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

AN INTERNATIONAL GUIDE TO ANTI-CORRUPTION LEGISLATION MARCH 2019

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INTRODUCTION

"While there are exceptions, the data [from Transparency International's Corruption Perceptions Index 2018] shows that despite some progress, most countries are failing to make serious inroads against corruption. ... This year, further research analysis shows a disturbing link between corruption and the health of democracies, where countries with higher rates of corruption also have weaker democratic institutions and political rights."

Extract from Transparency International's website following the launch of the TI CPI 2018 on 29 January 2019

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

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

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

CLIFFORD

СНАМСЕ

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

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

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

- What is the definition of bribery?
- What is the definition of a public official and a foreign public official?
- Is private sector bribery covered by the law?
- Does the law apply beyond national boundaries?
- How are gifts and hospitality treated?
- Is there an exemption for facilitation payments?
- How is bribery through intermediaries treated?
- Are companies liable for the actions of their subsidiaries?
- Are companies required, or is it a defence, to have compliance procedures in place?
- What are the penalties?

THE UNITED NATIONS CONVENTION AGAINST CORRUPTION

"Corruption is present in all countries, rich and poor, North and South. ... It robs societies of schools, hospitals and other vital services, drives away foreign investment and strips nations of their natural resources. It undermines the rule of law and abets crimes such as the illicit trafficking of people, drugs and arms. ... the cost of corruption is at least £2.6 trillion [and] businesses and individuals pay more than \$1 trillion in bribes each year."

António Guterres, United Nations Secretary-General, 9 December 2018

The UN Convention, which was opened for signature on 9 December 2003, has been ratified by 186 countries¹ and came into force on 14 December 2005. 9 December is now marked annually as international anti-corruption day.

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

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

All Parties to the Convention are required to criminalise:

the bribery of national and foreign public officials, as well as officials of public international organisations;

 the embezzlement, misappropriation or other diversion of either public or private funds by a public official to whom the funds have been entrusted;

- the laundering of proceeds of crime; and
- obstruction of justice.

In addition, Parties must consider criminalising trading in influence, the abuse of functions by a public official, illicit enrichment and private sector bribery.

Each Party must, consistent with its legal principles, adopt measures to establish the liability of legal persons for participation in Convention offences and must take, "to the greatest extent possible within its domestic legal system", measures to facilitate freezing, seizure and confiscation of the proceeds of Convention offences.

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

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

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

While the Convention is clearly a welcome development as the first truly global legal instrument on corruption, there are a number of aspects to the Convention that have given rise for concern. One of these concerns, the lack of any inherent monitoring or enforcement mechanism in the instrument itself, was addressed at the November 2009 UN Conference in Doha when a "Review mechanism" was supported by a vast number of signatory countries, and by international companies.

Under this mechanism, states parties to be reviewed in each year of the four-year cycle are selected by lot, and the country review, reports composed of selfassessments and peer reviews are published on the UN website.

^{1.} As at 22 January 2019

Critics argue that a handful of countries have compromised the review mechanism by weakening key provisions, namely those providing for participation of civil society organisations in the review process and publication of country reports. The adopted mechanism gives governments discretion to exclude civil society from the review process, and withhold information from publication in country reports. Critics also suggest that the implementation review group will be ineffective because it is an open-ended intergovernmental group of State parties, rather than a smaller group of independent experts.

A further concern is the large number of "optional" Articles in the Convention. These include Articles where Parties are required simply to "consider" adopting particular measures (see above for examples), as well as Articles where Parties are required to adopt measures, but only "where appropriate and in accordance with the fundamental principles of its legal system".

There is no doubt, however, that the UN Convention has been instrumental in helping countries work towards establishing a common framework for anti-bribery measures, and in increasing the focus of the international community on the issues surrounding corruption.

THE OECD CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS

"Corruption remains one of the most pressing challenges of our time. It promotes mistrust in governments, public institutions, banks, corporations, politicians, political parties, democracies, you name it. It corrodes our social fabric. [In a 2017 survey] only 15% of citizens felt the system was working for them and 69% expressed concerns about 'corruption'.

Angel Gurría, OECD Secretary-General, 14 November 2018

On 17 December 1997, OECD member countries and five non-member countries (Argentina, Brazil, Bulgaria, Chile and Slovenia) signed a Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. There are now 44 signatory countries to the Convention², which came into force on 15 February 1999.

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

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

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

Parties must prohibit off-the-book accounts and other accounting irregularities for the purpose of bribery or of hiding such bribery and there are also provisions on money laundering, mutual legal assistance, extradition and monitoring.

Signatories to the OECD Convention

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

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

antibriberyconventionratification.pdf.

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

^{2.} As at 22 January 2019

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

THE OECD RECOMMENDATION FOR FURTHER COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS

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

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

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

As an integral part of the Recommendation, the OECD Council also adopted (on 18 February 2019) the Good Practice Guidance on Internal Controls, Ethics and Compliance³ which is "intended to serve as non-legally binding guidance to companies in establishing effective internal controls, ethics, and compliance programmes or measures for preventing and detecting foreign bribery". Specifically, the Good Practice Guidance calls on businesses to:

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

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

The OECD has announced a review of the Recommendation and a consultation document is expected to be published in the second quarter of 2019.

^{3.} http://www.oecd.org/daf/anti-bribery/44884389.pdf

AUSTRALIA

What is the definition of bribery?

There are laws in each State and Territory of Australia which make bribery of state and local officials, as well as bribery of private individuals, an offence in some circumstances. In general, such laws make it an offence to give, offer or accept a benefit of any kind dishonestly or corruptly. In addition, the payment or receipt of secret commissions or corrupt rewards as inducements, both in the public and private sectors, also constitute offences under some State laws in Australia.

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

Section 70.2 provides:

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

(a) the person:

- (i) provides a benefit to another person; or
- (ii) causes a benefit to another person; or
- (iii) offers to provide, or promises to provide, a benefit to another person; or
- (iv) causes an offer of the provision of a benefit, or a promise of the provision of a benefit, to be made to another person; and
- (b) the benefit is not legitimately due to the other person; and
- (c) the first-mentioned person does so with the intention of influencing a foreign public official (who may be the other person) in the exercise of

the official's duties as a foreign public official in order to:

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

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

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

The Australian Government has proposed an amendment to section 70.2 to clarify that it is not necessary to prove that the accused person intended to influence a particular foreign public official (in the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017 (the "**CLA Bill**")).

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

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

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

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

The term "Commonwealth public official" is also defined in the Criminal Code and includes:

- the Governor-General, a Minister, a Parliamentary Secretary, a member of either House of the Parliament;
- a judicial officer;
- a member of the Australian Defence Force, or Australian Federal Police;
- an officer or employee of a Commonwealth authority;
- an individual who is a contracted service provider for a Commonwealth contract;
- individuals who exercise powers or perform functions, or holds or performs the duties of an office established, under certain Commonwealth legislation.

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Is private sector bribery covered by the law?

Private sector bribery is not addressed in the Criminal Code but is covered by individual State and Territory laws.

Does the law apply beyond national boundaries?

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

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

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

How are gifts and hospitality treated?

Gifts and hospitality are likely to be viewed as a "benefit" and may therefore be bribes depending on whether the other elements of the offence are present, such as whether or not there is an intention to influence the recipient when providing the gift or hospitality.

Is there an exemption for facilitation payments?

The Criminal Code provides a facilitation payment defence to the offence of

bribing a foreign public official in section 70.4. In summary, there is a defence if:

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

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

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, counselled 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 actions of their subsidiaries?

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

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

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

The Australian government has proposed (in the CLA Bill) the introduction of a new offence of failing to prevent bribery. If introduced, this would make a company liable for the actions of its associates unless the company could establish that it had adequate procedures in place to prevent bribery occurring.

Are companies required, or is it a defence, to have compliance procedures in place?

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

As noted above, the Australian government has proposed the introduction of a new corporate offence of failing to prevent bribery, similar to the offence which exists in the United Kingdom. This will require the company to establish that it had adequate procedures in place to prevent bribery occurring as a defence to any prosecution.

What are the penalties?

The maximum penalty for a corporation is the greater of:

- 100,000 penalty units (currently AUD 21 million);
- if the value of the benefit obtained directly or indirectly by the corporation or related body corporate can be determined by the court then three times the value of the benefit attributable to the conduct constituting the offence; or
- if the court cannot determine the value of the benefit, 10% of the annual turnover of the corporation during the 12 month period ending at the end of the month in which the offending conduct occurred.

The maximum penalty for an individual is 10 years' imprisonment and/or a fine of 10,000 penalty units (currently AUD 2.1 million).

BELGIUM

What is the definition of bribery?

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

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

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

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

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

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

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

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

Individuals who are applying for a public position, who lead others to believe that they will exercise a public function or who, by misrepresenting themselves, mislead others into believing that they will exercise a public function are also included (Article 246 (3)). Managers of private enterprises are deemed to exercise public functions to the extent that the act of bribery affects a public service mission entrusted to the enterprise. A political party official in a single party country would be considered to be a public official if he performed public functions.

Is private sector bribery covered by the law?

Private sector bribery is a separate offence in Belgian law (although there is some overlap). It is an offence for any person to propose to another person in his capacity as director or manager of a legal entity, proxy holder or employee of a legal entity, or proxy holder or employee of a natural person, any offer, promise or benefit, directly or indirectly and whether for himself or for a third party, in order to do, or omit to do, an act within his function, without the authorisation and knowledge of the board of directors, the general meeting of shareholders, the principal or the employer (as the case may be). It is also an offence for a person acting in one of the capacities above to request, accept or receive such an offer, promise or benefit (Article 504 bis Criminal Code).

Does the law apply beyond national boundaries?

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

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

- where it is committed by a Belgian citizen or by someone who has their main residence in Belgium; or
- (ii) with respect to the bribery of a person holding public office, where the offence relates to a Belgian official, to a Belgian official of a foreign country or an international organisation that has its headquarters in Belgium.

Where the bribe-payer is a Belgian national or resident and the act of bribery is committed outside Belgium and concerns a public official who is neither Belgian nor employed by an international organisation headquartered in Belgium, Belgian courts will only have jurisdiction if the act is also punishable under the laws of the country in which the act is committed (Article 10 *quater* (2) of the Preliminary Title of the Belgian Code of Criminal Procedure).

How are gifts and hospitality treated?

Gifts and hospitality are likely to be treated as an "advantage" and may therefore be bribes where the other elements of the offence are present.

Is there an exemption for facilitation payments?

There is no exemption in Belgian law for facilitation payments, and such payments will therefore fall within the scope of the Article 246 offence if the necessary elements of the offence are present.

Article 247 specifically states that a bribe for performing "a proper but unpaid official act" will be an offence.

How is bribery through intermediaries treated?

A company can be held liable for the actions of an intermediary where the

latter is deemed to have been acting as an intermediary through which the offence of bribery was committed.

Are companies liable for the actions of their subsidiaries?

Parent companies are not liable for offences committed by their subsidiaries by virtue only of the ownership relationship. However, the parent company may be liable where a subsidiary is considered to have been acting as an intermediary in respect of the bribery offence.

Are companies required, or is it a defence, to have compliance procedures in place?

Companies are not required to have antibribery compliance procedures in place. However, a company may be able to avoid corporate liability in respect of an offence committed by an employee or intermediary where it can prove that the company did not have criminal intent, that it exercised appropriate due diligence in the hiring or supervision of the person who committed the offence and that the offence was not the consequence of defective internal controls and systems.

What are the penalties?

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

Active bribery of a person holding public office by an individual is punishable with a prison sentence of up to five years and/or a fine of up to EUR 800,000. These penalties can however be increased depending on the capacity of the person bribed (*e.g.*, the bribery of judges being

subject to higher penalties than for other public officials). Bribery of foreign public officials is also subject to more severe punishment.

For companies and other legal entities, the maximum fine is EUR 2.88 million, and assets may also be confiscated. The calculation of fines for companies is subject to complicated rules, and to changes due to the "indexation" ("opdeciemen") of these amounts. Legal persons may also be dissolved, may be prohibited from carrying on an activity relating to corporate services or may be required to close down one or more establishments.

A Law of 11 May 2007 explicitly prohibits the tax deductibility of secret commissions by companies. Any such commissions cannot be exempted from tax through other deductions. The cost or advantage (*i.e.*, the secret commission) will furthermore be taxed at a rate of 103% (if the beneficiary is a person) or 51.5% (if the recipient is a legal entity) (Article 219 of the Income Tax Code). To the extent this separate taxation can be considered as a criminal sanction, it is eligible for reduction or mitigation by the judge.

Active private bribery by an individual is punishable with a prison sentence of up to three years and/or a fine of up to EUR 800,000. For companies and other legal entities, the maximum fine is EUR 1.6 million.

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

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BRAZIL

What is the definition of briberv?

The Brazilian Criminal Code

The Brazilian Criminal Code (Article 333) provides that it is an offence to offer or promise an undue advantage to a public official, in order for him to put into practice, to omit or delay, any official act (active corruption).

Article 316 of the Brazilian Criminal Code prohibits a direct or indirect demand to a public official or a third party to grant an undue advantage through a public office (even if the person is no longer in office, or is not yet in office) (graft).

Article 317 prohibits passive corruption, and Article 332 prohibits influence peddling - the request, demand, or receipt, by oneself or a third party, of an advantage or promise, with the aim of influencing an act by a public official in the exercise of office.

In respect of foreign public officials, Article 337-B of the Brazilian Criminal Code prohibits:

"[an] act or promising, offering or granting, directly or indirectly, any improper advantage to a foreign public official or to a third party, to lead the official into practising, omitting or delaving an official act related to an international business transaction".

Article 337-C prohibits:

"[an] act of requesting, demanding, imposing or obtaining, for the agent or for a third party, directly or indirectly, any improper advantage or promise of advantage, with the intent of influencing a foreign public official in the performance of his or her duties. related to an international business transaction".

The term "undue advantage" is not defined, and does not have to have a direct financial or commercial value. Other types of advantage may therefore be deemed undue, for example, offering a job to the son of a government official.

The Brazilian Clean Companies Act

The Brazilian Clean Companies Act⁴ (section 5) creates strict civil and administrative corporate liability for bribery of foreign and domestic officials. It applies to "constituted corporate enterprises, regardless of the organisation or corporate structure adopted, as well as any constituted foundations, associations of entities or individuals, or foreign companies, based or with affiliates or representation in Brazilian territory, even if temporarily constituted". Under this provision, the mere promise of undue advantage is enough to constitute a corrupt act, even if not materially given.

Other corrupt acts prohibited by the Clean Companies Act include:

bearing, in any way, the costs of (i) carrying out acts prohibited by the Clean Companies Act;

- using an intermediary to hide the (ii) company's real interest or the identity of the beneficiary of the prohibited acts;
- engaging in fraudulent activities in a (iii) public bid or public procurement process; or
- (iv) intervening, in any way, in the actions and decisions of a public official.

The Administrative Improbity Act

The Administrative Improbity Act⁵ prohibits obtaining any undue patrimonial advantage due to the exercise of public office (Article 9).

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

A public official is defined in Article 327 of the Brazilian Criminal Code as an individual who holds a public position, job or office, whether permanent or temporary and whether paid or unpaid. The term includes employees from all bodies, entities and branches of the government, at municipal, state and federal levels, including elected officials. It also includes employees of private companies who are performing an activity typically performed by the state.

Officials at state-owned or controlled companies that perform public services are also public officials for the purposes of the corruption offences.

^{4.} Federal Law No. 12,846 of 2014

^{5.} Law 8,429 of 1992

A foreign public official is a person who holds a public position, job or office, whether permanent or temporary and whether paid or unpaid, in a government agency or entity, the diplomatic representation of a foreign country, a legal entity controlled, directly or indirectly, by the government of a foreign country, or an international public organisation.

Is private sector bribery covered by the law?

Private sector bribery is not covered by Brazilian law.

Does the law apply beyond national borders?

The Brazilian Criminal Code applies to corruption and influence peddling in relation to foreign public officials in the context of international business transactions.

The Brazilian Clean Companies Act applies to bribery of domestic and foreign public officials even in circumstances where the corruption takes place outside Brazil, if the relevant company is based, or has subsidiaries or representation, in Brazilian territory.

How are gifts and hospitality treated?

An undue advantage may include gifts and hospitality, which may therefore be bribes if the other elements of an offence are present.

Additionally, there are instructions and guidance from the Government and the General Comptroller's Office which set out more detailed rules for federal government officials, and there are state and municipal rules which apply more locally.

Is there an exemption for facilitation payments?

There is no exemption in Brazilian law for facilitation payments.

How is bribery through intermediaries treated?

Both the Brazilian Criminal Code and the Clean Companies Act expressly provide that bribery of domestic and foreign public officials may be committed directly or indirectly.

Under the Administrative Improbity Act a company could be held liable for corrupt acts by an intermediary where it had induced, agreed to, or in any way, directly or indirectly benefited from such acts.

The Clean Companies Act specifically prohibits the use of an intermediary to hide the company's real interest, or the identity of the beneficiary of a wrongful act.

