



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

A Guide to Anti-corruption legislation  
in Asia Pacific 2014



# Clifford Chance's Asia Pacific Anti-corruption Group

# Clifford Chance's Asia Pacific Anti-corruption Group

Clifford Chance's on-the-ground anti-corruption team in Asia Pacific combines litigation, dispute resolution, and corporate specialists. Our team advises 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.

In addition to experienced white collar and regulatory lawyers in each of our Asia Pacific offices, including Australia, Singapore, Hong Kong, PRC, and Japan, we have 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), and Europe 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. Wendy leads the group while maintaining offices in Hong Kong and Washington, DC.

## **FOREWORD**

by Wendy Wysong

This third edition of the Clifford Chance Guide to Anti-Corruption Legislation in Asia Pacific is the work of a team of lawyers interested in furthering compliance with the anti-corruption laws and regulations in the Asia Pacific region. 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 Foreign Corrupt Practices Act and the UK Bribery Act.

As this Guide makes clear, Asia Pacific countries vary in their legislation and in their enforcement practices. There are different standards for criminal enforcement and civil liability that should be taken into account when developing your anti-corruption compliance program. For example, monetary thresholds for liability and the definition of what a country considers to be bribery may differ. If your program does not encompass local standards, you risk running afoul 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 overview of the anti-corruption regimes in Asia Pacific. Each section features the key pieces of legislation and highlights how businesses operating in these countries should best deal with anti-corruption compliance. We have also included in annexures 1 and 2 the main features of the US Foreign Corrupt Practices Act and the UK Bribery Act given their extended extraterritorial effect and possible implications for businesses in Asia Pacific.

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. Or a customs official may 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. However, what constitutes corruption varies from jurisdiction to jurisdiction and significant differences remain, causing headaches for multinationals wanting to implement a global anti-corruption policy. For instance, private sector bribery is expressly criminalised in the PRC and in Malaysia, but not in Japan or Indonesia. Facilitation payments are exempt in Australia and South Korea under certain conditions but not in other countries. Giving a bribe to a foreign public official is a criminal offence in Taiwan 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 as well as partner firms, sets out the key elements of the bribery offences in each jurisdiction, looks at how it is treated in relation to intermediaries, private sector bribery, facilitation payments, gifts and hospitality, extraterritorial applicability, and it identifies the key enforcement trends.

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# 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>	No	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	Yes	No	No
<b>Malaysia</b>	Yes	Yes	Only for foreign bribery offences	No	No
<b>Taiwan</b>	Yes	Yes	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:

<b>Key legislation</b>	<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>
<b>Private sector bribery</b>	Yes
<b>Extraterritorial effect</b>	Yes
<b>Exemption for facilitating payment</b>	No
<b>Defences</b>	<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 purpose.</p>

<p><b>Penalties for individuals</b></p>	<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, and confiscation of property;</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 150 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>
<p><b>Penalties for companies</b></p>	<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>

### **Collateral consequences**

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.

#### **Blacklisted for public procurement in healthcare sector:**

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 offense of paying bribes:

- results in a conviction by a court judgment or is minor, therefore criminal penalties are exempted;
- is minor, therefore the prosecutor decides not to prosecute;
- results in the imposition of penalties by the Chinese Communist Party's Discipline and Inspection Commission or the Administrative Supervision Authority;
- results in the imposition of administrative penalties by the authority of Finance, AIC, or Food and Drug Administration.

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.

### **Anti-corruption treaties**

- United Nations Convention Against Corruption
- Member of the Financial Action Task Force

### What is the definition of a bribe?

Anti-bribery rules are mainly provided 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 form 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 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.

### **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 seeks interest by taking 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 hospitalities 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.

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

The PRC regulators are strengthening their investigation and prosecution of bribery cases, in particular for 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. This trend has continued so far in 2014.

In 2013, the SAIC pursued 4,521 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 2014.

During 2013 and the beginning of 2014, the banking industry has been 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.

# 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 authorizes 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 for giving assistance 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>■ Others: 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>■ Others: fine of HKD100,000 (approx. USD12,900) and imprisonment for three years.</li></ul>
<b>Penalties for companies</b>	Same as above.

<p><b>Collateral consequences</b></p>	<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. 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>
<p><b>Anti-corruption treaties</b></p>	<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 be made a public body. For instance, any member of a club or an association vested with any responsibility for the conduct or management of its affairs is considered a public servant. “Club” is not defined and should be given its general meaning.

