of Foreign Public Officials and Officials of Public International Organisations Bill.



# Annexure 1 - The US Foreign Corrupt Practices Act



# Annexure 1 - The US Foreign Corrupt Practices Act

## What is the definition of a bribe?

The Foreign Corrupt Practices Act ("**FCPA**") prohibits the provision of anything of value, monetary payments, any offer, or promise or authorisation of such to a non-US government official. "Anything of value" is defined broadly to include tangible and intangible benefits or services including, for example, benefits offered to friends and relatives of the official. Significantly, the FCPA provides no de minimis exception for the value promised or conferred. Moreover the Act can be violated even if no payment is actually made.

The FCPA, however, does not prohibit all payments to non-US officials. Rather, the offer or payment must be intended either to influence the official action of the recipient or to induce the recipient to use his or her influence to affect the official decisions or actions of others "in order to assist [the issuer or domestic concern] in obtaining or retaining business for or with, or directing business to, any person," or to secure an improper advantage.

The FCPA also has provisions that are applicable to US issuers - companies that list securities on a US stock exchange or which are required to file reports with the Security and Exchange Commission - to have adequate internal controls to ensure the accuracy of their books and records.

## What is the definition of a public official and a foreign public official?

The FCPA prohibits bribes to any "foreign official." The FCPA does not apply to bribes involving US government officials, although other US Federal and State statutes apply to such conduct.

The term foreign official is defined under the FCPA as "any officer or employee of a [non-US] 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 government or department, agency, or instrumentality or for or on behalf of any such public international organisation." This definition is expansive and broadly construed by the US regulators. It includes individuals who are not necessarily considered government officials under the locally applicable law, officers of government-owned or controlled commercial enterprises, officials of public international organisations, and political party officials.

In a series of recent rulings, the US Department of Justice (**DOJ**) obtained judicial confirmation of its long-held view that bribes paid to employees of state-owned or state-controlled enterprises (**SOEs**) are bribes paid to a "foreign official."

## Is private sector bribery covered by the law?

Private sector bribery is not covered by the FCPA.

## Does the law apply beyond national boundaries?

Yes. The FCPA's anti-bribery prohibitions and internal control requirements have broad extraterritorial reach. The provisions apply to violative acts by US 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. Jurisdiction has also been found where the act occurring in the United States was the processing of US dollar-denominated bribe payments through the US banking system, where there was no other nexus to the United States and US payment processing was not contemplated by the parties.

### How are gifts and hospitality treated?

While lavish gifts provided to influence the recipient's actions; to obtain, retain, or direct business to any person; or to otherwise secure an inappropriate advantage are clearly prohibited, there are business courtesy exceptions that regulators recognise do not necessarily imply a corrupt intent.

In particular, the FCPA recognises an affirmative defence for “reasonable and bona fide expenditures”, such as travel and lodging expenses, incurred by or on behalf of a foreign official directly related to either “the promotion, demonstration, or explanation of products or services” or “the execution or performance of a contract with a foreign government or agency thereof.”

Subject to a strict assessment of the actual circumstances surrounding it, this defence may apply, for instance, to the provision of reasonable travel and meals to employees of a commercial State-owned entity in the course of negotiating a deal. But US authorities have taken a rather narrow view as to whether expense reimbursements or outlays are “reasonable and bona fide” and “directly related” to the “promotional” activities. Regulators will infer corrupt intent if a gift to a public official is likely to have an influence on the business of the gift giver, in particular when the gift giver eventually obtains a favourable decision from the public official. The value and the total number of advantages provided to the public official, the nature of the relationship, the way it has been authorised within the organisation and recorded, would be examined by the regulators in order to determine if a corrupt intent could be inferred from such circumstances.

The US Department of Justice has provided some guidance as to what should qualify for the affirmative defence: modest travel

conditions (economy class flights; standard business hotels); payments made directly to the service providers, not to the officials; and no expenses for family members. Gifts of a nominal value branded with the company's logo are also likely to qualify as a promotional gift covered by the affirmative defence.