Are companies liable for the actions of their subsidiaries?

There is no corporate criminal liability in Brazil, other than for environmental crimes. A company cannot therefore be held criminally liable for a bribery offence committed by its subsidiary.

However, under the Administrative Improbity Act, a controlling or investing entity can be held civilly liable, where it induces, agrees to or, in any way, directly or indirectly, benefits from the act of the controlled, owned or related company.

Under the Clean Companies Act a company is jointly liable with its subsidiary for conduct prohibited by that Act. Penalties are restricted to the payment of fines and compensation for damages.

Are companies required, or is it a defence, to have compliance procedures in place?

Private sector companies are not required to have anti-bribery internal controls in place either as an affirmative requirement or as a defence to liability for acts of bribery by employees or agents.

However, the existence and depth of an 'Integrity Programme' will be considered when determining the range of fines and penalties to be applied to companies found to have violated the Clean Companies Act.

Additionally, Leniency Agreements signed with Brazilian authorities (whether or not relating to conduct prohibited by the Clean Companies Act) typically include an obligation on the company to implement or improve a Compliance/ Integrity Programme as part of the deal.

The General Comptroller's Office and the *Instituto Ethos* (a private organisation of public interest) have jointly established a programme designed to promote the adoption of voluntary anti-corruption or integrity measures within the corporate sector. Companies certified by this programme as having internal controls

and measures designed to achieve the programme's objective receive specific public incentives and market recognition.

State-owned companies are required to have internal integrity controls and measures to manage compliance and anti-corruption risks related to the company's business.

What are the penalties?

Active corruption – imprisonment of two to twelve years, and fines.

Passive corruption – imprisonment of two to twelve years, and fines.

Graft – imprisonment of three to eight years, and fines.

Influence peddling – imprisonment of two to five years, and fines.

Penalties for breaches of the Administrative Improbity Act include: the loss of illegally obtained gains; indemnification of damages caused; loss of public office; suspension of political rights for eight to ten years; fines; debarment from government contracts; and a prohibition on receiving subsidies or loans from state-controlled financial institution or other entities for a period of up to ten years.

CZECH REPUBLIC

What is the definition of bribery?

Czech law approach to bribery is twofold. In the area of private law, bribery is prohibited under unfair competition provisions contained in Czech Act No. 89/2012 Coll, as amended (the **"Czech Civil Code**") which define "bribery" as offering, promising or providing any benefit in order to obtain an undue competitive advantage, as well as requesting, accepting or being promised such benefit.

From the public law standpoint, bribery is prosecuted under Czech Act No. 40/2009 Coll., the Criminal Code, as amended (the "**Czech Criminal Code**") which defines "bribe" as any unjustified advantage (*i.e.* direct property enrichment or other advantage) obtained directly by the recipient or by another person with the recipient is permission, to which the recipient is not legally entitled (e.g. gifts, hospitality and invitations to events) (section 334(1)). Based on this definition, the Czech Criminal Code describes several "bribery offences" in sections 331 to 333, including:

- (a) accepting bribes;
- (b) offering bribes; and
- (c) indirect bribery.

In particular, the Czech Criminal Code makes it an offence:

- to give or accept bribes in connection with "procuring matters in the public interest" for oneself or for someone else;
- to give or accept bribes in connection with the "business activities" of oneself or someone else; and

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

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

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

The term public official is defined to include, *inter alia*:

- the president of the Czech Republic, the members of the Czech Parliament, the members of the Czech government or other persons holding a position in a public authority, *e.g.* employees of the Czech Permanent Representation to the EU and Czech Embassies;
- (ii) persons holding office at the legislative body, judicial authority

or other public authority of a foreign state;

- (iii) persons holding office, employed or working in an international organisation formed by states or other subjects of public international law or its bodies and institutions or persons acting in a name thereof, *e.g.* employees of the EU institutions, members of the European Parliament; and
- (iv) persons holding an office in an enterprise in which the Czech Republic or a foreign state has a decisive influence (section 127 and 334(2) of the Czech Criminal Code).

There is no separate definition of foreign public official and foreign public officials are included within the definition of public official.

Is private sector bribery covered by the law?

Yes, the bribery offences set out above can apply to bribery of private sector persons, except for the offence of indirect bribery.

Where a bribery offence has been committed by a public official or in relation to a public official, the maximum penalties available are higher.

Does the law apply beyond national boundaries?

Yes. The provisions of the Czech Criminal Code have particularly broad extraterritorial reach. Among other things, the Czech Criminal Code applies to:

 an act committed in the Czech Republic even if the breach of, or threat to, an interest protected under the Czech Criminal Code took place or was intended to take place abroad; and

(ii) an act committed abroad if the breach of, or threat to, an interest protected under the Czech Criminal Code, or at least a part of the consequence of such act, took place or was intended to take place in the Czech Republic.

The Czech Criminal Code also applies to conduct on board a Czech aircraft or a Czech ship abroad.

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

How are gifts and hospitality treated?

In line with the definition of a "bribe" contained in the Czech Criminal Code, gifts, hospitality and invitations to events may be considered prohibited where the other elements of the offence are present.

Is there an exemption for facilitation payments?

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

How is bribery through intermediaries treated?

From the perspective of the Czech Criminal Code, it is irrelevant whether a bribery offence is committed directly or *via* an intermediary. In addition, also the intermediaries may be held criminally liable, provided that relevant persons were aware or should have been aware that the elements of a bribery office are present in the relevant conduct.

Are companies liable for the actions of their subsidiaries?

Generally, in accordance with the Czech Act No. 418/2011 Coll., on Criminal Liability of Legal Entities (the "**Czech Act on Criminal Liability of Legal Entities**") companies may be held criminally liable for specific criminal offences including the criminal offence of offering bribes and indirect bribery.

In particular, under sections 8(1) and 8(2), a company may be held criminally liable if the criminal offence is committed on its behalf, in its interests or as part of its activities and the offence is committed by:

- (i) its statutory body, a member of its statutory body or other persons acting on behalf of the company (e.g. agents) or by a person in a leading role within the company;
- persons in a leading role within the company authorized to perform managerial or supervisory activities within the company, even if they are not specified in (i) above;
- (iii) persons exercising decisive influence over the management of the company, if the conduct of such person was one of the causes of the consequences upon which the criminal liability of the company is based; or
- (iv) employees of the company or persons with similar status while carrying out their work tasks on the basis of resolutions or instructions of the company's bodies or persons specified under (i) to (iii) above, or where due supervision by the

company's bodies or persons specified under (i) to (iii) above was not exercised.

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

Are companies required, or is it a defence, to have compliance procedures in place?

There is no requirement for companies to have anti-bribery compliance procedures in place, but under the Czech Act on Criminal Liability of Legal Entities a company can attract criminal liability for a bribery offence committed by an employee in circumstances where due supervision was not exercised (see above).

A company may defend itself from criminal liability if it proves that it exercised due care to the maximum extent that can be justly requested of the company in order to prevent persons specified under (i) to (iv) above from the relevant criminal conduct.

What are the penalties?

The penalties for a bribery offence under the Czech Criminal Code include imprisonment for a term of up to 12 years, forfeiture of property and/or a monetary penalty of up to approximately EUR 1.35 million (forfeiture of property and a monetary penalty cannot be imposed at the same time). The actual length of the term of imprisonment and/ or the amount of the monetary penalty depends, among other things, on the scale and seriousness of the offence, the amount of the bribe *etc*.

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

- (i) monetary penalty of up to approximately EUR 54 million; in addition to factors such as the scale and seriousness of the offence, the amount of the bribe *etc.*, the actual amount of the monetary penalty is also based on the value of the property owned by the legal entity (section 18 of the Czech Act on Criminal Liability of Legal Entities);
- prohibition of activity (e.g. a business activity) for up to 20 years, if the criminal offence was committed in connection with such activity

(section 20 of the Czech Act on Criminal Liability of Legal Entities);

- (iii) prohibition of performance under public procurement contracts, participation in concession procedures or public tenders for up to 20 years, if the criminal offence was committed in connection with participation of the legal entity therein (section 21 of the Czech Act on Criminal Liability of Legal Entities);
- (iv) prohibition on accepting grants and subsidies for up to 20 years if the criminal offence was committed in connection with the application, provision or utilisation of any grant, subsidy or any public aid (section 22 of the Czech Act on Criminal Liability of Legal Entities); and/or
- (v) publication of a judgment, if the court deems that the public should be informed about a condemning judgment (section 23 of the Czech Act on Criminal Liability of Legal Entities).

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

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

FRANCE

What is the definition of bribery?

The offences of corruption are set out in the French Criminal Code⁶, and include offences of corruption in relation to public officials, corruption in relation to foreign public officials and corruption in relation to private individuals. Both passive and active corruption fall within the scope of the legislation.

Corruption in relation to public officials

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

- (1) either to carry out or abstain from carrying out, or because he has carried out or has abstained from carrying out, an act relating to his office, duty or mandate, or facilitated by his office, duty or mandate; or
- (2) to abuse, or because he has abused, his real or alleged influence with a view to obtaining from any public body or administration any distinction, employment, contract or any other favourable decision" (Article 432-11, French Criminal Code).

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

- (1) either to induce him to carry out or abstain from carrying out, or because he has carried out or has abstained from carrying out, an act relating to his office, duty or mandate or facilitated by his office, duty or mandate; or
- (2) either to induce him to abuse his real or alleged public influence, or because he has abused his real or alleged public influence, with a view to obtaining from a public body any distinction, contract [...]" (Article 433-1, French Criminal Code).

Corruption in relation to foreign public officials

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

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

Corruption in relation to private individuals

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

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

Public official is defined in the statement of the offence (see above) as "a person holding a public authority or discharging a public service mission or holding a public electoral mandate".

^{6.} Relevant articles are essentially 432-11 and 433-1 (domestic public official), 435-1 to 435-4 (foreign bribery) and 445-1 and 445-2 (private sector bribery).

Similarly, a foreign public official is defined in the statement of the offence (see above) as "a person holding a public authority, discharging a public service mission or holding a public electoral mandate in a foreign country or in an international public organisation".

Is private sector bribery covered by the law?

Yes, Article 445-2 of the French Criminal Code, set out above, applies to bribery of "a person not vested with public authority or discharging a public service mission, nor holding a public electoral mandate, performing in the course of his professional or social duties a function of management or performing a work for an individual or a corporate entity or any organism".

Does the law apply beyond national boundaries?

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

Under certain conditions, France also establishes jurisdiction over offences, punishable by imprisonment, committed by a French national or a foreigner outside French territory against a French victim, where the victim was a French national at the time of the offence (Article 113-7, French Criminal Code).

Law No. 2016-1691 of 9 December 2016 (the "**Sapin II Law**") expanded the extraterritorial application of French criminal law so that it also applies to corruption offences committed outside France by persons "habitually resident in France" or "having all or part of their economic activity in France".

How are gifts and hospitality treated?

The relevant provisions of the French Criminal Code apply to "offers, promises, donations, gifts or advantages"; gifts and hospitality may therefore be bribes where the other elements of an offence are present.

How is bribery through intermediaries treated?

A company can be liable for indirect bribery, *i.e.* bribery through an intermediary, where there is evidence of intent on the part of the company, *i.e.* evidence of knowledge of the conduct on the part of the senior management of the company or, in some cases, a conscious failure by senior management to prevent the conduct.

Article 17 of the Sapin II Law requires the implementation of due diligence procedures for intermediaries, on a risk-based approach.

Are companies liable for the actions of their subsidiaries?

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

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

Although a parent company is legally separate from its subsidiary, it may attract criminal liability in respect of an offence committed by the subsidiary if it has used its subsidiary as an intermediary for the payment/receiving of a bribe or if it has participated in the misconduct of its subsidiary in some way.

Is there an exemption for facilitation payments?

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

Are companies required, or is it a defence, to have compliance procedures in place?

The Sapin II Law imposes anti-corruption compliance requirements on French companies which:

- (i) have at least 500 employees and whose headquarters are in France, or which belong to any group whose parent company's headquarters are in France and which has at least 500 employees, and
- (ii) have a turnover or group turnover of more than EUR 100 million.

For companies that meet these criteria, eight specific measures and procedures must be implemented:

- A Code of Conduct defining and illustrating the different types of prohibited behaviours, which may notably constitute bribery or influence peddling;
- 2. An internal system of alerts designed to enable employees to report any

conduct or situation that may be contrary to the Code of Conduct;

- A risk mapping document designed to identify, analyse, and hierarchise the company's exposure to any risk related to bribery;
- 4. Due diligence on third parties taking into consideration the risk mapping;
- Accounting control procedures designed to ensure that the company's books and accounts are not used to conceal bribery acts or influence peddling;
- Training sessions for managers and employees likely to be exposed to the risks of bribery and influence peddling;
- A disciplinary regime to sanction employees in case of violation of the Code of Conduct; and
- 8. Internal control procedures to assess the efficiency of the compliance programme.

Companies that do not meet the criteria are not required to have anti-bribery compliance procedures in place.

What are the penalties? Non-compliance with anti-corruption regulations

The Sapin II Law led to the creation of the French Anti-bribery Agency (the "**AFA**") which has the role of monitoring the implementation of programmes to prevent and detect acts of corruption and influence peddling.

The AFA has been empowered to refer cases to its Sanctions Committee to prosecute and punish non-compliant legal entities. To that purpose, AFA agents may order the production of any document, as well as any helpful information, and may keep a copy thereof (Article 4 of the Sapin II Law). They may also verify such information on the spot.

Article 17 of the Sapin II Law provides that legal entities which do not comply with the anti-corruption measures listed above may be punished by a financial penalty of up to EUR 1 million, while individuals may face a financial penalty of up to EUR 200,000.

Any decision issued by the AFA can also be made public.

Disclosures concerning violations mentioned in Article 17 of the Sapin II Law or corruption may be submitted directly to the AFA.

Where appropriate, the AFA will refer the disclosures to the relevant Public Prosecutor, under the terms of Article 40 of the French Criminal Procedure Code.

Corruption

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

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

Additional criminal penalties applicable to individuals include:

- deprivation of rights (civic, criminal and family rights) for five years or more;
- possible banishment (in the case of foreign perpetrators);

- professional restrictions (a ban of up to five years on performing a public function or professional or social activity in connection with the offence and/or performing a commercial or industrial activity in order to manage or control in any capacity, directly or indirectly, on his own name or on behalf of another, an industrial or commercial enterprise);
- confiscation; and
- publication of the Court's ruling.
- (ii) Legal entities

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

Pursuant to Articles 433-25 and 445-4 of the French Criminal Code, additional criminal penalties applicable to legal persons (each of which may be imposed for a period of up to five years) include:

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

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

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

Convention Judiciaire d'Intérêt Public

The Sapin II Law introduced a new settlement procedure with no acknowledgement of guilt, called the "Convention Judiciaire d'Intérêt Public"

(the "**CJIP**"). Inspired by the American deferred prosecution agreement, the CJIP is only available for legal entities suspected of acts of bribery or influence peddling, laundering of tax fraud proceeds and related offences.

It may be initiated by the public prosecutor before the opening of criminal proceedings as well as by the investigating judge before the closing of his/her investigation, at the request of or in agreement with the public prosecutor, and may lead the legal entity to be offered to:

• Pay a fine in proportion to the advantages gained from the offences within a limit of 30% of the annual

average turnover based on the last three turnovers available, with the possibility of spreading the fine over a maximum of one year; and/or

- Set up, under the AFA's supervision, a compliance programme for three years in line with the measures described above; and
- Compensate the victims for their loss, if necessary.

In accordance with the provisions of the French Criminal Procedure Code, (i) the validation order, (ii) the amount of the public interest fine and (iii) the agreement itself are published on the AFA's website. C

GERMANY

What is the definition of briberv?

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

Accepting a benefit (Vorteilsannahme)

- "(1) A public official, a European public official or a person with special public service obligations who demands, allows himself to be promised or accepts a benefit for himself or for a third person for the discharge of a duty ...
- (2) A judge, a European public official or arbitrator who demands, allows himself to be promised or accepts a benefit for himself or a third person in return for the fact that he performed, or would in the future perform a judicial act ... An attempt shall be punishable.
- (3) The act shall not be punishable under subsection (1), if the perpetrator allows himself to be promised or accepts a benefit which he did not demand and the competent public authority, within the scope of its powers, either previously authorises the acceptance, or the perpetrator promptly makes a report to it and it authorises the acceptance" (section 331 StGB).

Accepting a bribe (Bestechlichkeit)

- "(1) A public official, a European public official or person with special public service obligations who demands, allows himself to be promised or accepts a benefit for himself or for a third person in return for the fact that he performed or would in the future perform an official act, and thereby violated or would violate his official duties ... An attempt shall be punishable.
- (2) A judge, a Member of the Court of Justice of the European Union or an arbitrator who demands, allows himself to be promised or accepts a benefit for himself or for a third person in return for the fact that he performed or would in the future perform a judicial act, and thereby violates or would violate his judicial duties ...
- (3) If the perpetrator demands, allows himself to be promised or accepts a benefit in return for a future act, subsections (1) and (2) shall already be applicable if he has indicated to the other his willingness to:
 - violate his duties by the act; or
 - to the extent the act is within his discretion, to allow himself to be influenced by the benefit in the exercise of his discretion" (section 332 StGB).