#### 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.

### 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 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 to be caught by the section. The same logic should 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 dollar value 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.

Yet, there are several types of entertainment, gifts, and advantages which are generally permitted. For example, 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 an advantage for the purposes of the POBO, no matter how lavish or corruptly offered. However, the acceptance of entertainment by a public servant may 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?**

The POBO does not directly cover actions of subsidiaries. There does not appear to be any case law in Hong Kong which directly relates to parent companies’ liability for bribes or corruption committed by their subsidiaries. However, it has been accepted in Hong Kong case law that as a matter of general principle in the context of public policy or illegality, the courts are inclined to look at the substance rather than form. 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 has held thematic seminars for business organisations to equip them with the legal knowledge and skills to prevent corruption.

# 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>	<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></ul>
<b>Penalties for companies</b>	<ul style="list-style-type: none"><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, generally, will 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:

- a person who engages in public services for a foreign, state, or local government;
- a person who engages in services for an entity established under a special foreign law to carry out specific affairs in the public interest;
- a person who engages in the affairs of an enterprise of

which the number of voting shares or the amount of capital subscription directly owned by one or more of the foreign, state, or local governments exceeds 50 percent of that enterprise's total issued voting shares or total amount of subscribed capital, or of which the number of officers (which means directors, auditors, secretaries, and liquidators and other persons engaged in management of the business) appointed or designated by one or more of the foreign, state, or local foreign governments exceeds half of that enterprise's total number of officers, and to which special rights and interests are granted by the foreign state or local governments for performance of its business, or a person specified by a Cabinet Order as an equivalent person;

- a person who engages in public services for an international organisation (which means an international organisation constituted by governments or intergovernmental international organisations); or
- a person who engages in the affairs under the authority of a foreign, state, or local government or an international organisation, and which have been delegated by such organisation.

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 would 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?**

As a general principle, a company is not held liable for the action of its subsidiary. However, such company can be held liable as a conspirer with its subsidiary.

#### **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. 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 such payment is not made in order to obtain or retain 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 pursuant to the UCPA (possibly because it can be difficult to obtain adequate evidence to prosecute such crimes).<sup>3</sup>

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 (Singapore office)

## 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>a. Fine not exceeding SGD100,000 (approx. USD80,000);</li><li>b. 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>a. Fine not exceeding SGD100,000; (approx. USD80,000);</li><li>b. 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</p> <p>Member of the Financial Action Task Force</p> <p>Asia Pacific Economic Cooperation Anti-corruption &amp; Transparency Experts’ Task Force</p>

### 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 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, or 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:

a) 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

b) 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 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 compliance 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 is one of the most corruption-free countries in the world, ranked 5th out of 177 countries in the Transparency International's Corruption Perception Index 2013. Singapore also tops the 2014 annual poll by Political and Economic Risk Consultancy as it is perceived to be the least corrupt of 16 major Asia-Pacific economies.

Corruption in Singapore remains low and under control, with no significant increase in the number of complaints and cases investigated over the past five years. In particular, public sector complaints and prosecutions remain consistently low, due to the aggressive stance taken by the Corrupt Practices Investigation Bureau ("**CPIB**") at its inception and the high wages paid to public servants so as to reduce the financial attraction of bribes.

There has been a recent increase in CPIB's enforcement of anti-corruption laws with an active approach against public officials. The increase is marked most notably by at least two separate high profile investigations in 2012 by the CPIB against public officials for allegedly receiving sexual favours as gratification amounting to corruption. One of these cases led to a six month imprisonment sentence while the other resulted in an acquittal. In early 2014, a former head of the CPIB's Field Research and Technical Support pleaded guilty to misappropriating funds issued to the branch he headed within the bureau and was sentenced to a ten-year imprisonment.

Nonetheless, the percentage of cases involving employees from the public sector remains low. In 2013, 84% of cases registered for action by the CPIB related to the private sector, while 6% and 10% of the cases related to statutory boards and government departments respectively. There was a 96% conviction rate with respect to the matters that went to trial. The CPIB targets corruption at all levels, from proceedings in relation to small payments between low-level workers up to actions against those in the upper echelons of the corporate world.