### How is bribery through intermediaries treated?

The FCPA prohibits indirect as well as direct improper payments. In this regard, the FCPA expressly applies to action taken through “any person, while knowing that all or a portion of such money or thing or value will be offered, given, or promised, directly or indirectly,” to any non-US government official for a prohibited purpose. Under the FCPA, a company or an individual is deemed to be “knowing” if they are “aware” that such person is engaging in such conduct or if they have a “firm belief” that such conduct “is substantially certain to occur.” In addition, a person is deemed to have knowledge under the FCPA if he or she is aware of a “high probability” that the conduct did or will occur.

Further, a company's or an individual's “conscious disregard,” “wilful blindness,” or “deliberate ignorance,” of culpable conduct or suspicious circumstances may be adequate to support a violation of the FCPA. In this way, companies effectively are charged with knowledge of the activities of their business associates that they could have obtained through reasonable due diligence efforts.

### Are companies liable for the action of their subsidiaries?

Yes. 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.

### **Is there an exemption for facilitating payments?**

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”.

### **Is there a defence for having adequate compliance procedures?**

No, the FCPA does not provide for a compliance programme defence. However the existence of a strong compliance programme may be taken into account by the enforcement authorities when making a determination whether to prosecute certain companies or may support mitigation of the ultimate penalty.

### **What are the enforcement trends in the business area?**

In November 2012, the DOJ and SEC jointly issued the Resource Guidance to the FCPA, available at <http://www.justice.gov/criminal/fraud/fcpa/guide.pdf>, which sets forth their principles of prosecution, a history of the FCPA cases, and practical guidance for compliance personnel.

For the last ten years, US authorities have become increasingly active in FCPA enforcement. Recent enforcement trends include in particular (i) larger corporate penalties, (ii) an enforcement focus on individuals, (iii) periodic announcements that various industry sectors have become the focus of attention in order to encourage cooperation and voluntary compliance a sector-creep movement extending the regulators’ scrutiny beyond their traditional sector focus, (iv) increased international cooperation between the regulators and (v) an expansive jurisdictional reach of the FCPA.

# Annexure 2 - The UK Bribery Act

# Annexure 2 - The UK Bribery Act

## What is the definition of a bribe under the UK Bribery Act?

The Bribery Act provides that any “financial or other advantage” can, accompanied by the other requisite conduct that makes up a bribery offence, amount to a bribe. There are no *de minimis* thresholds set by the Bribery Act. As a result, any sort of monetary or non-monetary advantage can amount to a bribe, regardless of its value.

The Bribery Act contains 6 general bribery offences 2 of which relate to the offering/promising and giving of a bribe (commonly referred to as “active bribery” offences) and 4 of which relate to requesting, agreeing to receive or accepting a bribe (commonly referred to as “passive bribery” offences).

There are 2 elements common to all 6 of the general offences: (i) an advantage, financial or otherwise is offered, promised, given, requested, agreed to be received or accepted; (ii) for the improper performance of a function or activity (and the mere request, agreement to receive or receipt of an advantage alone in some cases will amount to improper performance – for example, a judge requesting a bribe), be it of a public nature, or connected with a private business.

The Bribery Act also has 2 further offences, the offence of bribing a Foreign Public Official and the offence of a commercial organisation failing to prevent bribery by an associated person (commonly referred to as the “**Corporate Offence**”; more details on this offence are set out below).

The offence of bribing a Foreign Public Official is stricter than the general bribery offences as there is no requirement to show that the advantage (financial or otherwise) was offered, promised or given for the improper exercise of a function or activity. The

offence occurs where an advantage is offered, promised or given to the Foreign Public Official to influence him/her in his/her public capacity and with the intention of obtaining or retaining business or a business advantage (in circumstances where the Foreign Public Official is not permitted by written law applicable to him/her to receive the advantage). In reality, such activity is likely to involve the improper exercise of the official’s function or activity, but the offence does not require proof of it or an intention to induce it (hence making it easier to secure a prosecution).