Granting a benefit (Vorteilsgewährung)

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

person or a third person, for the discharge of a duty ...

- (2) Whoever offers, promises or grants a benefit to a judge or an arbitrator, a Member of the Court of Justice of the European Union for that judicial act ...
- (3) The act shall not be punishable under subsection (1), if the competent public authority, within the scope of its powers, either previously authorised the acceptance of the benefit by the recipient or authorises it upon prompt report by the recipient" (section 333 StGB).

Granting a bribe (Bestechung)

- "(1) Whoever offers, promises or grants a benefit to a public official, a European public official, a person with special public service obligations, or a soldier of the Federal Armed Forces, for that person or a third person, in return for the fact that he performed or would in the future perform an official act and thereby violates or would violate his official duties ...
- (2) Whoever offers, promises or grants a benefit to a judge, a Member of the Court of Justice of the European Union or an arbitrator, for that person or a third person, in return for the fact that he:
 - performed a judicial act and thereby violated his judicial duties; or
 - would in the future perform a iudicial act and would thereby violate his judicial duties,
 - ... [A]n attempt shall be punishable.

- (3) If the perpetrator offers, promises or grants the benefit in return for a future act, then subsections (1) and
 (2) shall already be applicable if he attempts to induce the other to:
 - violate his duties by the act; or
 - to the extent the act is within his discretion, to allow himself to be influenced by the benefit in the exercise of his discretion" (section 334 StGB).

Section 335a StGB further extends the scope of the offences set out in sections 331 *et seqq*. StGB to certain foreign and international officials, such as members of foreign and international courts, functionaries of international institutions and NATO service members stationed in Germany.

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

Acceptance by, and granting bribes to, delegates (Bestechlichkeit und Bestechung von Mandatsträgern)

- "(1) A member of Parliament of the Federation (Bund) or of the federal states (Länder) who demands, allows himself to be promised or accepts an undue benefit for himself or a third party as a consideration for the performance of an action or omission in relation to his mandate and in accordance with an order (Auftrag) or instruction (Weisung) ...
- (2) Whoever offers, promises or grants a member of parliament of the Federation (Bund) or of the federal state (Länder) an undue advantage for that member or a third party as a consideration for an action or omission in relation to that member's mandate and in accordance with an

order (Auftrag) or instruction (Weisung) ...

- (3) The following members are equivalent to the members in paragraphs 1 and 2 ...
 - a member of representative body of a municipality;
 - a member, elected by direct and universal suffrage, of an organ of an administrative division responsible for part of the territory of a federal state (Land) or a municipality;
 - a member of the Federal Convention (Bundesversammlung);
 - a member of the European Parliament;
 - a member of a parliamentary assembly of an international organization: and
 - a member of a legislative body of a foreign state.
- (4) A benefit will, in particular, not be undue if the acceptance of the benefit is in line with the legal status of the member and the respective regulations ..." (section 108e StGB).

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

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

There are also more specific criminal offences or administrative offences (*Ordnungswidrigkeiten*) defined in other

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

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

Accepting and granting a bribe in business transactions (Bestechlichkeit und Bestechung im geschäftlichen Verkehr)

- "(1) Whoever, as an employee or an agent of a business,
 - demands, allows himself to be promised, or accepts a benefit for himself or another in a business transaction as consideration for giving a preference in an unfair manner to another in the competitive purchase of goods or commercial services ...
 - without consent of the business, demands, allows himself to be promised, or accepts a benefit for himself or another in a business transaction as consideration for taking or refraining from an action and in doing so violates a duty owed to the business
- (2) Whoever,
 - offers, promises or grants an employee or an agent of a business a benefit for himself or for

a third person in a business transaction as consideration for his giving him or another a preference in an unfair manner in the purchase of goods or commercial services ...

 without consent of the business, offers, promises or grants an employee or an agent of the business a benefit for himself or for a third person in a business transaction as consideration for him taking or refraining from an action and in doing so violating a duty owed to the business"

(section 299 paras. 1 and 2 StGB).

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

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

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

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

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

(a) is a civil servant or judge;

- (b) otherwise has an official relationship with public law functions or;
- (c) has been appointed to a public authority or other agency or has been commissioned to perform duties of public administration without prejudice to the organisational form chosen to fulfil such duties" (section 11 para. 1 no. 2 StGB).

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

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

"2a. A European public official is whoever:

- (a) is a member of the European Commission, the European Central Bank, the European Court of Auditors or of a Court of the European Union;
- (b) is an official or other functionary of the European Union or of an Institution created on the basis of European Law;
- (c) is tasked with discharging duties of the European Union or of Institution created on the basis of European Law."

- Section 335a StGB further extends the scope of the law to certain foreign and international officials, by equating, for the purposes of sections 332, 334 and 335 StGB judges with members of foreign or international courts and other public officials with:
 - (a) functionaries of a foreign state and persons tasked with performing public functions for a foreign state;
 - (b) functionaries of an international organisation and persons tasked with performing functions for an international organization;
 - (c) soldiers of a foreign state and soldiers tasked with performing functions for an international organization;
- for the purposes of sections 331 and 333 when applied to acts aiming to influence a future judicial action or future discharge of a duty,
 - (a) judges with members of the International Criminal Court;
 - (b) other public official with functionaries of the International Criminal Court; and
- for the purposes of section 333 paras. 1 and 3 when applied to a future discharge of a duty,
 - (a) soldiers of the German Armed Forces (*Bundeswehr*) with soldiers of the troops of NATO member states stationed in Germany present in Germany at the time of the offence;
 - (b) other public officials with functionaries of these troops;
 - (c) person with special public service obligations with persons which are employed by these troops or are working for them and have been formally directed by general or

special directive of a higher office of these troops to faithfully discharge their duties.

Furthermore, the IntBestG contains separate criminal provisions regarding bribery of members and electors of parliamentary representations of Germany, foreign countries, the EU and international organisations.

Is private sector bribery covered by the law?

Yes, although there are some differences in the way in which public sector bribery and private sector bribery is treated.

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

Additionally, sections 299a and 299b StGB make it a criminal offence for medical professionals to receive bribes in exchange for preferential treatment for medical suppliers or pharmaceutical companies when discharging their duties and for others to grant such bribes.

Furthermore, under section 265c para 1 StGB (*Sportwettbetrug*), athletes or coaches may be criminally liable if they (as "receivers") demand, allow themselves to be promised or accept a benefit for themselves or a third person to influence the course or the result of a competition to the advantage of the opponent and, thereby, an illegal benefit will be received from a public sport bet in relation to that competition.

In contrast, section 265d StGB (Manipulation von berufssportlichen Wettbewerben) establishes similar criminal offences that include corrupt agreements regarding professional sport competitions even if there is no special relation to sporting bets.

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

Does the law apply beyond national boundaries?

Yes. Article 2 section 3 IntBestG expressly stipulates that German criminal law applies when a German citizen bribes a foreign member of Parliament abroad. Section 108e para. 3 of the StGB states that paras. 1 and 2 also apply in connection with, amongst others, members of the European Parliament, members of a parliamentary assembly of an international organization and members of a legislative body of a foreign state. Section 299 para. 1 no. 1 and para. 2 no. 1 of the StGB clarifies that the criminal offences of accepting and granting a bribe in business transactions apply also to activities in foreign competition.

Furthermore, according to general rules, provisions on German criminal or administrative offences may apply to activities outside Germany, in particular, if they are committed:

- (i) by a German perpetrator;
- (ii) jointly with co-perpetrators who act in Germany; or
- (iii) to the detriment of a German natural or legal person (*e.g.*, corruption offences to the detriment of the German employer of a bribed employee or of a German competitor of the person bribing him).

Moreover, section 9 para. 2 sentence 2 StGB stipulates that German criminal law (including criminal anti-corruption law) applies if someone from Germany participates (in the form of instigation or of aiding and abetting) in a principal offence committed by a principal offender outside Germany, even if this principal offence is not a criminal offence under the law of the country where it is committed.

How are gifts and hospitality treated?

While there are no specific statutory monetary thresholds on the value of gifts and hospitality that may be offered, gifts and hospitality must be "socially adequate" (*sozialadäquat*) and appropriate with regard to the position and social status of the recipient. When assessing whether gifts or hospitality are socially adequate, German authorities are likely to look at benefits granted to the same recipient over a period of time. Prosecution authorities and the courts tend to take a very strict approach to gifts and hospitality, and internal guidelines applicable to domestic public officials often impose very low value thresholds.

Is there an exemption for facilitation payments?

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

How is bribery through intermediaries treated?

There are no general anti-corruption provisions regarding the use of intermediaries, or agents. However, in some procurement processes the use of agents is specifically prohibited. If such prohibitions are violated and the use of agents is not disclosed, German prosecution authorities and courts may take the position that this constitutes fraud.

Generally, it is advisable to include into agency agreements clauses expressly obliging the agent to comply with all applicable legal provisions, in particular, with all anti-corruption provisions.

Furthermore, agency agreements should not provide for inappropriately high commissions or other remuneration structures which German prosecution authorities or courts could interpret as incentives for corruption offences.

Are companies liable for the actions of their subsidiaries?

Section 130 of the German Administrative Offences Act

(Ordnungswidrigkeitengesetz, "**OWiG**") establishes the administrative offence of violation of supervisory duties, which consists of a failure by superiors appropriately and efficiently to supervise subordinate employees in enterprises where this leads to criminal or administrative offences, in particular, corruption offences. This offence may be sanctioned by an administrative fine (*Geldbuße*) against the superiors concerned which may amount to up to EUR 1 million.

German prosecution authorities and courts may assume such violation of supervisory duties if superiors do not duly instruct employees regarding anticorruption provisions (*e.g.*, by compliance guidelines) and do not establish effective monitoring (*e.g.*, by appointing a compliance officer and establishing a compliance process).

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

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

Are companies required, or is it a defence, to have compliance procedures in place?

There are no specific requirements for companies to have anti-bribery compliance procedures in place.

However, as noted above, a company may be subject to a corporate administrative fine (*Verbandsgeldbußen*)⁷, or a forfeiture order

(*Einziehungsanordnung*)⁸, specifically where a representative or manager of the company has intentionally or negligently refrained from taking measures (such as implementing anti-bribery controls) that would have been appropriate to prevent or hinder criminal acts or administrative offences committed by an employee (*i.e.* the administrative offence of violation of supervisory duties

(Aufsichtspflictverletzung)⁹).

^{7.} Section 30 OWiG

^{8.} Sections 29a OWiG, 73b StGB.

^{9.} Section 130 OWiG

Financial institutions are required to have in place a proper business organisation ensuring compliance with applicable legal provisions (section 25a German Banking Act (*Kreditwesengesetz, KWG*), as well as adequate risk management and policies and procedures for the prevention of money laundering, terrorist financing or other criminal actions which might jeopardise the institution's assets (including bribery and corruption offences).

What are the penalties?

The maximum penalty under the StGB for a corruption offence is imprisonment for a term not exceeding 10 years (in particularly serious cases of bribery of public officials).

A court may also impose a forfeiture order (*Einziehungsanordnung*) disgorging the gross proceeds from a corruption offence (without deduction of expenses). Moreover, if a natural person commits a corruption offence when acting for a company, the company may also be subject to a forfeiture order or to a corporate administrative fine which may generally amount to up to EUR 10 million or more if necessary to disgorge higher profits.

Natural persons convicted of bribing a delegate, and delegates convicted of accepting bribes, may also be disqualified from voting, and standing in public elections.

HONG KONG

What is the definition of bribery?

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

Public sector bribery offences under the POBO include:

- any prescribed officer, without the general or special permission of the Chief Executive, soliciting or accepting any advantage (section 3);
- any person, without lawful authority or reasonable excuse, offering any advantage to the Chief Executive or a public servant in relation to his:
 - performing or abstaining from performing any act in public capacity,
 - (2) expediting, delaying, hindering or preventing the performance of an act in public capacity by himself or other public servants, or
 - (3) assisting, favouring, hindering or delaying any person in the transaction of any business with a public body (section 4);
- the Chief Executive or any public servant, without lawful authority or reasonable excuse, soliciting or accepting any advantage in relation to his:
 - performing or abstaining from performing any act in public capacity,
 - (2) expediting, delaying, hindering or preventing the performance of an act in public capacity by himself or other public servants, or

- (3) assisting, favouring, hindering or delaying any person in the transaction with a public body (section 4);
- any person, without lawful authority or reasonable excuse, offering, soliciting or accepting any advantage to the Chief Executive or a public servant in relation to any contract with a public body (section 5);
- the Chief Executive or any public servant, without lawful authority or reasonable excuse, soliciting or accepting any advantage in relation to any contract with a public body (section 5);
- any person, without lawful authority or reasonable excuse, offering, soliciting or accepting any advantage for procuring withdrawal of tenders (section 6);
- any person, without lawful authority or reasonable excuse, offering, soliciting or accepting any advantage in relation to any auction conducted by or on behalf of any public body (section 7);
- any person, without lawful authority or reasonable excuse, offering any advantage to any prescribed officer or public servant while having dealings with the Government or any other public body (section 8);
- any public servant, without lawful authority or reasonable excuse, offering, soliciting or accepting any advantage in relation to his principal's affairs or business (section 9); and
- the Chief Executive or prescribed officer possessing unexplained property (section 10).

Private sector bribery offences under the POBO include:

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

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

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

What is the definition of a public official and a foreign public official? Public Official

"Public servant" is defined under the POBO to mean:

- (1) any prescribed officer; and
- (2) any employee of a public body.

The Chief Executive of Hong Kong, though not a public servant, also falls within the public sector. Prescribed officers include government officials, officials of the Hong Kong Monetary Authority, members of the Independent Commission Against Corruption, judicial officers, and the Chairman of the Public Service Commission in Hong Kong.

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

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

Foreign public official

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

Is private sector bribery covered by the law?

Yes. Private sector bribery is covered by section 9 of the POBO. This prohibits any solicitation to, offer to, or acceptance by, an agent, without the permission of the principal, of any advantage in exchange 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 a reasonable time 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 HKD 500,000 (approximately USD 64,000) and imprisonment of up to seven years.

Does the law apply beyond national boundaries?

Section 4 of the POBO (which criminalises bribery of Hong Kong public servants, as set out above) has extraterritorial effect since there is an express reference to the advantage being offered "whether in Hong Kong or elsewhere." Bribery offences connected to Hong Kong public officials are therefore subject to Hong Kong jurisdiction wherever they take place.

For other corruption offences summarised above, the position is less certain as they do not include the words "whether in Hong Kong or elsewhere." Such omission may well be construed as a legislative intention not to afford extraterritorial effect to these sections. Indeed, case law suggests that, with regard to section 9 of the POBO (which covers private sector bribery, and bribery connected with non-Hong Kong public officials), the whole course of offer, solicitation or acceptance of the illegal advantage must take place within Hong Kong jurisdiction to be caught by the section. The same logic should therefore apply to sections 5 to 8 as well.

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

How are gifts and hospitality treated?

Gifts and hospitality may qualify as bribes given the wide definition of "advantage" under section 2 of the POBO.

Under the POBO, there is no specified monetary value or threshold that would generally be considered reasonable or customary for a gift accepted by a public official in his public capacity, or by a private sector agent. However, there are several types of entertainment, gifts and advantages which are generally permitted under Hong Kong law. Examples of generally permitted exceptions include: promotional items of insignificant value, offered free of charge to clients in compliance with the practice of the industry; client meals of modest value that are provided for general goodwill purposes; training programmes offered to clients on a new product which involves meals, trips or accommodation being offered to clients free of charge. Such hospitality and facilities provided must be reasonable and compatible with the professional or educational nature of the event. Factors to be considered in deciding whether or not the advantage should be construed as a bribe include the nature of the gift, the position of the

agent, the relationship between the donor and the agent and whether or not an obligation might be created.

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

Is there an exemption for facilitation payments?

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

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 actions of their subsidiary?

The POBO does not directly address 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 of an entity, and its activities, rather than its form. Thus, in an extreme case, such as where the parent company uses a wholly-owned subsidiary to do something illegal, the court may be more than ready to equate the subsidiary with its parent company. Therefore, a parent company may be liable for bribes or corruption committed by its subsidiaries, particularly a wholly-owned subsidiary.

Are companies required, or is it a defence, to have compliance procedures in place?

Companies are not required to have antibribery compliance measures in place. Nor is having compliance procedures in place a defence under the POBO. It does not seem that having a robust compliance programme would be accepted as a "reasonable excuse" defence under the POBO.

What are the penalties?

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

Other offences

On indictment, maximum penalties for:

- possession of unexplained property (section 10): fine of HKD 1 million and imprisonment for ten years;
- bribery in relation to any contract with a public body (section 5) or for procuring withdrawal of tenders (section 6): fine of HKD 500,000 and imprisonment for ten years; and
- other offences: fine of HKD 500,000 and imprisonment for seven years.