# 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 (AUD1.7 million, approx. USD1.6 million)* *penalties increased as from 20 February 2010
<b>Penalties for companies</b>	A fine of not more than the greatest of the following: 1) 100,000 penalty units (AUD17 million, approx. USD16 million); 2) if the value of the benefit can be determined, three times the value of the benefit attributable to the offence conduct; 3) 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.
<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 ( "OECD Anti-Bribery Convention") 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. 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.

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

Australia’s first and only prosecution to date under its foreign anti-corruption legislation introduced in 1999 is progressing through the courts at present with further charges laid as a result of ongoing investigations on some of the accused. In October 2012, the OECD released its Phase 3 Report on Australia, which was critical of Australia’s enforcement of the anti-bribery legislation and the lead examiners expressed concern that “the AFP [Australian Federal Police] may have closed foreign bribery cases before thoroughly investigating the allegations”. 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 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;</li><li>■ Act Concerning Offences Relating to the Submission of Bids to State Agencies; and</li><li>■ Act on Offences of Employees in Government Organisations or Agencies.</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>	No
<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 THB60,000 (approx. USD1,900) or the death penalty.
<b>Penalties for companies</b>	The company can receive the same criminal fines as an individual when the director acts within the scope of his authority and of the company's objectives and the company receives a benefit from the offence.
<b>Collateral consequences</b>	All properties given as a bribe shall be forfeited, except any 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. 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, wrongfully given to any person to induce a public official to exercise or not to exercise any act of his functions or delay to do any act of his functions, whether such exercise or non-exercise of his functions is wrongful or not.

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 or accepting 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 officials 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 officials, persons performing duties in a State-

owned enterprise or a State agency, local administrators and, members of a local assembly, 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 officials 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**

It is not a criminal offence to bribe foreign public officials under Thai law.

#### **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.

It is also a requirement that any person involved in a project with government agencies which has the value of more than THB500,000 (approx. USD16,000) must prepare and submit a revenue and expense account of 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 Thai courts as well. Additionally, Thai courts also have jurisdiction to prosecute passive bribery committed abroad by a Thai public official or judicial official.

### **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:

- (i) from a relative if the value of the gift is proportionate to the life standing of that official;
- (ii) from any person or entity if the value of the gift does not exceed THB3,000 (approx. USD100) on each occasion; or

- (iii) 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. USD100) if the State official reports it to his relevant superior and is granted with 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 to one-third of the punishment provided for such 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 as provided for the 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.

#### **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 the 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 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 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 specific 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 business transactions. However, Thailand is currently making greater efforts against corruption and bribery after ratifying the United Nations Convention Against Corruption.



# Anti-corruption legislation in South Korea

# Anti-corruption legislation in South Korea

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## Key points:

<b>Key legislation</b>	<p>Korean Criminal Code ("<b>Criminal Code</b>")</p> <ul style="list-style-type: none"><li>■ The Act on the Aggravated Punishment of Specific Crimes ("<b>Specific Crimes Act</b>")</li><li>■ The Act on Aggravated Punishment of Specific Economic Crimes ("<b>Specific Economic Crimes Act</b>")</li><li>■ The Act on the Creation and Operation of the Anti-corruption and Civil Rights Commission and the Prevention of Corruption</li><li>■ Code of Conduct for Public Officials of Korea ("<b>CoC</b>")</li><li>■ The Act on Combating Bribery of Foreign Public Officials in International Business Transactions ("<b>Foreign Bribery Act</b>")</li></ul>
<b>Private sector bribery</b>	Yes
<b>Extraterritorial effect</b>	No
<b>Exemption for facilitating payment</b>	Yes
<b>Defences</b>	<p>If the value of the benefit received is within the extent of normal practices, the benefit cannot be deemed a bribe. However, the extent of normal practices is strictly and narrowly interpreted by the courts, usually with a very low monetary threshold.</p>
<b>Penalties for individuals</b>	<p>For public sector bribery:</p> <ul style="list-style-type: none"><li>■ A bribe-taker will be subject to imprisonment of up to life and a fine of two to five times the value of the bribe, depending on the amount of the bribery.</li><li>■ Bribing a domestic public official will be subject to imprisonment of up to five years or a fine up to KRW20 million (approx. USD19,500);</li><li>■ Bribing a foreign public official will be subject to imprisonment of up to five years or a maximum fine of twice the pecuniary benefit of the bribe, depending on the amount of the bribery.</li></ul>