## What is the definition of a public official and a foreign public official?

### Domestic public official

The Bribery Act does not provide a definition for a domestic public official. This is because the Bribery Act’s general offences and the Corporate Offence are applicable to the bribery of any person, (private sector or public sector).

### Foreign public official

The Bribery Act sets out a separate offence of bribing a Foreign Public Official. A Foreign Public Official is defined as an individual who:

- 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),
- 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
- is an official or agent of a public international organisation.”

“Public international organisation” means an organisation whose members are any of the following—

- countries or territories,
- governments of countries or territories,
- other public international organisations,
- a mixture of any of the above.

### What is the Corporate Offence of failing to prevent bribery under the UK Bribery Act?

The Corporate Offence creates one of the strictest regimes in the world for commercial organisations, making a commercial organisation effectively vicariously liable for both public and private sector bribery by its associated persons (for example, an associated person may be an employee, agent or other more loosely connected party that provide services for or on behalf of the organisation). The definition of a person “associated with” a commercial organisation is set out in further detail below. The offence can be triggered by acts of bribery anywhere in the world.

A commercial organisation will be guilty of an offence if a person associated with the organisation bribes another person with the intention of obtaining or retaining business or an advantage in the conduct of business for that organisation. The commercial organisation does not need to be an entity incorporated in a part of the UK to be caught by the offence. Any organisation, wherever formed in the world, that carries on part of its business in the UK is subject to the Corporate Offence.

There is only one defence to the Corporate Offence: the organisation must prove that it had “adequate procedures” in place designed to prevent persons who are associated with it from bribing. Statutory guidance for companies has been issued by the UK Ministry of Justice on adequate procedures (the “**MoJ**

**Guidance**”), but this is not intended to provide any form of safe harbour for companies and is not binding on the courts.

Both the Serious Fraud Office in England and Wales and the Crown Office and Procurator Fiscal Service in Scotland operate self-reporting schemes whereby businesses that self-report bribery offences that have taken place within, or predominantly within, the relevant jurisdiction may in certain circumstances (including where the business has conducted a thorough investigation and offers full disclosure of its findings) be referred for civil settlement rather than criminal prosecution. Every case is considered on its own merits and with a view to the public interest; the first such civil settlement for the Corporate Offence by the Crown Office and Procurator Fiscal Service in Scotland was announced in September 2015.

### What is an associated person under the UK Bribery Act?

For the purposes of the Corporate Offence described above, a person is “associated with” a commercial organisation if he/she performs services for, or on behalf of, the organisation. Obvious examples of an associated person may include employees (the Bribery Act has a rebuttable presumption that employees are associated persons), agents and subsidiaries that perform services for their parent company. The government indicated during debates on the Bribery Act bill that the definition had been deliberately drafted widely, and could include parties with which there was no formal relationship. It is clear from this that there is a real risk that companies may become criminally liable where an act of bribery has been committed by joint venture or consortia partners, or by agents of any sort. The Corporate Offence does not require the associated person to be connected to the UK nor does it require any part of the bribery to have taken place in the UK.

The MoJ Guidance aims to provide assistance in determining who is an associated person. In this connection, it confirms that contractors, sub-contractors, suppliers, joint venture partners or a joint venture entity could all potentially be associated persons, but clarifies that where a joint venture entity pays a bribe, the members of the joint venture will not be liable “simply by virtue of them benefiting indirectly from the bribe through their investment in or ownership of the joint venture”.

### **Is private sector bribery covered by the law?**

Yes. The Bribery Act’s 6 general offences of bribing and being bribed as well as the “Corporate Offence” apply equally to bribery in the public and the private sectors.

### **Does the law apply beyond national boundaries?**

Yes. Even where no part of an offence takes place within the UK, a person/entity may be prosecuted in the UK if that person/entity has “a close connection” with the UK. A person/entity has a close connection with the UK if they are:

- a British citizen,
- a British overseas territories citizen,
- a British National (Overseas),
- a British Overseas citizen,
- a person who under the British Nationality Act 1981 was a British subject,
- a British protected person within the meaning of that Act,
- an individual ordinarily resident in the United Kingdom,
- a body incorporated under the law of any part of the United Kingdom,
- a Scottish partnership.” (Section 12(4), Bribery Act).”