On summary conviction, maximum penalties for:

- possession of unexplained property: fine of HKD 500,000 and imprisonment for three years; and
- other offences: fine of HKD 100,000 and imprisonment for three years.

ITALY

What is the definition of bribery?

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

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

The offence of corruption in relation to foreign public officials was introduced by Law No. 300 of 29 September 2000 while the offence of private bribery was introduced in Italian legislation in 2002 at article 2635 of the Italian Civil Code. On 28 November 2012, Law No. 190 (setting out "Rules for the prevention and repression of corruption and illegality within the public administration") introduced further offences and heavier penalties. More recently, Legislative Decree No. 38/2017 and Draft Bill No. 1189/2018 (which has recently been approved and will shortly come into force) have introduced further offences and made sanctions harsher overall.

Extortion by a public official (article 317 of the Criminal Code)

"The public official or the person in charge of a public service who, abusing his or her position or powers, compels anyone unduly to give or promise to him/her or to a third-party money or other thing of value shall be liable to imprisonment of between six and twelve years".

(Passive) Corruption in the performance of a public office (article 318 of the Criminal Code)

"The public official who, for the performance of his/her functions or for the exercise of his/her powers, unduly receives for him/herself or others money or other thing of value or accepts their promise shall be liable to imprisonment of between three and eight years".

(Passive) Corruption involving a specific act in breach of official duties (article 319 of the Criminal Code)

"The public official who, for performing, refraining from performing or delaying a specific act in breach of his official duties, receives money or other thing of value for him/herself or for a third party or accepts their promise shall be liable to imprisonment of between six and ten years".

Corruption in judicial acts (article 319 ter of the Criminal Code)

"If the facts referred to in articles 318 and 319 are committed to favour or damage a party in a civil, criminal, or administrative proceeding, the sanction is imprisonment between eight and twenty years".

Undue inducement to give or promise a bribe (article 319 quater of the Criminal Code)

"Save where this constitutes a more serious offence, the public official or the person in charge of a public service who, abusing his or her position or powers, induces someone unduly to give or promise money or other thing of value to him or to a third party shall be liable to imprisonment of between six and ten years and six months.

The person who gives or promises money or any other thing of value shall be liable to imprisonment up to three years".

(Passive) Corruption of persons in charge of a public service (article 320 of the Criminal Code)

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

(Active) Corruption of a public official or of a person in charge of a public service (article 321 of the Criminal Code)

In addition to where already expressly specified, the person who unduly gives or promises money or other thing of value to bribe a public official or a person in charge of a public service as described in the articles above shall be punishable with the same penalties.

Instigation to Corruption (article 322 of the Criminal Code)

Both active and passive corruption are punishable as "Instigation to corruption" when no illegal agreement is reached between the parties because either the public official/the person in charge of a public service or the citizen respectively

Corruption offences include the following:

refuse to abuse their function and to give or promise undue advantages.

Corruption of a foreign public official or of an officer of the European Union (Article 322 bis of the Criminal Code)

The scope of the offences described by the articles mentioned above is extended to include bribery of foreign officials, including officials of EU institutions, public officials of foreign Countries and members of international organisations.

Trading in influence (Article 346 bis of the Criminal Code)

"Save where this constitutes aiding and abetting corruption offences provided for by Articles 318, 319, 319 ter and 322-bis of the Criminal Code, the person who, taking advantage of or boasting his or her relationship, both existing or alleged, with a Public Official, a person in charge of a public service, or one of the other subjects referred to in art. 322-bis, induces someone unduly to give or promise to him/herself or to a third party money or other thing of value either as compensation for his or her illegal mediation or as compensation for the public official, the person in charge of a public service or the subject referred to in art. 322-bis for the exercise of their functions or of their powers shall be liable to imprisonment of between one to four years and six months.

The same penalty shall be applicable to the person who unduly gives or promises the money or the other thing of value.

The penalty is increased if the person who induces someone unduly to give or promise to him/herself or to a third party, money or other thing of value is a public official or a person in charge of a public service. The penalty is also increased if the facts are committed in relation to the exercise of judicial activities or as a compensation for the public official, the person in charge of a public service or the subject referred to in art. 322-bis for the performance, the omission or the delay of an act in breach of their duties.

The penalty is lowered if the facts are particularly tenuous".

Private bribery (Article 2635 of the Civil Code)

"Save where this constitutes a more serious offence, companies' directors, general managers, internal auditors and liquidators, who, also through intermediaries, urge or receive, for themselves or for others, or accept the promise of money or other thing of value, in order to perform or refrain from performing an act in breach of their fiduciary duties, shall be liable to imprisonment of between one to three years. The same penalty is applied if the fact is committed by a person exercising managerial functions other than those previously referred to.

Where the relevant offence is committed by those under the respective supervision of the individuals identified above, the penalty is up to 18 months' imprisonment.

The person who, also through intermediaries, gives or promises money or the undue advantage shall be liable to the same penalties.

The penalties are doubled if Listed Companies are involved.

Prosecution is ex-officio.

Save what is provided for by art. 2641, the extent of the seizure for equivalent value shall not be lower than the value of the given, promised or offered thing of value".

Instigation to private bribery (Article 2635 bis of the Civil Code)

The offence referred to in art. 2635-*bis* is punishable as "Instigation to private bribery" when the offer or the promise is not accepted. The penalty is lowered by a third.

Prosecution is ex-officio.

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

Article 357 of the Criminal Code defines "public official", for the purposes of the offence of corruption in the public sector, as "any person who performs official duties within a legislative body, the judiciary and the public administration.

Article 358 of the Criminal Code defines "person in charge of a public service" as "any person carrying out a public service". This term is still unclear and very much discussed between scholars and judges in Italy. For the purposes of its application, a service is normally considered public when it is regulated by public law and when the nature of the activity which forms the object of the service is public or linked to public utility. However, low level tasks are expressly excluded by the law.

Examples of persons found by case law to be persons in charge of a public service include a court translator, the head of a public archive, bursar's officers and trustees.

Article 322 *bis* of the Criminal Code defines "foreign public officials" as:

- Members of the European Commission, the European Parliament and the Court of Justice;
- Officers and members of the European institutions;
- Public officials and persons in charge of a public service of other European country governments;

- Judges, public prosecutors and public officials of the European Court of Justice;
- Officials of other foreign countries; and
- Members and officials of international institutions.

Is private sector bribery covered by the law?

Yes, as set out above. The main differences in the treatment of public sector bribery and private sector bribery are as follows.

- The offence of passive private sector bribery can be committed not only by companies' directors, managers, auditors, or liquidators, but also by people under their supervision, while the offence of passive corruption in the public sector can only be committed by public officials or people in charge of a public service.
- Unlike the offence of corruption in the public sector, the private sector bribery offence requires that some damage to the corporate entity derive from the criminal conduct of its bribed director for him or her and the corruptor to be punishable.
- While public officials (and their corruptors) are punishable regardless of when the undue payment or promise is made, in the private sector the law requires that the undue payment or promise is made before the breach of duties on the part of the director.
- Unlike corruption in the public sector, private sector bribery can only be

prosecuted upon the victim's request, unless the crime distorted competition.

Does the law apply beyond national boundaries?

Yes. Articles 7, 9 and 10 of the Criminal Code provide that both Italian citizens and non-Italian citizens who commit certain criminal offences (including corruption) abroad are subject to Italian criminal law when the relevant criminal offence¹⁰ was committed by an Italian public official, in service, and in breach of his/her duties. Additionally, Italian citizens are subject to Italian criminal law if they committed the offence outside Italy when, under Italian law the relevant criminal offence is punishable with imprisonment of not less than three years¹¹, and the offender is located in Italy.

Non-Italian citizens are subject to Italian criminal law even if they committed the crime outside Italy when:

- under Italian law the relevant offence is punishable with imprisonment of not less than one year;
- Italy or an Italian citizen were the victims of the crime;
- the offender is located in Italy; and
- either the victim of the crime or the Italian Ministry of Justice asked that the offender be prosecuted, save where the committed offences are those provided for in articles 317, 318, 319, 319-*bis*, 319-*ter*, 319-*quater*, 320, 321, 322, and 322-*bis* of the Criminal Code.

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

How are gifts and hospitality treated?

The corruption offences are broadly worded and "any thing of value" can include gifts or hospitality. Italian criminal law does not prescribe monetary thresholds on the value of gifts, travel expenses, meals or entertainment to public officials, or others.

Is there an exemption for facilitation payments?

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

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

How is bribery through intermediaries treated?

Bribery through intermediaries is punished. The relevant articles are article 346-*bis* of the Criminal Code for the

^{10.} Please note that under Italian Criminal Law, criminal offences are divided into two main categories depending on the penalty applicable to the relevant offender: these are crimes in the strict sense (*delitti*) and contraventions (*contravvenzioni*). The relevant provisions of articles 7, 9 and 10 of the Criminal Code only refer to the first category of criminal offences.

^{11.} The offender may be subject to Italian Criminal Law even where the relevant criminal offence is punishable with a lower term of imprisonment, but only upon the Ministry of Justice's or victim's request. The Ministry of Justice's or victim's request is not necessary for the offences provided for in articles 320, 321 and 346-*bis* of the Criminal Code.

public sector and articles 2635, para. 1 and 3 for the private sector.

Are companies liable for the actions of their subsidiaries?

Yes. Under the Criminal Corporate Liability Act (*Decreto Legislativo no. 231/2001*, "**Law 231**") corporate entities may be held liable if their representatives, employees or agents commit one of the corruption offences set out above in the interest, or for the benefit, of the entity, unless they are able to demonstrate that they have put in place and effectively implemented adequate systems and controls to prevent the commission of the crime.

Are companies required, or is it a defence, to have compliance procedures in place?

Companies are not required to have antibribery compliance controls.

However, having anti-bribery compliance controls is relevant to a defence under Law 231. As noted above, a company may be held liable for a corruption offence which was committed (at least in part) in the interest, or for the benefit, of that company, by an employee, representative or agent of the company. However, the company will not be liable if it can show that:

- its management body had adopted and effectively implemented, prior to the commission of the offence, internal systems and controls (including an assessment of risk areas, a training programme, internal communications and adequate sanctions);
- a supervisory body had been set up to oversee the company's internal systems and controls to which independent powers of initiative and control had been granted);

- the employee or agent committed the offence by fraudulently avoiding the internal systems and controls; and
- the supervisory body had not failed to exercise adequate controls.

Guidance for the preparation of Law 231 internal systems and controls is set out in Law 231 itself, and also in Law 231 Guidelines prepared by the industry representative organisation (*Confindustria*).

What are the penalties?

Penalties for corruption are applicable both to individuals and to corporate entities.

Penalties for individuals include:

- Imprisonment;
- Temporary and permanent bans from serving in public offices (ancillary penalty);
- Bans from contracting with the public administration, except to obtain the supply of a public service (ancillary penalty);
- Payment of compensation equal to the bribe received, in addition to possible damages;
- Confiscation of bribes or, if it is not possible, confiscation of goods of a corresponding value, available to the condemned person.

Penalties for corporate entities include:

- Fines;
- Temporary bans from carrying out business activity;
- Suspension or revocation of licences which were instrumental to the commission of the crime;
- Bans from contracting with the public administration, except to obtain the supply of a public service;

- Exclusion from facilitations, grants, contributions or subsidies, and their revocation if already granted;
- Bans from promoting goods or services; and
- Publication of the judgment.

The availability of plea bargains and suspended judgments for corruption offences is subject to restitution of the profits of the crime. Moreover, when pleabargaining in the context of proceedings involving the offences provided for in articles 314, par. 1, 317, 318, 319, 319-ter, 319-quater, 320, 321, 322, 322-bis and 346-bis of the Criminal Code, the defendant can make the plea conditional upon receiving an exemption from the ban from serving in public offices or, in case this ban applies, conditional upon conditional suspension of the above ancillary sanction. Moreover, the judge has the discretion to impose a ban from serving in public offices also if the agreed sentence does not exceed two years of imprisonment.

Penalties may be reduced where the offender acted to prevent further consequences of the offence or cooperated with the investigation.

In connection with the offences provided for in articles 318, 319, 319-ter, 319-quater, 320, 321, 322-bis exclusively in relation to the offences of corruption and inducement to corruption. 353. 353bis, and 354 of the Criminal Code, nonpunishment is allowed if the offender turns himself in voluntarily and cooperates with the judicial authorities before becoming aware of being under investigation and in any event within no more than four months from having committed the crime. Eligibility for non-punishment is conditional upon the offender making available the proceeds from the crime or an equivalent sum of money, or providing elements useful to identify the actual beneficiary of the proceeds of the crime.
JAPAN

What is the definition of bribery?

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. In 2017, the Criminal Code was amended to widen the territorial scope to capture a bribe given by a Japanese national to a public official belonging to a Japanese governmental/ official body whilst outside of Japan.

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.

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

In relation to the Criminal Code, the definition of public sector is understood by reference to public officials (*koumu-in*) who are subject to the offences of corruption under the Criminal Code.

Under the Criminal Code, such a "public official" is defined to mean a national or local government official, a member of an assembly or committee, or other employees engaged in the performance of public duties in accordance with laws and regulations.

Foreign public officials for the purpose of the UCPA are:

- (i) an official of a foreign, national or local government;
- a person engaged in the performance of duties for an entity established under foreign laws and regulations in order to perform specific duties in respect of public interests;
- (iii) a person engaged in the performance of duties for an entity (a) a majority stake of which is owned, or a majority of the officers (director, statutory auditor, liquidator and other persons engaged in management of the entity) of which is appointed, by foreign national and/or local government(s) and (b) which is granted specific rights and interests for the

performance of its business by a national or local government, as well as a person who is considered similar to the aforementioned person as designated in the cabinet ordinance;

- (iv) an official of an international organisation consisting of governments or inter-governmental organisations (an "IO"); and
- (v) a person engaged in the performance of duties over which a national or local government or an IO has power and authority and which are delegated to such person by a national or local government or an IO.

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 (Law No. 85 of 1984, as amended) forbids the bribery of NTT employees; and
- The Companies Act (Law No. 86 of 2005, as amended), specifically Articles 967 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 under Article 969.

E

CHANC

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. In 2017, the Criminal Code was amended to widen the territorial scope to capture a bribe given by a Japanese national to a public official belonging to a Japanese governmental/official body whilst outside of Japan.

Any person, whether foreign nationals or Japanese nationals can be found guilty of the bribery of foreign public officials under the UCPA if part of the bribery is committed within the territory of Japan. In addition, Japanese nationals can be found guilty of the bribery of foreign public officials under the UCPA notwithstanding that the bribery was committed outside the territory of Japan.

How are gifts and hospitality treated?

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.

Is there an exemption for facilitation payments?

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

There is no specific exemption either in the UCPA. However, if a person makes a payment to a foreign public official purely for the purpose of facilitating a normal administrative service to which he/she is entitled, it is generally understood that such payment will not be found by Japanese courts to constitute bribery of the official, as it is not thought that there is an improper business advantage. However, the Guidelines for the Prevention of Bribery of Foreign Public Officials published by the Ministry of Economy, Trade and Industry in 2004, as subsequently amended (the "METI Guidelines"), provide that facilitation payments can amount to bribery, even in circumstances where a person seeking the performance of a routine administrative process in compliance with local laws may experience significantly prejudicial treatment as a result of not making a facilitation payment.

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 both the Criminal Code and the UCPA, an individual who expressly or impliedly consents to money (or other things of value) being given to an intermediary for the payment of a bribe to a public official will also be guilty of an offence (conspiracy to commit a crime). Knowledge of the principal is required, but such knowledge can be found impliedly on the basis of the particular circumstances.

Are companies liable for the actions of their subsidiaries?

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

Corporate liability is possible under the UCPA. Moreover, a parent company may be liable for the action of its subsidiary if it had some involvement in the subsidiary's bribery or if the bribe-giving employee of the subsidiary could be seen as virtually an employee of the parent.

Parent companies are expected (although not required) to ensure that subsidiaries establish and operate systems to prevent bribery as appropriate to the degree of risk, as indicated in the METI Guidelines.

See also above on the liability of those who consent to money being given to an intermediary (which could include a subsidiary in certain circumstances) for the payment of a bribe.

Are companies required, or is it a defence, to have compliance procedures in place?

Companies are not required to have antibribery compliance procedures in place.

The METI Guidelines state that Japanese companies which conduct overseas business operations should organise and operate an internal control system, ethics and compliance programmes for the prevention of bribery of foreign public officials, on a risk-based approach, taking into account the risks associated with the target countries, business fields and types of activities. The internal control system should address the organisation, recording and auditing of appropriate approval processes for risky operations such as hiring local agents, acquiring local companies and conducting business entertainment.

A Supreme Court ruling indicates that for a company to avoid liability for an employee's actions, the company should have taken actions to prevent the offence in the form of proactive and specific instruction. The existence of a strong compliance programme may also be taken into consideration by the courts in determining penalties.

What are the penalties?