	<p>For private sector bribery:</p> <ul style="list-style-type: none"> <li>■ A bribe-taker will be subject to imprisonment of up to life and a fine of two to five times the value of the bribe, depending on the amount of the bribery.</li> <li>■ A briber will be subject to imprisonment of up to 5 years and a fine of up to KRW30 million (approx. USD29,000).</li> </ul>
<p><b>Penalties for companies</b></p>	<ul style="list-style-type: none"> <li>■ For bribing a domestic public official: N/A</li> <li>■ For bribing a foreign public official: fine up to KRW1 billion (approx. USD975,000); provided, if the value of the pecuniary benefit obtained by the bribe exceeds KRW500 million (approx. USD487,000), a fine up to twice the benefit.</li> </ul>
<p><b>Collateral consequences</b></p>	<ul style="list-style-type: none"> <li>■ All properties (i) given to public officials or persons who knew the bribery or (ii) set aside as bribe to public officials will be forfeited. If such properties are not forfeitable, the amount equivalent to the value of such properties will be collected from the persons who committed the bribery.</li> <li>■ Under the State Contracts Act, a company can be debarred from government procurement contracts for up to two years if an employee of the company bribed a public official with respect to bidding, entering into and executing a contract with the relevant government agency. The Defence Acquisition Program Act has a similar provision with respect to defence procurement contracts, which restricts participation in bidding and execution of contracts with the relevant government agency for up to one year.</li> <li>■ Restrictions on public tender</li> <li>■ Money laundering effects</li> </ul>
<p><b>Anti-corruption treaties</b></p>	<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, interpreted broadly to cover any advantages of value gained by the recipient, including not only financial or proprietary gains, but also other types of tangible and intangible advantages. Thus, “benefit” includes hospitality as well as gifts. Furthermore, the Korean courts construe “the connection with his duties” broadly and recognises that the benefit received may not only arise during the course of the legitimate and formal duties of the public official, but also in the course of his de facto duties, other related works that have been customarily handled by him, and other ancillary duties that he merely assists with or in which he can affect the decision maker.

Neither the statutes nor court precedents establish any monetary threshold for determining the bribe. However, the CoC, which is used as a guideline in administrative and disciplinary proceedings against public officials, provides that a public official is prohibited from receiving any cash, gifts or entertainment from anyone who has an interest in the performance of his duties, with certain exceptions, among others, (i) food or conveniences of value up to KRW30,000 (approx. USD30) and (ii) cash or gifts of value up to KRW50,000 (approx. USD50) for commemorative events such as weddings and funerals.

Under the Criminal Code and the Specific Crimes Act, soliciting, promising to accept and accepting a bribe by a domestic public official in connection with his duties are all punishable. As for the active side, giving, offering or promising a bribe by a natural person to a domestic public official all constitute 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 generally 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 Criminal Code punishes arbitrators who take bribes to the same extent as in the case of the domestic public officials, and the Specific Crimes Act considers managers of government-controlled organisations or companies as 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 government has invested 50% or more of the paid-in capital, or exercises substantial control through statutory supervision or shareholders rights.

#### **Foreign Public Official**

Under the Foreign Bribery Act, the scope of a “foreign public official” is quite broad, and includes not only (i) a person conducting legislative, administrative or judiciary service for a foreign government, but also (ii) a person to whom a business of a foreign government was delegated, (iii) a person working for a statutory public institution/organisation, and (iv) a person who works for a corporation in which a foreign government invested an amount more than 50% of the paid-in capital of that corporation or controlled by a foreign government. Under the Foreign Bribery Act, giving, offering, or promising a bribe to a foreign public official for purpose of obtaining improper benefit in connection with the

international commercial transactions are punishable. Unlike bribery to a domestic public official, however, a specific purpose of the briber is required to constitute a criminal act.

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

Yes, 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 a legal entity or a natural person, if such benefits are related to an improper request made in connection with his duties.

The difference between the elements of private sector bribery and those of public sector bribery is that, in principle, private sector bribery requires that an “improper request” be made (e.g., a request to award a bid in exchange for cash), whilst it is not necessarily required for public sector bribery (as long as the economic benefits are connected to the public official’s duties). In practice, however, it appears that this requirement has not been strictly required by all court rulings on recent private sector bribery cases.