In addition, under the Corporate Offence, a commercial organisation may be prosecuted in the UK for failing to prevent

bribery even where no part of the underlying bribery offence took place in the UK, the associated person who did the bribing is not closely connected to the UK and the commercial organisation is formed outside the UK (so long as it carries on part of its business in the UK).

### **How are gifts and hospitality treated?**

Gifts and hospitality to private sector individuals, and to UK public officials, will only be an offence where there is some element of impropriety, e.g., an intention that the recipient perform his/her job improperly (but note that such intention may be inferred by lavishness of the gift/hospitality).

Gifts and hospitality to Foreign Public Officials remain problematic because, as explained earlier, this offence does not include any element of impropriety. However, the MoJ Guidance recognises that the offence of bribing a Foreign Public Official has been drafted very broadly, and says “it is not the Government’s intention to criminalise behaviour where no such mischief (i.e., some form of improper performance) occurs, but merely to formulate the offence to take account of the evidential difficulties”.

It stresses that the prosecution must show that “there is a sufficient connection between the advantage and the intention to influence and secure business or a business advantage”, and says “the more lavish the hospitality or the higher the expenditure in relation to travel, accommodation or other similar business expenditure provided to a Foreign Public Official, then, generally, the greater the inference that it is intended to influence the official to grant business or a business advantage in return”. Adhering to market practice or business sector norms will not, it specifies, be sufficient.

### How is bribery through intermediaries treated?

The Bribery Act covers bribes given, offered, promised, requested, agreed to be received, received directly or through a third party.

Are companies liable for the action of their subsidiaries?  
The Corporate Offence of the Bribery Act makes it an offence for a commercial organisation to fail to prevent bribery by its associated persons.

Consequently, where a subsidiary bribes, its parent company will be liable for this bribery if 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 parent company. The parent company’s only defence is to prove that it had adequate procedures in place to prevent bribery by its associated persons.

### Is there an exemption for facilitating payments?

There is no exemption in the Bribery Act for facilitation payments<sup>1</sup> (nor was there under the UK’s former anti-bribery laws). The MoJ Guidance describes facilitation payments as “small bribes” and says that “exemptions in this context create artificial distinctions that are difficult to enforce ...”.

The SFO has stated<sup>2</sup> though that “[i]t would be wrong to say there is no flexibility” [with respect to prosecution for facilitation

payments] and that “[w]hether or not the SFO prosecutes in relation to facilitation payments will always depend on (a) whether it is a serious or complex case which falls within the SFO’s remit and, if so, (b) whether the SFO concludes, applying the Full Code Test in the Code for Crown Prosecutors, that there is an offender that should be prosecuted.” By way of example, cases will usually satisfy these criteria where they involve significant international elements and/or where complex legal or accountancy analysis is likely to be required. Companies may wish to consider in particular the Joint Prosecution Guidance of the Director of the SFO and the Director of Public Prosecutions on the Bribery Act 2010, which indicates<sup>3</sup> that prosecution will be less likely where a single, isolated payment is made and where the organisation had a clear and appropriate policy in place, with procedures which were correctly followed.

Nevertheless, the MoJ Guidance refers readers to joint guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions on the Bribery Act (which was published at the same time the MoJ Guidance came out). This sets out the factors a prosecutor will take into account when deciding whether or not to prosecute facilitation payments. A prosecution is more likely where there are large or repeated payments, where facilitation payments are “planned for or accepted as part of a standard way of conducting business” and where “a commercial organisation has a clear and appropriate policy setting out procedures an individual should follow if facilitation payments are requested and these have not been correctly followed”.

<sup>1</sup> It should be noted however that a person may be able avail themselves of the common law defence of duress in situations where, but for the making of a facilitation payment, there would be risk to life, limb or liberty.

<sup>2</sup> <http://www.sfo.gov.uk/bribery--corruption/the-bribery-act/questions-and-answers.aspx>

<sup>3</sup> See page 9.