Under the Criminal Code a public official may be sentenced to a maximum term of imprisonment of 20 years. The bribe may be confiscated or the value of the bribe levied as a further penalty. The person who bribed, or attempted to bribe, the public official may be sentenced to a maximum term of imprisonment of three years or fined up to JPY 2.5 million (approximately USD 22,700).

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

Under the UCPA, there are no sanctions for the foreign public official (the UCPA only penalises the persons giving or offering the bribe). The person who bribed, or attempted to bribe, the foreign public official may be sentenced to a maximum term of imprisonment of five years and/or may be fined up to JPY 5 million (approximately USD 45,500).

Corporations that bribed, or attempted to bribe, a public official may be fined up to JPY 300 million (approximately USD 2,727,300).

LUXEMBOURG

What is the definition of bribery?

On 21 November 1997, Luxembourg adopted the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the **"Convention**") of the Organization for Economic Cooperation and Development (the **"OECD**") and ratified it by a law dated 15 January 2001, introducing several anti-bribery articles into the Luxembourg Criminal Code (the **"LCC**").

These anti-bribery provisions of the LCC have since been amended by a law dated 13 February 2011 – implementing additional recommendations made by the OECD and the Council of Europe's Group of States against Corruption – in order to reinforce counter-bribery controls.

The anti-bribery provisions are currently set forth in articles 246 to 253, article 310 and article 310-1 of the LCC.

The LCC distinguishes between public bribery (bribery of public officials, private individuals or legal entities corrupting a public official) and private bribery (bribery of a director or manager of a legal entity, or of a proxy-holder or agent of a legal entity or natural person (bribery of a private person)).

Public bribery

A public bribery offence applies whenever the following persons are involved:

 any person, agent or representative of the public authority or of the public force, or discharging a public service mission, or vested with a public electoral mandate (articles 246 to 249 of the LCC); or any judge or any other person sitting in a jurisdictional body, any arbitrator or expert appointed whether by a court or by the parties (article 250 of the LCC).

The LCC distinguishes between active public bribery (article 247, article 249 §2 and article 250 §2 of the LCC) and passive public bribery (article 246, article 249 §1 and article 250 §1 of the LCC).

Offences of active and passive bribery are understood to include the concepts of "giving" (active) and "receiving" (passive), without involving an automatic requirement for an agreement between the parties (a bribery pact).

A public bribe consists of an offer, a promise, a donation, a gift or an advantage of any kind, directly or indirectly promised or given to (active bribery), or solicited or accepted by (passive bribery) any of the abovementioned person, with the objective of getting this person either to:

- perform or refrain from performing an act linked to his/her function, mission or mandate or facilitated by such function, mission or mandate; or to
- abuse a true or assumed influence in order to obtain rewards, employment, business or any other favourable decision from a public authority or public administration.

Article 249 of the LCC deals with *a posteriori* bribery, *i.e.* the situation in which a gift or an advantage of any kind is directly or indirectly promised or given to, or solicited or accepted by, any of the above-mentioned persons, as a subsequent compensation for having performed or refrained from performing an act linked to his/her function, mission

or mandate or facilitated by such function, mission or mandate.

Article 248 of the LCC deals with influence peddling, *i.e.* in connection with a person actively or passively abusing his/her function, in order to obtain a favorable decision from any of the abovementioned persons.

Bribery in relation to foreign public officials

Article 252 of the LCC defines "foreign public official" – to which the provisions of articles 246 to 250 (active and passive bribery) also apply – as:

- any person, agent or representative of the public authority or the public force, or vested with a public electoral mandate, or discharging a public service mission in another State;
- any person sitting in a foreign jurisdictional body, even as a nonprofessional member of a collegial body adjudicating on the outcome of a litigation, or any arbitrator governed by the regulations of another State or of an international public organization;
- European Union officials and members of the European Commission, of the European Parliament, of the Court of Justice of the European Union and of the Court of Auditors of the European Union; and
- any official, agent or member of another public international organization, members of a parliamentary assembly of a public international organization and persons practicing judicial functions or record office functions in another international court.

The term "European Union officials" refers to:

- any person who is an official or contracted agent within the meaning of the Staff Regulations of officials of the European Union or of the employment conditions of other agents of the European Union; and
- any person seconded to the European Union by Member States or by any public or private body, who carries out functions equivalent to those performed by European Union officials or other agents.

Members of bodies set up in accordance with the treaties establishing the European Union and the staff of such bodies shall be treated in the same way as European Union officials when the Staff Regulations of officials of the European Union or the employment conditions of other servants of the European Union do not apply to them.

Bribery in the private sector

A private bribery offence applies whenever the following persons are involved:

- any director or manager of a legal entity; or
- any proxy-holder or agent of a legal entity or natural person.

The LCC distinguishes between active private bribery (article 310-1 of the LCC) and passive private bribery (article 310 of the LCC). Here also, offences of active and passive bribery are understood to include the concepts of "giving" (active) and "receiving" (passive), without involving an automatic requirement for an agreement between the parties (a bribery pact). A private bribe consists of an offer, a promise, or an advantage of any kind, directly or indirectly (through an intermediary) promised or given to, or solicited or accepted by, any of the above-mentioned persons or any third party, with the objective of getting this person to perform or to not perform his or her duties or an act facilitated by his or her position, and whose actions are carried out without the knowledge and authorization of the board, the shareholders, the principal or the employer.

Does the law apply beyond national boundaries?

Yes. According to article 5-1 of the Luxembourg Criminal Procedure Code (the "LCPC"), any Luxembourg citizen, any person having his/her usual residence in Luxembourg, or any foreign citizen found in Luxembourg, who committed - abroad - an offence of bribery (reference is made to articles 246 to 252 (public bribery), article 310 and article 310-1 (private bribery)) can be sued and sentenced in Luxembourg, even though the act is not punishable under the legislation of the country in which it was committed, and even though the Luxembourg authority did not receive either a complaint from the offended party, or a denunciation from the authority of the country where the offence was committed.

According to the principle of 'ubiquity', an offence is considered to have occurred in the place where its constitutive elements (and especially its effects) occurred, even if the perpetrator was found in another country when the offence was committed. Consequently, foreign individuals can be prosecuted for bribery in Luxembourg, if there is an element which connects the offence to Luxembourg (e.g. if the offence was committed on Luxembourg territory).

How are gifts and hospitality treated?

Gifts and hospitality are not specifically treated in the LCC, which does not establish quantitative or qualitative limitations on such expenses.

They can constitute a bribe, provided that the other constitutive elements of a bribery offence are fulfilled.

A Grand-Ducal decree dated 14 November 2014 (and last amended on 28 December 2015), fixing the deontological rules of the Government's members and their rules and rights in the performance of their duties, deals with gifts, hospitality offers, honours and distinctions given to Government members and sets out the limits within which gifts and hospitality may be accepted.

These rules only apply to members of the Government and are consequently not binding for persons of the private sector.

Is there an exemption for facilitation payments?

Luxembourg has not adopted a facilitation payments exception which would allow for certain payments to be permitted if they fall under such exception.

How is bribery through intermediaries treated?

Bribery through intermediaries is explicitly covered in cases of active bribery by the words "directly or indirectly". СНАМСЕ

A natural person or legal entity could thus be held liable under Luxembourg criminal law if that person had a role in committing the offence and could be considered either:

- as a co-perpetrator (*i.e.* if their role in the offence was such that it could not have been committed without their help), thus incurring the same penalty as the perpetrator; or
- as an accomplice (*i.e.* if they provided material or assisted the perpetrator), incurring the penalty immediately below the one incurred by the perpetrator.

Are companies liable for the actions of their subsidiaries?

A subsidiary is an economic and legal entity, distinct from its parent company, although owned by the parent corporation (unlike branches, which are not separate legal entities of the parent company).

There is no Luxembourg legislation which specifically regulates the establishment, organization and liability of group companies and thus no specific regulation for situations in which criminal offences are committed in the context of a corporate group.

In principle, the liability of a parent company cannot arise from acts of its subsidiaries (and *vice versa*), due to the legal autonomy of the companies of a group (unlike offences committed at the level of a branch, for which the head office remains fully liable).

The criminal liability of a parent company could however be involved, if it participated in the misconduct of its subsidiary in some way, although it remains very difficult to establish that the means of acting this way were given by the parent company to its subsidiary (*i.e.* that both companies form one single entity or that the parent company acted as accomplice in the commission of the offence).

Are companies required, or is it a defence, to have compliance procedures in place?

There are regulatory requirements in Luxembourg for companies of the banking and financial sector to have antibribery policies and procedures in place. These requirements are documented in guidelines issued by the Commission de Surveillance du Secteur Financier (i.e. the official regulator in charge of overseeing all banks and other institutions and professionals active in Luxembourg financial sector), which set out factors that firms should consider when assessing the risks associated with a business relationship or occasional transaction and also set out how firms can adjust the extent of their customer due diligence measure.

Companies from other sectors are not required to have anti-bribery compliance procedures in place.

In any case, all companies are subject to the general rule set out in article 140 of the LCC, according to which any person (except if it concerns family members of the perpetrator or accomplice (i.e. parents and their partners, brothers and sisters and their partners, or partner), or persons bound by professional secrecy) having knowledge of a crime, which could still be averted or limited in its effects, or whose authors are prone to commit other crimes which could be averted, is required to inform the judicial or administrative authorities (public prosecutor, investigating magistrates, police authorities, Labour Inspectorate etc.).

In the same way, article 23 of the LCPC compels public officials (*fonctionnaires*) and employees or agents entrusted with a public service mission (*salariés ou agents chargés d'une mission de service public*) to report to the attorney general any crime or offence (including bribery) they become aware of in the performance of their duties.

Besides, in case of bribery committed by an employee or an agent of a company, the company (as a legal entity) could (in addition to the perpetrator) be held criminally liable for such offence, if such offence has been committed in its name or in its interest, by one of its legal representatives or by one of its *ipso jure* or *de facto* managers (article 34 of the LCC).

Having compliance procedures in place is not a defence *per se*.

As a matter of fact, there are no exceptions to the liability principle under bribery regulations, so that no defence is available to defendants. However, defendants can argue mitigating circumstances depending on the case at hand.

Consequently, companies providing clear structures and provisions in order to guarantee their employees' right to report possible offences (either internally or externally) could possibly mitigate their guilt in case of legal proceedings.

What are the penalties? For violations of bribery rules by individuals

Public sector bribery

According to articles 246, 247 and 249 of the LCC, **active and passive bribery** as well as **a posteriori bribery** can result in:

- imprisonment of between 5 and 10 years; and
- a fine of between EUR 500 and EUR 187,500.

According to article 248 of the LCC, **influence peddling** can result in:

- imprisonment of between 6 months and 5 years; and
- a fine of between EUR 500 and EUR 125,500.

According to article 250 of the LCC, **bribery of a magistrate** can result in:

imprisonment of between 10 and 15 years; and

- a fine of between EUR 2,500 and EUR 250,000.

Private sector bribery

According to article 310 and article 310-1 of the LCC, bribery in the private sector can result in:

- imprisonment of 1 month to 5 years; and
- a fine of between EUR 251 to EUR 30,000.

For violations of bribery rules by legal entities

Since a law dated 3 March 2012, legal entities are also subject to criminal liability. According to articles 35, 36 and 37 of the LCC, **public sector bribery** can result in a fine of up to EUR 3.75 million and **private sector bribery** can result in a fine of up to EUR 300,000.

Besides the above-mentioned fines, legal entities also face the following sanctions:

- special confiscation;
- debarment from tendering for public contracts, either permanently or for a maximum period of 5 years;
- exclusion from the opportunity to obtain public aid or advantages; and/or
- judicial liquidation.

NETHERLANDS

What is the definition of bribery?

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

Public bribery

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

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

Commercial bribery

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

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

Bribes

Bribes may consist of gifts, promises or services. No further definitions of these terms are provided by law. In accordance with Dutch case law, a gift means a transfer of something that has any value to the recipient. A promise is the promise of a gift (offering money is a promise).

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

The DCC does not provide a definition of public sector and there is no overall definition of public official. Article 84 DCC states that the term "public officials" also includes members of (publicly) elected representative bodies, judges, arbitrators, and the armed forces. In Dutch case law, a public official (*ambtenaar*) is defined as a "person who, under the supervision and responsibility of the government, has been appointed to perform a function that undeniably has a public character and to exercise some powers of the State or its agencies".

Dutch courts apply the following three criteria to determine whether a person can be considered a public official:

- the function of the public official is to a large part influenced by governmental institutions, notably if the public official has been appointed under supervision and responsibility of the government;
- (ii) the function of the public official is of a public nature; and
- (iii) the public official's tasks entail the execution of governmental tasks.

Whether a person is also considered a public official from an employment or administrative law perspective is irrelevant.

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

Foreign public official

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

Is private sector bribery covered by the law?

Yes. The offences of active and passive private commercial bribery are set out above.

Does the law apply beyond national boundaries?

The following persons may be prosecuted in the Netherlands:

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

• a Dutch public official or a person in the public service of an international institution with its seat in the Netherlands who commits the offence of bribery abroad.

How are gifts and hospitality treated?

As noted above, bribes may consist of gifts, promises or services. In this context, gifts and promises should be interpreted broadly, and should be assumed to include invitations to dinners, excursions, working visits, and visits to an event.

The fact that providing/offering a service may also be a bribe means that bribes can include rewards that may not have a specific economic value, such as a (honorary) title, and the provision of pleasure trips and holiday homes at significantly discounted prices.

Is there an exemption for facilitation payments?

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

- the public official concerned was required by law to carry out or to refrain from carrying out the act that was facilitated by the payment;
- the payment cannot in any way have a distortive effect on competition;
- the amounts involved are small (in absolute or in relative terms);

- the payments are made to lower tier public officials;
- the payment has been entered into the records of the company in a clear, transparent manner; and
- the initiative for the payment was taken by the foreign public official.

How is bribery through intermediaries treated?

A company can be liable for a bribery offence committed by an intermediary, if the bribery can be imputed or attributed (*toegerekend*) to the company. The criteria which are applied in determining whether or not an offence can be imputed to an intermediary are the same as those for attributing liability to a parent company for the actions of its subsidiary, and are set out below.

Are companies liable for the actions of their subsidiaries?

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

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

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

Are companies required, or is it a defence, to have compliance procedures in place?

No, companies are not required to have compliance procedures in place.

However, having adequate compliance procedures in place may mitigate the risk of criminal liability being attributed to a company (as described above). For example, it may show that the company has taken reasonable care to prevent such conduct and that the conduct does not fall within the regular scope of conduct of the entity.

What are the penalties?

Active or passive bribery of a public official is punishable by a maximum term of imprisonment of six years and a maximum fine of EUR 83,000 for natural persons and EUR 830,000 for legal entities (articles 177 and 363 DCC). Active and passive private commercial bribery are punishable by a maximum prison term of four years and a maximum fine of EUR 83,000 for natural persons and EUR 830,000 for legal entities (article 328 *ter* DCC). The active and passive bribery of a judge is punishable by a maximum prison term of nine years (or 12 years where the intention of the bribery is to obtain a conviction in criminal proceedings) and a maximum fine of EUR 83,000 for natural persons and EUR 830,000 for legal entities (article 178 and 364 DCC).

The maximum fine for legal entities can be increased up to a maximum of 10% of their annual turnover, if the maximum fine of EUR 830,000 is considered not an appropriate punishment.

PEOPLE'S REPUBLIC OF CHINA

What is the definition of bribery?

The relevant rules regarding bribery and corruption are contained in various texts, the most important of which are the PRC Criminal Law, effective as from 1 October 1997 (as amended on 4 November 2017, the "**Criminal Law**") and the Anti-Unfair Competition Law, effective as from 1 December 1993 (as amended on 4 November 2017, the "**AUCL**"). The Criminal Law criminalises bribery of public officials and commercial bribery involving companies and their employees. The AUCL deals with commercial bribery only.

Corruption in relation to public officials

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

- (i) an individual offers a public official:
 - a) "money or property for the purpose of securing an illegitimate benefit";
 - b) "money or property of relatively high value in violation of state regulations during a commercial transaction"; or
 - c) "various forms of 'kickbacks' or 'handling fees' during a commercial transaction in contravention of state regulations"¹²;
- (ii) an entity offers a public official:
 - a) "a bribe for the purpose of securing an illegitimate benefit"; or

- b) "'kickbacks' or 'handling fees' in violation of state regulations and the circumstances are serious"¹³; or
- (iii) an individual or an entity offers a state organisation (*i.e.*, a state organ, a state-owned company/enterprise/ institution or a people's organisation):
 - a) "money or property for the purpose of securing illegitimate benefits"; or
 - b) "various forms of 'kickbacks' or 'handling fees' during a commercial transaction in contravention of state regulations"¹⁴.

It is also a criminal offence for any individual or entity to bribe (i) any close relative of a public official or any other person who has a close relationship with that public official; or (ii) any former public official, any of his or her close relatives or any other person who has a close relationship with that public official, for the purpose of securing an illegitimate benefit.¹⁵

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

- (i) "takes advantage of his office to demand money or property";
- (ii) "illegally accepts 'money or property' in relation to a favour provided to the briber";

- (iii) "accepts various kinds of 'kickbacks' or 'handling fees' during a commercial transaction for his personal use in violation of state regulations"; or
- (iv) "abuses his status as a public official, by influencing another public official to secure an illegitimate benefit for another party, in exchange for money or property"¹⁶.