The Specific Economic Crimes Act also expressly prohibits the giving, offering and promising of illicit economic benefit to, and soliciting, promising to accept and accepting of such illicit economic benefit by, 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 Korean anti-corruption laws 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 standard making a distinction between gifts/hospitality and bribes. However, the CoC sets out certain exceptions, such as:

- food or conveniences 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 a difficult situation due to disease or disaster.

The CoC sets out a threshold of KRW30,000 (approx. USD30) for “food or conveniences provided within the extent of normal practices” and of KRW50,000 (approx. USD50) for commemorative tokens for funeral and wedding.

In addition to these general rules, there are some specific business sector regulations providing for specific exceptions to the prohibition of giving or accepting benefits if certain conditions are met, including 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 specifically provides for third party bribery, which prohibits a domestic public official from directing a bribe to a third party upon acceptance of unjust request in connection with his duties.

Furthermore, if an instigator gives a bribe to an intermediary to deliver the bribe 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 briber 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 intermediary is not a required element of the bribery, and the instigator's directing the delivery will be sufficient. In case no directions are given by the instigator, although there are no established court precedents, it is generally understood that a person with the knowledge of such acts may be liable as an accomplice to the bribery and will be subject to half of the penalties for the bribery.

Under the Foreign Bribery Act, a bribery committed by employees, officers or agents will also constitute a criminal act of the 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, though there are no established court precedents, the liabilities of the legal entity will generally depend on the degree and depth of its involvement with the bribery by its employees, officers or agents.

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

No, in the case of bribery to domestic public officials.

As for the bribery to foreign public officials, no, unless the parent company is 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 allows offering of small amounts of cash or benefit to a foreign public official for the purpose of securing his routine and fair performance of government action.

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

The Foreign Bribery Act punishes both the individual offender and the company employing or appointing the individual. However, the company is exempted from such punishment if it had taken reasonable care and supervision in order to prevent the commission of offence. More generally, it seems to take into consideration the effort made by the company to prevent criminal violation within its organisation when determining the liability of the company. In this regard, the Korean courts would probably give most consideration to an internal compliance programme when ruling on a corruption case involving a company, even if, strictly speaking, the programme itself would not be a defence for the company.

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

Awareness of, and compliance with, anti-corruption laws are substantially improving in the Korean market. For example, many Korean companies are preparing and incorporating internal compliance programs on gifts and entertainment, and the government and public entities almost always require a commitment letter to show integrity to be completed and submitted before entering into contracts with private parties. Recently it has been observed that even some financial institutions have made similar requests to their business partners.

Recently, the Anti-corruption and Conflicts of Interest Act of Korea ("ACIA") was proposed and is under deliberation by the National Assembly. The ACIA seeks to criminally punish any exchange of job-related bribes for public officials and restrict illegal solicitation for bribe, and would be broadly applicable to public officials at public institutions such as the National Assembly and the courts, as well as the central administration agencies, local and municipal governments, public service-related organizations and public institutions.

# 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.

<p><b>Penalties for companies</b></p>	<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>
<p><b>Collateral consequences</b></p>	<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>
<p><b>Anti-corruption treaties</b></p>	<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?**

Corruption is a significant problem in Indonesia with Indonesia being ranked 114 out of 175 countries in Transparency International's 2013 Corruption Perception Index.

As reported in the media and other publicly available sources, the primary enforcement efforts to date have been focused on areas of losses 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, and the former Bandung mayor) and senior judges (including the former chief judge of the Constitutional Court) are being prosecuted for bribing or accepting bribes.

# 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>	Not generally – only in some professions.
<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. USD47,000)).</li></ul>
<b>Penalties for companies</b>	<ul style="list-style-type: none"><li>■ Administrative penalties (up to VND2 billion fine (approx. USD94,000)).</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, assets or other “material benefit” in any form, which has a value of VND2,000,000 (approx. USD95) or more (or less than VND2,000,000 (approx. USD95) if serious consequences arise or if the act of bribery was committed repeatedly) either provided, offered, or promised to a person holding an official position or 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 certain economic value.

Active bribery, i.e., giving, offering, and promising a gratification, and passive bribery, i.e., receiving bribes), soliciting, or accepting the bribe, 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 regarded as public officials. However, in practice, the authorities may adopt a broader interpretation when enforcing the laws and consider employees holding 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 in certain specific sectors 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 bribe receivers 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.