A case study published with the MoJ Guidance (but which is not officially part of the MoJ Guidance) sets out a number of steps a business should consider in dealing with hidden or overt facilitation payments. These include: building in extra time in project planning to cover potential delays as a result of non-payment; questioning the legitimacy of the payments; raising the matter with superior officials and/or the UK embassy; and the use of UK diplomatic channels or participating in “locally active non-governmental organisations” to apply pressure on the relevant governmental authorities.

### **Is there a defence for having adequate compliance procedures?**

Yes, for the Corporate Offence. The only defence available to a commercial organisation prosecuted for the Corporate Offence of failing to prevent bribery is to prove that it had “adequate procedures” in place designed to prevent persons who are associated with it from bribing.

The MoJ Guidance sets out 6 principles that should be reflected in an organisation’s corporate anti-corruption programme:

#### **Principle 1: Proportionate procedures**

A commercial organisation’s procedures to prevent bribery by persons associated with it are proportionate to the bribery risks it faces and to the nature, scale and complexity of the commercial organisation’s activities. They are also clear, practical, accessible, effectively implemented and enforced.

#### **Principle 2: Top-level commitment**

The top level management of a commercial organisation (be it a board of directors, the owners or any other equivalent body or person) are committed to preventing bribery by persons

associated with it. They foster a culture within the organisation in which bribery is never acceptable.

#### **Principle 3: Risk assessment**

The commercial organisation assesses the nature and extent of its exposure to the potential external and internal risks of bribery on its behalf by persons associated with it. The assessment is periodic, informed and documented.

#### **Principle 4: Due diligence**

The commercial organisation applies due diligence procedures, taking a proportionate and risk based approach, in respect of persons who perform or will perform services for or on behalf of the organisation, in order to mitigate identified bribery risks.

#### **Principle 5: Communication (including training)**

The commercial organisation seeks to ensure that its bribery prevention policies and procedures are embedded and understood throughout the organisation through internal and external communication, including training, that is proportionate to the risks it faces.

#### **Principle 6: Monitoring and review**

The commercial organisation monitors and reviews procedures designed to prevent bribery by persons associated with it and makes improvements where necessary.

The MoJ Guidance makes it clear that more is expected of large commercial organisations when it comes to adequate procedures.

### **What are the enforcement trends in the business area?**

The Bribery Act came into force on 1 July 2011 and is not retrospective in application. It is therefore too early to identify any enforcement trend at this stage.

In its 2010-2011 annual report, the SFO (the body responsible for prosecuting bribery in the UK) noted that it takes on average 24 months for it to investigate a case. This combined with needing time for companies and individuals to commit bribery offences under the new law means that it may be some time before we see a regular flow of prosecutions. Consequently, companies should not interpret a low number of cases in the first few years of the Bribery Act coming into force as a lack of activity on the part of UK prosecutors.

For example, in December 2013 the SFO announced that it had opened a criminal investigation into allegations of bribery and corruption at Rolls Royce, centred around the company's use of third party contract negotiators in Indonesia and China. In January 2014, the UK Treasury approved one-off additional funding to the SFO to conduct this investigation, reported to be in the "low millions of pounds".

In May 2014, the SFO announced that it had opened a criminal investigation into allegations of bribery and corruption at GlaxoSmithKline Plc and its subsidiaries, centred around well publicised incidents of alleged bribery in China.

In July 2015, the SFO announced that it had opened another criminal investigation into Soma Oil & Gas Holdings Ltd and affiliated companies, in relation to allegations of corruption in Somalia.

All of the above investigations remain ongoing and indicate that the SFO is serious about utilising the Bribery Act as a weapon against corruption by UK connected companies, wherever it may occur.

Equally, an investigation may start off as a fraud investigation and mutate into a bribery investigation (or vice versa) as it progresses. This was the case with the SFO's investigation into Sustainable AgroEnergy Plc, under which 2 individuals were ultimately convicted in December 2014 of Bribery Act offences of bribing and being bribed respectively, in addition to various fraud offences.

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