The illegal bribe can take various forms such as: (i) cash; (ii) "kickbacks" or "handling fees"; or (iii) assets and benefits other than cash that can be valued in monetary terms, such as home renovation, debt relief, membership services and travel.¹⁷

Corruption in relation to foreign public officials

Article 164, paragraph 2 of the Criminal Law criminalises bribery of foreign public officials and officials of international public organisations (active bribery only).

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

The 2016 Interpretation and the Supplemental Rules to Provisions (II) on the Standards for Initiating Investigation and Prosecution of Criminal Cases under

¹² Article 389 of the Criminal Law

¹³ Article 393 of the Criminal Law

¹⁴ Article 391 of the Criminal Law

¹⁵ Article 390(1) of the Criminal Law

¹⁶ Articles 385 and 388 of the Criminal Law

¹⁷ Article 12 of the Interpretation of Several Issues concerning the Application of Law in Handling Criminal Cases Related to Graft and Bribery, promulgated jointly by the Supreme People's Court and the Supreme People's Procuratorate on 18 April 2016 ("2016 Interpretation ")

the Jurisdiction of the Public Security Authorities jointly promulgated by the Supreme People's Procuratorate and the Ministry of Public Security on 14 November 2011 set out thresholds for initiating investigation and prosecution of the offence of bribery of foreign public officials or officials of international public organisations. The threshold is RMB 60,000 if the offender is an individual, and RMB 200,000 if the offender is an entity (e.g., a company).

Corruption in relation to private individuals or entities

Commercial bribery is prohibited under the Criminal Law (criminal liability) and under the AUCL (administrative liability). The Criminal Law prohibits any person from offering money or property to a staff member of a company, an enterprise or other organisation for the purpose of securing an illegitimate benefit¹⁸.

It is also a criminal offence for a staff member of a company, an enterprise or other organisation to accept or solicit money or property from any person in relation to any benefit provided to the briber¹⁹.

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

- employees of counterparties to a transaction;
- (ii) entities or individuals entrusted by the transaction counterparties to handle relevant matters; and
- (iii) entities or individuals that take advantage of their positions or influence to affect the transaction²⁰.

The former State Administration of Industry and Commerce ("SAIC", currently replaced by the State Administration for Market Regulation, "SAMR") issued interpretative guidance (Provisional Measures on Prohibition of Commercial Bribery) which states that a bribe, for the purposes of the AUCL, refers to any money or property provided to an entity or individual, such as promotional fees, advertising fees, sponsorship, research fees, service fees, consulting fees or commissions, etc., or other benefits such as domestic or overseas trips for the purpose of selling or purchasing goods. Commissions to an intermediary or discounts to any party must be recorded in the accounting books of the company; any person who receives a commission or "kickback" not recorded in the accounting books of that party may also be punished for commercial bribery²¹.

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

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

The notion of a public official, which is specific to public sector bribery, is broadly construed under the Criminal Law and includes in particular, individuals:

- (i) who perform public services in state organs including all levels of power organs, administrative organs
 (*i.e.*, the State Council and the local governments), judicial organs
 (*e.g.*, courts and prosecution bodies) and military organs;
- (ii) who perform public services in stateowned institutions (*e.g.*, universities or hospitals) or civil organisations;
- (iii) who perform public services in SOEs, including directors, managers, supervisors or accountants (however, SOE employees who perform technical services without government-related functions, such as back office staff, should be excluded); and
- (iv) who are assigned by the government or SOEs to perform public services in non-state-owned enterprises, institutions or civil organisations²².

The term "foreign public official" is not defined under the Criminal Law. In an interview, the officials in the Congress responsible for the drafting of this provision confirmed that it was adopted to implement the United Nations Convention Against Corruption (ratified by China in 2005). According to Article 2 of this Convention, "foreign public official" refers to any person holding a legislative,

¹⁸ Article 164 of the Criminal Law

¹⁹ Article 163 of the Criminal Law

²⁰ Article 7 of the AUCL

²¹ Articles 2, 5, 6 and 7 of the Provisional Measures on Prohibition of Commercial Bribery

²² Article 93 of the Criminal Law

executive, administrative or judicial office of a foreign country, whether appointed or elected, and any person performing a public function, including for a public agency or public enterprise or providing a public service under the law of a foreign country.

Similarly, the term "official of an international public organisation" is not defined under the Criminal Law. Under Article 2 of the United Nations Convention Against Corruption, this term refers to any international civil servant or any person who is authorised by such an organisation to act on behalf of that organisation.

Is private sector bribery covered by the law?

Yes, as provided under Articles 163 and 164 of the Criminal Law and Article 7 of the AUCL (see above).

Under the Criminal Law, the criminal penalties for public sector bribery are much more severe than those for private sector bribery. For instance, in the most severe cases, a public official convicted of taking bribes may be subject to the death penalty,²³ while the maximum penalty for a non-public official who has committed taking commercial bribery is a fixed term imprisonment of up to 15 years.²⁴

Does the law apply beyond national boundaries?

Yes. The Criminal Law applies to any crime committed:

- (i) within the territory of the PRC (a crime is deemed to have been committed within the territory of the PRC when either its act or result – *e.g.*, receiving an improper commercial benefit – takes place in China);
- (ii) by a PRC citizen or entity anywhere (unless the maximum penalty for the crime is less than three years imprisonment);
- (iii) by a PRC public official anywhere, regardless of the maximum penalty; and
- (iv) by a non-PRC citizen outside the territory of the PRC, which harms the interests of the state or PRC citizens, provided that the minimum penalty for the crime is not less than three years imprisonment.²⁵

The AUCL may have extraterritorial effect when, for example, both the bribe-giver and the bribe receiver are incorporated in China, while the offence of commercial bribery takes place overseas. In practice, however, regulatory investigations into 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:

- the background to 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 or her relevant position or whether the receiver takes advantage of his or her position in the relevant entity for the benefit of the gift giver.²⁶

Hospitality, particularly if excessive or lavish, may be regarded as a bribe if the other elements of bribery are satisfied.

The wording of the AUCL is sufficiently broad to cover gifts and hospitality, and there is no guidance on the legitimacy of gifts and hospitality under the AUCL. However, advertising gifts of nominal value, provided in accordance with relevant market practice, are exempted.²⁷ In practice, reasonable and occasional hospitality is unlikely to be investigated or penalised.

Is there an exemption for facilitation payments?

There are no specific provisions or exemptions under Chinese law for facilitation payments. Each payment must be judged according to whether it fulfils the criteria for the offences described above.

Payments that are made under extortion where no illegitimate benefit is obtained in return, however, are not to be regarded as bribes under the Criminal Law²⁸. There is no comparable provision in the AUCL.

²³ Articles 383 and 386 of the Criminal Law

²⁴ Article 163 of the Criminal Law

²⁵ Articles 6, 7 and 8 of the Criminal Law

²⁶ Article 10 of the Opinions on Several Issues and Application of Law concerning the Handling of Criminal Cases of Commercial Bribery jointly issued by the Supreme People's Court and the Supreme People's Procuratorate on 20 November 2008

²⁷ Article 8 of the Provisional Measures on Prohibition of Commercial Bribery

²⁸ Article 389 of the Criminal Law

However, the Criminal Law, as opposed to the AUCL, sets out differing thresholds regarding the value of the concerned bribe. For example, in the absence of particular circumstances prescribed by relevant laws or regulations, a criminal offence is committed if (i) the bribe offered by an individual to a public official is RMB 30,000 or above,²⁹ (ii) the bribe offered by an individual to a non-public official is RMB 60,000 or above,³⁰ or (iii) the bribe offered by an entity (whether to a public official or non-public official) is RMB 200,000 or above.³¹

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.

There is also a criminal offence of facilitating a bribe as an intermediary. For example, communicating an intention to give a bribe or transferring money between the bribe giver and the bribe receiver are criminal offences.

Similarly, the AUCL enhances the prohibition of bribery through intermediaries. Specifically, it is an offence for a business operator to bribe any entity or individual entrusted by the transaction counterparty to handle relevant matters, or any entity or individual that takes advantage of their position or influence to affect the transaction for the purposes of seeking business opportunities or competitive advantages.

Are companies liable for the actions of their subsidiaries?

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

The AUCL is silent on the liability of a company for the acts of its subsidiary. Even if, in principle, a company is legally independent form 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 bribery conduct is used as an agent by the parent company, the latter may be held liable, as described above.

Are companies required, or is it a defence, to have compliance procedures in place?

Companies are not legally required to have anti-bribery compliance procedures in place.

Having compliance procedures in place is not a statutory defence under either the Criminal Law or the AUCL. That said, under the AUCL, an act of bribery by an employee may be deemed to be an act of bribery by the employer unless the employer can show that the employee's action is irrelevant to seeking business opportunities or competitive advantages for the employer. In practice, the PRC regulators are likely to consider the adequacy of an employer's compliance procedures when assessing the evidence advanced by an employer to prove that its employee's act of bribery is irrelevant to seeking business opportunities or competitive advantages for the employer.

What are the penalties?

Corruption in relation to public officials Under the Criminal Law, an individual convicted of the offence of offering a bribe to a public official may be subject to criminal detention³², a fixed term of imprisonment, or life imprisonment³³, and criminal fines or confiscation of property.

Which penalty shall apply depends on the severity of the offence. By defining "severe", "causing significant losses to the State", and "significantly severe", the 2016 Interpretation provides guidance on the determination of the penalties.

The Interpretation of Several Issues Concerning the Application of Law for Handling Criminal Cases of Bribery ("**2012 Interpretation**") jointly

²⁹ Article 7 of the 2016 Interpretation

³⁰ Article 11 of the 2016 Interpretation

³¹ Article 1(8) of the Rules on the Standards of Initiating Criminal Investigations in Cases Directly Accepted and Investigation by the People's Procuratorate, promulgated by the Supreme People's Procuratorate on 16 September 1999

^{32 &}quot;Criminal detention" is a "less serious form" of imprisonment. The length of criminal detention ranges from one month to six months. An individual under criminal detention is allowed leave from the detention of one or two days each month.

³³ Under the Criminal Law, the term of imprisonment usually ranges from six months to 15 years.

promulgated by the Supreme People's Court and the Supreme People's Procuratorate on 26 December 2012 also sets forth several incentives for confession. Mitigation or exemption from penalties based on confession is possible for both entities and individuals.

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

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

Corruption in relation to private individuals or entities

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

A staff member of a company, enterprise or other organisation found guilty of having

accepted a bribe may be sentenced to criminal detention or to a term of imprisonment and confiscation of property.

Under the AUCL, a business operator who offers a bribe, if the circumstances are not serious enough to constitute a criminal offence, may be subject to a fine ranging from RMB 100,000 to RMB 3,000,000 and any illegal income may be confiscated. In severe cases, the offender's business licence may be revoked. Pursuant to the Provisional Measures on Prohibition of Commercial Bribery, entities and individuals accepting bribes when purchasing or selling goods are subject to the same administrative penalty as the business operators offering the bribes.³⁴

³⁴ Articles 4 and 9 of the Provisional Measures on Prohibition of Commercial Bribery

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POLAND

What is the definition of briberv?

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

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

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

Paid patronage

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

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

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

The public sector bribery offence in the Polish Criminal Code applies to bribery of persons performing a public function. This term includes:

- 1. Public officials, which means:
 - (i) the President of the Republic of Poland;
 - (ii) a member of the lower or upper chamber of the Polish Parliament or of a local government agency;
 - (iii) a member of the European Parliament;
 - (iv) a judge, lay judge, public prosecutor, an official of a financial authority responsible for conducting preparatory proceedings or of an agency superior to such financial authority, notary, a court enforcement officer (bailiff), an official received, an insolvency administrator and trustee, a member of a disciplinary panel adjudicating of specific matters on the basis of a statute;
 - (v) an employee of a government agency, other state agency or local government agency, unless performing only auxiliary functions, and any other person authorised

to issue decisions in an administrative procedure;

- (vi) an employee of a state or local government inspection authority, unless performing only auxiliary functions;
- (vii) a holder of a managerial position in a different government institution;
- (viii)an officer of an agency designated for the protection of public security or a prison officer;
- (ix) a person doing active military service;
- (x) an employee of an international criminal court, unless performing only auxiliary functions;
- 2. persons holding a position with a foreign government or a supra-national organisation;
- 3. members of local government administration bodies;
- 4. persons employed by organisational units with public funds at their disposal (unless performing only service-type work), e.g. members of tender committees in the public procurement procedures; and
- 5 other persons whose competencies or duties concerning public activity are specified by Polish law (e.g. courtappointed experts, members of arbitral tribunals).

Officers of state-owned or controlled enterprises, while not specifically listed as persons exercising a public function, may be treated as such when their specific duties directly involve public funds or then can otherwise be seen as exercising a public function. This would include, e.g. senior officers in a bank in which the State Treasury is a majority shareholder.

Is private sector bribery covered by the law?

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

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

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

Does the law apply beyond national boundaries?

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

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

How are gifts and hospitality treated?

Gifts and hospitality are capable of being treated as bribes. However, according to case law, a custom may constitute, in some circumstances, a defence to the offence of public sector corruption. Thus, gifts and hospitality to public officials are permitted where they are:

- (i) customary and socially accepted as a gesture of courtesy;
- (ii) of small value; and
- (iii) provided as an expression of gratitude, *i.e. after* the provision of a service by a person holding public office, but provided that the gift or hospitality was not promised, suggested or expected in connection with the service provided.

There is no clear boundary between a small socially acceptable gift and active bribery. Guidelines issued by the Polish Central Anti-Corruption Bureau (*Centralne Biuro Antykorupcyjne*) in 2011 (the "**CBA Guidelines**") state that it is not an offence to give a customary expression of recognition or gratitude in the form of flowers, a small gift of a promotional nature (*e.g.* a branded pen or calendar) and of a token value after the public official has taken an action or performed a service.

Certain groups of public officials and their spouses are required to record benefits received in the Register of Benefits, where the value exceeds the amount specified in law (currently PLN 380, approximately EUR 88), or where the benefit is in the form of domestic or foreign travel not related to the public office held. Rules for the medical sector³⁵ permit giving and accepting items relevant to the practice of medicine or pharmacy which bear a mark promoting a firm or medicinal product and which have a value of under PLN 100 (approximately EUR 23).

Is there an exemption for facilitation payments?

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

How is bribery through intermediaries treated?

A company can be liable for the corrupt actions of an intermediary insofar as such actions might have brought it some benefit, where the conditions for corporate criminal liability (set out below) are met.

Are companies liable for the actions of their subsidiaries?

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

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

 a person acting on behalf of the corporate entity or in its interest and within the scope of his/her powers or duty to represent it, a person who makes decisions on behalf of the entity or who exercises internal control, or who exceeds his/her powers or fails to perform his/her duty (a "Manager");

³⁵ Article 58 of the Polish Pharmaceutical Law.

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- a person given permission to act by a Manager;
- a person acting on behalf of the corporate entity or in its interest with the consent or knowledge of a Manager; or
- a person being "an entrepreneur" (a sole trader) who is involved in a business relationship with the corporate entity.

The entity will be liable for the actions of such persons only if:

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

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

The Act on the Liability of Collective Entities for Punishable Acts provides that if a corporate entity is not criminally liable, it may still be civilly liable in respect of any damages caused, or administratively liable.

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

Are companies required, or is it a defence, to have compliance procedures in place?

Polish law does not require companies to have anti-bribery internal controls in place. Given that a corporate entity is not liable under the Act on the Liability of Collective Entities for Punishable Acts if it has exercised due diligence in preventing the offence and in hiring or supervising the relevant person (as set out above), it has been suggested that internal controls under which such due diligence has been undertaken would provide a defence in those circumstances. However, the use of this compliance defence is largely untested.

A draft Act on Transparency in the Public Sphere would introduce a requirement on larger companies to implement anticorruption procedures. However, this is not yet in force.

What are the penalties?

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

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

Under the Public Procurement Law, an entity may be fined with an administrative penalty of up to PLN 150,000 – approximately EUR 35,000 (depending on the value of the contract). Also, natural persons sentenced for certain specified criminal offences (in particular, in connection with a contract award procedure) are by law excluded from contract award procedures.

Under the Act on the Liability of Collective Entities for Punishable Acts a corporate entity may be fined up to PLN 5 million (approximately EUR 1.162 million). However, the fine may not exceed 3% of the entity's revenue earned in the financial year in which the offence was committed. The court is also competent to prohibit the corporate entity from carrying out promotions and advertising, benefiting from grants, subsidies or assistance from international organisations or bidding for public contracts. It can also decide to publicise the judgment. All the abovementioned bans may be imposed for a period of one year to five years.

The Polish Government is currently working on the new draft Act on Liability of Collective Entities for Punishable Acts, which is intended to make the procedure of bringing corporate entities to account more efficient (under the current Act, the procedure has been ineffective in practice). Work on the draft is at an early stage, but it is expected that it could come into force during 2019.