### **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, among other things (i) where the public official have responsibilities and/or power over the gift giver’s activity and (ii) where the gift giving is not justified by a clear and legitimate purpose.

Subject to prohibited cases 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) if the value of such gift is less than VND500,000 (approx. USD25).

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 staff, public officials, and officials can only receive gifts in accordance with applicable laws and must “sign” acknowledging the 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 action 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 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 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 indicated its willingness to tackle corruption in many circumstances, corruption remains widespread in Vietnam and the Vietnamese Government's efforts have not resulted in substantive improvement. That being said, the number of corruption cases handled by the court has increased in recent years.

# Anti-corruption legislation in Malaysia

# Anti-corruption legislation in Malaysia

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## Key points:

<b>Key legislation</b>	Malaysian Anti-corruption Commission Act (“ <b>MACC Act</b> ”)
<b>Private sector bribery</b>	Yes
<b>Extra-territorial effect</b>	Yes
<b>Exemption for facilitating payment</b>	No
<b>Defences</b>	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 of a maximum value if they are reported.
<b>Penalties for individuals</b>	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. USD3,200), whichever is higher. There is also a general penalty of a fine up to MYR10,000 (approx. USD3,200) or imprisonment up to two years or both.
<b>Penalties for companies</b>	No additional penalty specific to companies
<b>Collateral consequences</b>	No
<b>Anti-corruption treaties</b>	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 corporation sole, 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 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 2002 as well as the Guidelines for Giving and Receiving Gifts in the Public Service. The Guidelines for Giving and Receiving Gifts in the Public Service serve to support the Public Officers (Conduct and Discipline) Regulations 2002 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 Officer, depending on their value.

Accordingly, public officials are 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 for Giving and Receiving Gifts in the Public Service 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.

### **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.

### **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 MACC adopts two investigatory approaches in relation to its enforcement operations - the proactive-based investigation and the intelligence-based investigation. Based on MACC's 2012 Annual Report, MACC credited its use of the proactive-based investigatory approach to enforcement actions relating to syndicate-based criminal activities which resulted in the arrest of 23 individuals comprising the Malaysian government's Road Transport Department officers, insurance agents and middlemen who were arrested and investigated under section 16(a) and section 17(a) of the MACC Act 2009. Other enforcement actions stated in MACC's 2012 Annual Report included the arrest by MACC in May 2013 of the former CEO of Sime Darby Berhad, a multinational conglomerate listed in Malaysia for criminal breach of trust and fraud allegedly committed during the individual's tenure as CEO.

MACC's 2012 Annual Report further provides that MACC has extended its corporation to foreign anti-corruption enforcement agencies such as the Anti-corruption Bureau of Brunei Darussalam, Corruption Eradication Commission (also known as KPK) of Indonesia, Corrupt Practices Investigation of Singapore, Independent Commission Against Corruption, Hong Kong and the Integrity Commission of Trinidad and Tobago. Such collaborations have resulted in certain enforcement actions taken by the relevant foreign anti-corruption enforcement agencies, specifically in Hong Kong and Indonesia.



# Anti-corruption legislation in Taiwan

# Anti-corruption legislation in Taiwan

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## Key points:

<b>Key legislation</b>	<ul style="list-style-type: none"><li>■ Criminal Law</li><li>■ Anti-corruption Statute</li></ul>
<b>Private sector bribery</b>	Yes
<b>Extra-territorial effect</b>	Yes
<b>Exemption for facilitating payment</b>	No
<b>Defences</b>	None
<b>Penalties for individuals</b>	<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. USD100,000). 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 17,000).</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. USD3.3 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. USD2 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:

1. 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
2. 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 laws with statutory function and authority or 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), 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. USD100) 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. USD330). 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:

1. The attendance is required due to civil etiquette;

2. The event is held in relation to a traditional festival and is open to the public;
3. Bonus or recognition from his supervisor; and
4. 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 2013, legislators in Taiwan proposed a new law that would criminalise private sector bribery. Although the proposal is still being considered, the new law, if promulgated, would be a significant change in Taiwan's anti-corruption legislation.