The purpose of the new draft Act on Liability of Collective Entities for Punishable Acts is, first of all, to introduce corporate criminal liability for all offences, including corruption offences and treasury offences (currently, corporate criminal liability is limited to the offences specifically mentioned in the Act on Liability of Collective Entities for Punishable Acts). It will be possible to conduct criminal proceedings against a corporate entity, irrespective of criminal proceedings pending against an individual, and conviction of an individual will not be a criterion for instituting criminal proceedings against a corporate entity (which is the case at present). The new draft Act on Liability of Collective Entities for Punishable Acts would also considerably increase the maximum penalty for criminal liability of corporate entities to PLN 30 million (approximately EUR 7 million). Currently the maximum fine is PLN 5 million (approximately EUR 1.162 million).

ROMANIA

What is the definition of bribery?

Articles 289 and 290 of the Criminal Code ("Taking a bribe"/"Giving a bribe") set out the offences of soliciting or receiving, and promising, giving or offering, money or other undue benefits, in exchange for the performance or nonperformance of professional duties, or for expediting or delaying an act either within the scope of the public official/person's professional duties, or in breach of his or her professional duties.

The Criminal Code also criminalises trading in influence, both selling and buying. The offence of buying influence consists of promising, offering or giving money or other undue benefits, directly or indirectly, for oneself or for another, to a person who holds influence, or who claims to hold influence over a public official, intending to persuade the public official to perform or omit to perform a professional duty, or to expedite or delay the performance on an act either within the scope of the person's professional duties, or in breach of his or her professional duties.

Passive bribery is also criminalised, and there is a separate offence of abuse of office.

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

A public official is an individual who, on a temporary or permanent basis, whether paid or unpaid, (i) performs legislative, executive or judicial duties: (ii) holds public office or has public functions of any nature; or (iii) performs duties related to the activity of a public enterprise, economic agent or legal entity which is owned, or partly owned by the state. The term public official also includes any individual who performs a service of public interest entrusted to him or her by a public authority, or an individual who is subject to the control or supervisions of a public authority.

The term foreign public official is not defined in the Romanian Criminal Code.

Is private sector bribery covered by the law?

Yes. According to Romanian legislation, the same conditions that would trigger the criminal liability in respect of bribery of a public official are applicable to the private sector, *i.e.* offering an undue benefit to any person that carries out, on a permanent or on a temporary basis, with or without a remuneration, a duty, irrespective of its nature, in the service of a legal entity (including a private legal entity). The sanctions however are lower (*i.e.* the minimum and maximum sentences are reduced by a third).

Does the law apply beyond national boundaries?

Yes. Romanian criminal law applies in the case of criminal offences committed by a Romanian citizen or a Romanian legal entity outside Romania, where the offence is punishable by a term of imprisonment of ten years or more, or if the conduct is also a criminal offence in the jurisdiction in which the offence was committed.

Romanian criminal law also applies to criminal offences committed outside Romania by a foreign citizen if the offence was against the Romanian state, a Romanian citizen or a Romanian company.

How are gifts and hospitality treated?

There is no specific provision in Romanian law for gifts and hospitality, which will constitute bribes if the elements of a bribery offence are present.

Is there an exemption for facilitation payments?

There is no exemption in Romanian law for facilitation payments.

How is bribery through intermediaries treated?

Romanian anti-corruption law specifies that bribery offences may be committed directly or indirectly. Therefore, a principal who commits a bribery offence through the assistance of an intermediary will itself be criminally liable.

Are companies liable for the actions of their subsidiaries?

A company is criminally liable for a corruption offence committed by any person who is carrying out a core activity of the company, or who is acting in the interest of or on behalf of the company (*e.g.*, directors, managers or other persons with control or decision-making powers for the company).

Under Article 135 of the Criminal Code, a legal entity may be held criminally liable if the offence is committed:

 (i) in respect of the legal entity's core business activity; CE

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- (ii) in the interest of the legal entity (*i.e.* the offence must lead to a benefit to the legal entity, or avoid a loss);
- (iii) by an agent or representative of the legal entity and on its behalf; and
- (iv) further to a resolution taken by the legal entity, or as a result of its negligence.

Are companies required, or is it a defence, to have compliance procedures in place?

Companies are not required under Romanian law to have anti-bribery compliance procedures in place. While there is no statutory defence in Romanian law of having such procedures in place, there have been cases in which the courts have reduced the penalties where it was shown that procedures were in place.

What are the penalties? For individuals:

According to the Romanian Criminal Code, an individual that commits the offence of receiving a bribe may be sentenced to a term of imprisonment of between three and ten years. For the offence of giving a bribe, an individual may be sentenced to a term of imprisonment of between two and seven years. However, depending on the specific circumstances in which the bribery was committed, these sentences may be reduced or increased. Also, the giving of bribe will not be punished if the public /private officer self-denounces before the criminal investigation is started.

For legal entities:

Legal entities may be penalised by a fine (which may be daily and within a specific range subject to the legal entity income, in a maximum amount of EUR 720,000), and one or more auxiliary sanctions, such as:

- Debarment from public sector contracts for one to three years;
- Suspension of activity for between three months and three years;
- Closure of working points for three months to three years;
- Dissolution of the legal entity;
- Judicial surveillance; and
- Publication of the conviction.

RUSSIA

What is the definition of bribery?

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

The Anti-Corruption Law defines corruption as follows:

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

Individuals are subject to criminal, administrative, civil and/or disciplinary liability for bribery and other related offences³⁶. Organisations are subject to administrative liability for providing, offering or promising unlawful remuneration (Article 19.28 of the Administrative Offences Code). In Russian anti-corruption legislation bribery is defined, among other things, as follows:

(a) Bribery of public officials

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

- "directly or indirectly, accepting unlawful remuneration (in the form of monetary funds, securities or other property, services or property rights) by a public official, foreign public official or official of a public international organisation (including when at the instruction of a public official a bribe is transferred to another individual or legal entity) in return for performing an act (or omitting to act) in favour of the bribe-giver or the persons they represent, if it falls within the authority of the bribe-taker, or, if not, facilitating such an act (or omission to act) by means of abuse of official position, including general patronage or connivance" (Article 290 of the Criminal Code);
- "directly or indirectly, giving unlawful remuneration to a public official, foreign public official or official of a public international organisation (including when at the instruction of a public official a bribe is transferred to another individual or legal entity)" (Article 291 of the Criminal Code);
- "directly or indirectly, giving or accepting a bribe in an amount not exceeding RUB 10,000" (approximately

EUR 128 at the current exchange rate) (Article 291.2 of the Criminal Code).

The Plenum of the Supreme Court has clarified³⁷ that a bribe occurs if financial gain or any other benefit is given to, or accepted by, a public official for performing duties that derive solely from his/her official position and which are of an organisational, management or administrative nature.

However, if the benefit is not given directly to or accepted by a public official or his/her relatives, but is instead provided to another individual or organisation, and neither the public official nor the relatives obtain any financial gain or other benefit from it, then giving or accepting such a benefit does not constitute the crime of giving or accepting a bribe. In such cases the public official may nevertheless be prosecuted for abuse of office if his/her action (or omission to act) is tantamount to such abuse.

(b) Commercial bribery

- Bribery in business transactions is a crime under the Criminal Code, specifically:
- "giving unlawful remuneration (in the form of money, securities or other property, services or property rights) to a person exercising management functions at a commercial or other organisation (including when at the instruction of such person such unlawful remuneration is transferred to

³⁶ The Criminal Code establishes the following crimes of bribery and other related offences: accepting a bribe (Art. 290), providing a bribe (Art. 291), acting as an intermediary for a bribe (Art. 291.1), small-scale bribery (Art. 291.2), commercial bribery (Art. 204), acting as an intermediary in commercial bribery (Art. 204.1), small-scale commercial bribery (Art. 204.2), bribery in public procurement (Art. 200.5), incitement of a bribe (Art. 304), abuse of powers (Art. 201), abuse of public office (Art. 285), fraud (Art. 159), embezzlement (Art. 160) and forgery (Art. 292).

³⁷ Item 23 of Decree of the Plenum of the Supreme Court of the Russian Federation No. 24 dated 9 July 2013.

another individual or legal entity) in return for performing an act (or omitting to act) for the benefit of the bribe-giver or other individuals or legal entities, if such actions (or omissions) are part of the work duties of the person or the person may facilitate such actions (or omissions) on account of his/her position" (Article 204 of the Criminal Code);

- "accepting unlawful remuneration by a person exercising management functions at a commercial or other organisation" (Article 204 of the Criminal Code);
- "commercial bribery in an amount not exceeding RUB 10,000" (approximately EUR 128 at the current exchange rate) (Article 204.2 of the Criminal Code).

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

(c) Bribery in public procurement

Under the Criminal Code, the crime of bribery in public procurement is defined as bribe-giving/bribe-taking in relation to the following persons representing the interests of the customer in the procurement of goods, services or works for state or municipal needs:

- (i) contracting service employees;
- (ii) contracting administrators;
- (iii) persons responsible for the acceptance of goods, services or works; and
- (iv) other authorised representatives.

The offence here is acting (or omitting to act) in the interests of the bribe-giver or other person in connection with the procurement of goods, services or works for state or municipal needs (in the absence of elements of the offence of bribery or commercial bribery) (Article 200.5 of the Criminal Code).

(d) Incitement to bribe

Any attempt to transfer money, securities or other property, services or property rights to a public official, foreign public official, official of a public international organisation, a person exercising management functions at a commercial or other organisation or any of the persons listed in items (i)-(iv) of paragraph (c) above without their consent for the purposes of falsifying evidence of a crime or blackmail is categorised as incitement of a bribe, a commercial bribe or a bribe in public procurement (Article 304 of the Criminal Code).

(e) Bribery as an administrative offence

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

Organisations are subject to administrative liability for providing, offering or promising unlawful remuneration (in the form of money, securities or other property, services or property rights) to public officials, persons exercising management functions at a commercial or other organisation, foreign public officials or officials of public international organisations (including when unlawful remuneration is given to another individual or legal entity at the instruction of such person) (Article 19.28 of the Administrative Offences Code).

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

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

As a matter of Russian anti-corruption law, "public official", "foreign public official" and "official of a public international organisation" are defined as follows:

- A "public official" is an individual who, on a permanent or temporary basis or by special authority, performs the functions of a representative of the state or fulfils organisational and management or administrative functions at state or local authorities, state or municipal enterprises, state corporations, state companies, state or municipal unitary enterprises, jointstock companies in which the Russian Federation or a constituent entity or a municipality holds a controlling stake, or the military.³⁸
- A "foreign public official" is an individual who holds legislative, executive, administrative, or judicial office in a

³⁸ Note 1 to Article 285 of the Criminal Code.

foreign country, whether appointed or elected, and any person who exercises duties of public office of a foreign country, including at a public agency or public enterprise.³⁹ The Plenum of the Supreme Court has clarified that foreign ministers, mayors, judges, and public prosecutors are to be recognised as foreign public officials.⁴⁰

An "official of a public international organisation" is an international civil servant or any person who is authorised by an international organisation to act on behalf of that organisation.⁴¹ The Plenum of the Supreme Court has clarified that members of a parliamentary assembly of an international organisation to which Russia is party, individuals who hold judicial office at an international court, the jurisdiction of which is recognised by Russia, *etc.* are recognised as officials of international organisations.⁴²

Is private sector bribery covered by the law?

Yes. Private sector bribery is covered by Russian anti-corruption laws, specifically:

• The Criminal Code establishes criminal liability for commercial bribery (see above).

As a matter of Russian criminal procedure law, in the case of private sector bribery, where the harm caused by corruption offences is restricted exclusively to the interests of a commercial or other organisation which is not a state or municipal enterprise or state-owned/municipally owned organisation (and no harm is caused to other organisations, individuals, the general public or the state), the actors can generally only be prosecuted if and as long as the organisation seeks prosecution (Article 23 of the Criminal Procedure Code).

 The Administrative Offences Code establishes administrative liability for providing, offering or promising unlawful remuneration to (among others) persons exercising management functions at a commercial or other organisation (see item (e) above).

Does the law apply beyond national boundaries?

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

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

- the crime is directed against the interests of the Russian Federation or against a Russian citizen or a stateless person who permanently resides in Russia; or
- if it is provided for by international treaties to which the Russian Federation is a party or by other

international documents setting out obligations recognised by Russia; and

 no verdict has been rendered by a foreign court in relation to the crime and they are brought to criminal liability in Russia.

The Administrative Offences Code provides that an organisation is subject to administrative liability if it commits an offence in Russia, unless prescribed otherwise by an international treaty to which Russia is a party (Article 1.8 of the Administrative Offences Code). An organisation that has committed an offence outside the borders of the Russian Federation is subject to administrative liability if so prescribed by an international treaty to which Russia is a party. In addition, an organisation that has committed a corruption-related offence by providing, offering or promising unlawful remuneration (Article 19.28 of the Administrative Offences Code) outside the borders of the Russian Federation is subject to administrative liability if the following conditions are met:

- the offence is directed against interests of the Russian Federation; or
- if prosecution under administrative law for such corruption-related offences is envisaged by international treaties to which the Russian Federation is a party; and
- the organisation has not been prosecuted under administrative law in a foreign state for the corruptionrelated offence.

³⁹ Note 2 to Article 290 of the Criminal Code and Note 3 to Article 19.28 of the Administrative Offences Code.
40 Item 1 of Decree of the Plenum of the Supreme Court of the Russian Federation No. 24 dated 9 July 2013.
41 Note 2 to Article 290 of the Criminal Code & Note 3 to Article 19.28 of the Administrative Offences Code.
42 Item 1 of Decree of the Plenum of the Supreme Court of the Russian Federation No. 24 dated 9 July 2013.

How are gifts and hospitality treated?

Under the Civil Code (Article 575), it is prohibited "to donate gifts, with the exception of customary gifts worth no more than RUB 3000 [approximately EUR 38 at the current exchange rate], to persons holding public office of the Russian Federation, public office of constituent entities of the Russian Federation or public office of municipalities, or to state employees, municipal employees or employees of the Bank of Russia in connection with their official capacity or in connection with the performance of their official duties." There is no clear guidance as to whether gratuities and hospitality are to be treated as gifts, but there are grounds to believe that the definition of a 'gift' should be construed broadly to include both gratuities and hospitality.

These limitations do not apply to cases where gifts are donated in connection with official entertainment, business trips, and other official events.

If the value of a gift exceeds RUB 3,000, it should be deemed state, regional, or local property and officials must hand it over to the body for which the public official works. In practice this means that the value of officially given gifts can exceed RUB 3,000, but any such gifts must be handed over to the state, regional or local authorities (alternatively, such gifts can be bought out by the official under a special procedure).

Russian law contains no specific defences (such as classing them as promotional expenses, *etc.*) to the above limitations. Each payment (whether it exceeds RUB 3,000 or not) must be

assessed using the criteria for corruptionrelated offences, whether criminal or administrative. Neither the Criminal Code nor the Administrative Offences Code contain any rules as to the minimum amount of a payment to qualify as a bribe (including commercial bribe).

Is there an exemption for facilitation payments?

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

How is bribery through intermediaries treated?

Bribery through intermediaries is a crime under Russian law. Specifically, the Criminal Code establishes criminal liability for:

- "acting as an intermediary in bribery, i.e. directly transferring a bribe at the instruction of the bribe-giver or bribetaker or otherwise facilitating the reaching or realisation of an agreement between the bribe-giver and bribe-taker to receive and give the bribe" (Article 291.1 of the Criminal Code);
- "acting as an intermediary in commercial bribery, i.e. directly transferring the thing of value constituting the commercial bribe (unlawful remuneration) at the instruction of the bribe-giver or bribe-taker or otherwise facilitating the reaching or realisation of an agreement between them to receive and give the thing of value constituting the commercial bribe" (Article 204.1 of the Criminal Code).

Since there is no corporate criminal liability in Russian law, companies cannot be held criminally liable for bribery offences committed by an intermediary. However, where a third party agent is engaged by a company to act on its behalf (*e.g.*, by virtue of a power of attorney or under contract) the company could be subject to administrative liability for corrupt actions committed by the intermediary.

Are companies liable for the actions of their subsidiaries?

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

However, there is an exception to this rule. Since January 2019 companies can be prosecuted under Russian administrative law for providing, offering or promising unlawful remuneration in the interests of a related legal entity (*e.g.*, a subsidiary or affiliate of the company) (Article 19.28 of the Administrative Offences Code).

Are companies required, or is it a defence, to have compliance procedures in place?

Under Russian law, companies are obliged to have adequate procedures in place to prevent bribery.⁴³ Such procedures may include, amongst other things:

 determination of departments and officials responsible for prevention of corruption-related and other offences;

⁴³ Article 13.3 of the Federal Law No. 273-FZ of 25 December 2008 On Combating Corruption.