# Anti-corruption legislation in the Philippines

# Anti-corruption legislation in the Philippines

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## Key points:

<b>Key legislation</b>	<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></ul>
<b>Private sector bribery</b>	Yes
<b>Extra-territorial effect</b>	Yes
<b>Exemption for facilitating payment</b>	No
<b>Defences</b>	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.
<b>Penalties for individuals</b>	<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><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></ul>

	<ul style="list-style-type: none"> <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

### 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 to 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.

# Anti-corruption legislation in India

# 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</li><li>■ Prevention of Corruption Act, 1988</li><li>■ The Prevention of Corruption Amendment Bill, 2013</li><li>■ Whistle Blowers Protection Act, 2011</li><li>■ The Lokpal and Lokayuktas Act, 2013</li><li>■ 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>■ IPC – Yes.</li><li>■ PCA – Yes (to Indian citizens only)</li><li>■ PCA Amendment Bill – Yes (to Indian citizens only)</li><li>■ Whistle Blowers Act – No</li><li>■ Lokpal Act – Yes (to Indian public servants outside India)</li><li>■ Companies Act – No</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 is currently pending in the upper house of Parliament, provides that the companies may take the defence of showing that they took adequate measures 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.

- **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).

- **Lokpal Act:**

- 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.
- 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 lakh rupees (approximately USD1,675)

- **Companies Act:**

The Companies Act provides that the penalty in case of fraud by any person against a company is imprisonment for a term of six months extending up to ten years and the fine will be at least the amount related to the fraud and may extend to three times the amount involved in the fraud.

<p><b>Penalties for companies</b></p>	<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>
<p><b>Collateral consequences</b></p>	<p>Tax, money-laundering, ban from public tender, class-action</p>
<p><b>Anti-corruption treaties</b></p>	<p>United Nations Convention Against Corruption Member of the Financial Action Task Force</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 per cent 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 earlier this year.

### **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. Any person who is found to be guilty of fraud, shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to ten years and shall also be liable for a fine which shall not be less than the amount involved in the fraud, but which may extend to three times the amount involved in the fraud. Where the fraud in question involves public interest, the term of the imprisonment shall not be less than three years.

“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.

### **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.

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.

The *de minimis* threshold regarding the receipt of offering by public officials varies depending on the rules applicable to the public official in each case. As an example, the Service Rules 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 1,000 rupees (USD17).

### **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 beneficent

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 Vs. 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, “we have 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 procedure” defence. However, whether or not the existence of a robust anti-corruption programme proves as an adequate defence in any enforcement action will depend on the circumstances of each case.

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.

In addition to the PCA, the Right to Information Act, 2005 (“**RTI Act**”) was enacted in order to enhance government transparency and has been actively used to hold public officials accountable for their decisions and to monitor public spending. The Supreme Court of India has upheld corruption charges in several cases involving politicians and high-ranking government officials and continues to monitor certain corruption cases very closely.

A grassroots anti-corruption movement has led to the enactment of the Lokpal Act and the Whistle Blowers Act although, according to media reports, there is a proposal to amend the Whistle Blowers Act. The renewed focus on bribery has also led to the amendment to the PCA in the form of the PCA Amendment Bill. According to media reports, the Indian legislature has 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 authorization of such to a non-US government official.

“Anything of value” is defined broadly to include to the official, which broadly includes tangible and intangible benefits or services including, for example, benefits conferred 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 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 UK Bribery Act sets out a separate offence of bribing a Foreign Public Official. A Foreign Public Official is defined as an individual who:

- “(a) holds a legislative, administrative or judicial position of any kind, whether appointed or elected, of a country or territory outside the United Kingdom (or any subdivision of such a country or territory),
- (b) exercises a public function— (i) for or on behalf of a country or territory outside the United Kingdom (or any subdivision of such a country or territory), or (ii) for any public agency or public enterprise of that country or territory (or subdivision), or
- (c) is an official or agent of a public international organisation.”

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

- (a) countries or territories,
- (b) governments of countries or territories,
- (c) other public international organisations,
- (d) 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, employees, agents or other more loosely connected parties that provide services for or on behalf of the organisation). 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.

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

In addition, under 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”.

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:

<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.

**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 UK 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. 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".

Furthermore, 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 publicized incidents of alleged bribery in China.

Both investigations indicate that the SFO is serious about utilising the UK Bribery Act as a weapon against corruption by UK connected companies, wherever it may occur.

# Clifford Chance Asia Pacific - recent anti-corruption client briefings

Title	Date
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