- (ii) cooperation with law-enforcement and other public authorities;
- (iii) elaboration and implementation of standards and procedures aimed at ensuring the company operates in good faith;
- (iv) adoption of a code of ethics and professional behaviour for employees;
- (v) prevention and management of conflicts of interest; and
- (vi) prevention of false accounting and use of falsified documents.

The Russian Ministry of Labour and Social Security has also adopted non-binding Guidance on Elaboration and Adoption of Anti-corruption Measures by Organisations of 8 November 2013. This guidance is aimed at developing a uniform approach by legal entities, regardless of their form of ownership, legal form, etc., to anti-corruption measures.

In addition, public joint-stock companies are obliged to put in place a riskmanagement and internal control system by, amongst other things, adopting an appropriate policy and conducting an internal audit to assess the reliability and effectiveness of their risk-management and internal control system.⁴⁴

As regards defences to corporate liability, if a company is charged with an administrative corruption-related or other offence, it may be a defence to demonstrate that the company has taken all reasonable steps possible to prevent the offence and comply with the relevant statutory requirements. Furthermore, a legal entity can be exempted from administrative liability for providing, offering or promising unlawful remuneration (Article 19.28 of the Administrative Offences Code) if it assists in the detection or investigation of the offence and/or crime.45 It should be noted that this defence is not available in cases where the unlawful remuneration was provided, offered or promised to a foreign public official or an official of a public international organisation in connection with a commercial transaction.46

What are the penalties?

The maximum penalties under the Criminal Code for corruption in relation to public officials are as follows: for accepting/giving a bribe of RUB 1 million (approximately EUR 12,839 at the current exchange rate) or more – imprisonment for up to 15 years, accompanied by a fine equal to 70 times the value of the bribe. The maximum penalties under the Criminal Code for commercial bribery/bribery in public procurement are as follows:

- for accepting a commercial bribe/bribe of RUB 1 million (approximately EUR 12,839 at the current exchange rate) or more – imprisonment for up to 12 years, accompanied by a fine equal to 50 times the value of the bribe;
- for giving a commercial bribe/bribe of RUB 1 million (approximately EUR 12,839 at the current exchange rate) or more – imprisonment for up to eight years, accompanied by a fine equal to 40 times the value of the bribe.

Where an organisation is found guilty of corruption, the maximum possible administrative penalty for a bribe of RUB 20 million (approximately EUR 256,777 at the current exchange rate) or more is a fine equal to 100 times the value of the bribe (but in any case not less than RUB 100 million (approximately EUR 1.28 million at the current exchange rate)), accompanied by confiscation of the money, securities or other assets that constituted the bribe.

⁴⁴ Article 87.1 of the Federal Law No. 208-FZ of 26 December 1995 on Joint-Stock Companies.

⁴⁵ Note 5 to Article 19.28 of the Administrative Offences Code.

⁴⁶ Note 6 to Article 19.28 of the Administrative Offences Code.

SINGAPORE

What is the definition of bribery?

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

- (a) corruptly soliciting or receiving, or agreeing to receive for himself, or for any other person; or
- (b) corruptly giving, promising or offering to any person whether for the benefit of that person or of another person, any gratification as an inducement to or reward for, or otherwise on account of –
 - (i) any person doing or forbearing to do anything in respect of any matter or transaction (whether actual or proposed); or
 - (ii) any member, officer or servant of a public body doing or forbearing to do anything in respect of any matter or transaction (whether actual or proposed), in which such a public body is concerned.

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

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

- (a) money or any gift, loan, fee, reward, commission, valuable security or other property or interest in property of any description, whether movable or immovable;
- (b) any office, employment or contract;

- (c) any payment, release, discharge or liquidation of any loan, obligation or other liability whatsoever, whether in whole or in part;
- (d) any other service, favour or advantage of any description whatsoever, including protection from any penalty or disability incurred or apprehended or from any action or proceedings of a disciplinary or penal nature, whether or not already instituted, and including the exercise or the forbearance from the exercise of any right or any official power or duty; and
- (e) any offer, undertaking or promise of any gratification within the meaning of paragraphs (a), (b), (c) and (d) above.

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

There is no de minimis threshold.

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

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

 a public servant to accept or agree to accept any gratification, other than legal remuneration, as a motive or reward in respect of doing an official act;

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

While the term "gratification" is not expressly defined in the Penal Code, 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 under written law, and also a general reference to a "person in the employment of the Government or any department thereof". The PCA also contains express prohibitions with respect to dealings with "agents" in relation to his/ her "principal's affairs or business". "Agent" is defined to include a person serving the Government or under any corporation or public body. "Principal" includes the Government or a public body. Where the defendant is a public official and the gratification is paid to or received by him, there is a rebuttable presumption that where the gratification has been paid or given to or received by a public official, that it has been paid or given and received corruptly.

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

Foreign public official

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?

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

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.

In addition, under the abetment provisions in the Penal Code, a person who abets an offence (including an offence under the PCA) from outside Singapore shall be liable for the offence, notwithstanding that the acts of abetment were carried out outside Singapore.

The Penal Code also expressly provides that every public servant who, being a citizen or a permanent resident of Singapore, when acting or purporting to act in the course of his employment, commits an act or omission outside Singapore that if committed in Singapore would constitute an offence under the law in force in Singapore is deemed to have committed that act or omission in Singapore.

How are gifts and hospitality treated?

The term "gratification" is sufficiently broad to encompass gifts and hospitality, which are therefore capable of being bribes if the other elements of the offence are present. The explanatory notes to the Penal Code make it clear that the term is not restricted to gratification in monetary terms.

In practice, in the private sector, gifts and hospitality provided on a "one-off" basis and which cost only a modest or reasonable amount are unlikely to be prosecuted.

Is there an exemption for facilitation payments?

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

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

How is bribery through intermediaries treated?

The PCA provides that a person will be liable for the actions taken by that person "in conjunction with any other person". Where an intermediary acts in conjunction with its principal, the principal will therefore be liable. The PCA does not specify the knowledge required on the part of the principal of the bribery committed by the intermediary in order for the principal to be liable.

The Penal Code does not expressly provide for the liability of a principal for the acts of an intermediary.

Are companies liable for the actions of their subsidiaries?

No, Singapore legislation does not expressly provide for the liability of a parent company for the actions of its subsidiary. Although the reference to "person" is sufficiently broad under the PCA and Penal Code to cover companies, based on a review of current reported case law, no company has been prosecuted under the PCA and/or Penal Code to date in this regard.

Are companies required, or is it a defence, to have compliance procedures in place?

No, Singapore legislation does not require companies to have anti-bribery

compliance measures in place, and there is no formal defence of having such procedures in place. Nevertheless, a robust anti-bribery programme would be likely to be taken into consideration by the Singapore courts in any proceedings against a company.

What are the penalties?

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

I. For private sector bribery:

- a) Fine not exceeding SGD 100,000; and
- b) Imprisonment for a term not exceeding five years; or both.
- II. For public sector bribery:
 - a) Fine not exceeding SGD 100,000; and
 - b) Imprisonment for a term not exceeding seven years; or both.

SLOVAK REPUBLIC

What is the definition of bribery?

Slovak Act No. 300/2005 Coll., the Criminal Code, as amended (the "**Slovak Criminal Code**"), sets out several corruption offences in sections 328 to 336b, including:

- (a) accepting bribes;
- (b) offering bribes; and
- (c) indirect bribery.

In particular, the Slovak Criminal Code prohibits:

- accepting or requesting a bribe, or not refusing to be bribed, directly or *via* an intermediary:
 - (a) in order for a person to act in a way that breaches the duties under his/her employment, position or function;
 - (b) in connection with procuring matters in the public interest; and
 - (c) as a foreign public official in connection with the performance of his/her official duties, or in connection with exercising his/her authority, in order to enable an undue advantage to be gained or maintained;
- (ii) promising, offering or providing a bribe, directly or *via* an intermediary:
 - (a) in order for a person to act in a way that breaches the duties under his/her employment, position or function;
 - (b) in connection with procuring matters in the public interest; and
 - (c) to a foreign public official in connection with the performance of his/her official duties, or in connection with exercising his/her authority, in

order to enable an undue advantage to be gained or maintained;

- (iii) accepting or requesting a bribe, or not refusing to be bribed, directly or *via* an intermediary, in order to exert influence on the exercise of the authority of a person under (i)(a) above, a public official under (i)(b) above or a foreign public official under (i)(c) above, or for having done so; and
- (iv) promising, offering or providing a bribe, directly or via an intermediary, to a third party to exert its influence on the exercise of the authority of a person under (ii)(a) above, a public official under (ii)(b) above or a foreign public official under (ii)(c) above, or for having done so, or promising, offering or providing a bribe to another person for this purpose.

The Slovak Criminal Code also prohibits bribery at elections and bribery in sporting contests.

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

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

Certain sections of the Slovak Criminal Code refer to the exertion of influence on "public officials"; this term is defined to include the president of the Slovak Republic, members of the Parliament of the Slovak Republic as well as the European Parliament, members of the Slovak government, judges and other persons holding office in public authority institutions, *e.g.* employees of the Slovak Permanent Representation to the EU and the Slovak Embassies, and local administration, *etc.* (section 128(1) of the Slovak Criminal Code).

The Slovak Criminal Code also refers to the exertion of influence on "foreign public officials". This term includes persons:

- holding office in the legislative body, executive body, judicial or arbitral organs, or in another public administration body of a foreign state (including the head of a foreign state);
- (ii) holding office, employed by, or working at, an international organisation or supranational organisation formed by states or other subjects of international public law in its organ or institution, or authorised to act on its behalf;
- (iii) holding office, employed by, or working at, an international judicial organ or authorised to act on its behalf; or
- (iv) holding office in an enterprise in which a foreign state has a decisive influence,

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

Is private sector bribery covered by the law?

Yes. The Slovak Criminal Code prohibits both bribery in the private sector in general and bribery in connection with procuring matters in the public interest. However, there are some differences between private sector bribery and public sector bribery, reflecting the fact that the latter is considered to be a more serious offence.

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

The maximum penalty is higher for public sector corruption (up to fifteen years imprisonment) than for private sector corruption (up to twelve years).

Does the law apply beyond national boundaries?

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

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

How are gifts and hospitality treated?

Since the Slovak Criminal Code defines a bribe as any kind of thing or the performance of a property or nonproperty nature to which there is no legal entitlement, any gifts, hospitality and invitations to events, regardless of value, may be treated as bribes where the other elements of a bribery offence are present.

Is there an exemption for facilitation payments?

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

How is bribery through intermediaries treated?

As stated above, an intermediary may be also held liable under the Slovak Criminal Code if he/she, directly or *via* an intermediary,

- accepts or requests a bribe, or does not refuse to be bribed in order to exert influence on the exercise of the authority a person under (i)(a) above, a public official under (i)(b) above or a foreign public official under (i)(c) above, or for having done so; or
- (ii) promises, offers or provides a bribe, to a third party to exert its influence on the exercise of the authority of a person under (ii)(a) above, a public official under (ii)(b) above or a foreign

public official under (ii)(c) above, or for having done so, or promises, offers or provides a bribe to another person for this purpose.

Are companies liable for the actions of their subsidiaries?

Although under the Slovak Criminal Code only an individual (not a legal entity) may be held liable for a criminal offence set out by the Slovak Criminal Code (*i.e.* only an individual can be an offender), the Slovak Act on Criminal Liability of Legal Entities has introduced the concept of liability of legal entities for certain criminal offences, including bribery as defined above.

According to the Slovak Act on Criminal Liability of Legal Entities, a legal entity may be held criminally liable if the criminal offence is committed in favour of, on behalf of, within the scope of the activities of, or through, the legal entity and if it is committed by:

- (i) its statutory body or a member of its statutory body;
- (ii) a person performing management or supervisory activities in the legal entity; or
- (iii) a person authorized to represent or decide on matters on behalf of the legal entity.

The criminal liability of a legal entity is not conditional on the criminal liability of the individual offender. A legal entity may be held criminally liable even if the individual offender cannot be identified. Moreover, criminal liability of a legal entity does not preclude the criminal liability of the individual offenders under the general provisions of the Slovak Criminal Code. Although the Slovak Act on Criminal Liability of Legal Entities does not expressly regulate liability of companies for the actions of their subsidiaries, it cannot be excluded that the parent company may be held liable for a criminal offence committed by an individual holding a position in its subsidiary. However, this has not yet been tested by the Slovak courts. Therefore, it remains to be seen whether the courts would take such a broad approach.

Are companies required, or is it a defence, to have compliance procedures in place?

There is no requirement in Slovak law for companies to have anti-bribery compliance procedures in place, and it is not a defence.

What are the penalties?

The penalties for a corruption offence under the Slovak Criminal Code include imprisonment for a term of up to 15 years and/or a monetary penalty of up to approximately EUR 331,930. The actual length of the term of imprisonment and/ or the amount of the monetary penalty depends, among other things, on the scale and seriousness of the offence, the amount of the bribe *etc*.

Sanctions under the Slovak Act on Criminal Liability of Legal Entities include:

- (i) dissolution of the legal entity;
- (ii) seizure of property;
- (iii) seizure of assets;
- (iv) fines of up to EUR 1.6 million;
- (v) prohibition of business activities;

- (vi) prohibition on participating in public tenders;
- (vii) prohibition on receiving state subsidies and subvention;
- (viii) prohibition on receiving subsidies and incentives provided from the funds of the European Union; and
- (ix) publication of the conviction.

SPAIN

What is the definition of bribery?

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

- (i) corruption between individuals, set out in Article 286 *bis* of the Criminal Code; and
- (ii) corruption between, on the one hand, a public official or authority⁴⁷ who solicits or accepts the benefit or advantage and, on the other hand, an individual who receives the solicitation from the public official or proposes the bribe to the public official. This latter type is referred to in the Spanish Criminal Code as "bribery" (cohecho), rather than "corruption" (corrupción), which mainly refers to the private sector.

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

Corruption between individuals

The Criminal Code distinguishes between:

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

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

Bribery

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

- 1. Active bribery:
 - 1.1 Where the individual takes the initiative in the corruption, and
 - 1.2 Where the individual responds to the solicitation made to him/her.
- 2. Passive bribery in breach of inherent duties ("cohecho pasivo propio"): where the conduct of the civil servant or authority is sanctioned when they receive or solicit, personally or through an intermediary, gifts, favours or remuneration of any kind, or when they accept offers or promises to do one of the following:
 - 2.1 to commit an act, while carrying out the duties of the public office, which is contrary to the duties inherent to the post held, or
 - 2.2 to not carry out the duties or to unfairly delay the performance of

the duties which the authority or civil servant must carry out.

- Passive bribery in compliance with inherent duties: where the following actions by the public official or authority are prohibited:
 - 3.1 Receiving or soliciting, personally or through an intermediary, gifts, favours or remuneration of any kind, or accepting offers or promises to carry out an act inherent to the public office or in reward for an act already performed; and
 - 3.2 Accepting, personally or through an intermediary, a gift offered in view of the office held or duties performed, not including small gifts considered inherent to a friendly or good neighbourly relationship.

These provisions also apply to European Union officials⁴⁸.

Bribery of foreign public officials

There is a separate offence in the Criminal Code of bribery of foreign public officials which consists of offering, promising or granting any unjustified profit to a foreign civil servant or an authority, for his benefit or for the benefit of a third party, with the purpose of obtaining a specific action or omission by the civil servant or authority, aiming to achieve or maintain a contract, business activity or an unjustified profit in international commercial transactions, as

⁴⁷ In this context, authority means an individual public official with authority to enforce the law and to give orders to others for that purpose (e.g., a policeman, a judge, a dean or provost of a university, a mayor of a city or town, or a Cabinet minister).

⁴⁸ Meaning (a) Any person holding a legislative, administrative or judicial position or employment in a country of the European Union or in any other foreign country, both by appointment or by election; (b) Any person exercising a public function for a country of the European Union or any other foreign country, including a public body or a public enterprise, for the European Union or for another public international organization; (c) Any civil servant or agent of the European Union or of a public international organization.

well as agreeing, at the request of a foreign civil servant or an authority to give any unjustified profit, for his benefit or for the benefit of a third party, with the purpose of obtaining a specific action or omission by the civil servant or authority, aiming to achieve or maintain a contract, business activity or an unjustified profit in international commercial transactions (article 286 *ter* of the Spanish Criminal Code).

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

Article 24 of the Criminal Code provides:

"For criminal liability purposes, a person will be considered a public official if he, alone, or as a member of any corporation, tribunal or professional association, has a commanding post or exercises jurisdiction pertaining thereto. Regardless, the following will always be considered public officials: members of the Congress, the Senate, the regional legislative assemblies and the European Parliament. The officers of the Public Prosecutor's Officer are also regarded as public officials.

Any person that participates in the exercise of public duties by provision of law, or by election or appointment by the competent authority will also be considered to be a public official."

A foreign public official is defined as (article 427 of the Spanish Criminal Code):

- (i) any person who holds a legislative, administrative or judicial position or employment in a country of the European Union or in any other country, either by appointment or election;
- (ii) any person who exercises a public duty for a country of the European

Union or any other foreign country, including a public body or a public company for the European Union or for another public international organization; and

(iii) any officer or agent of the European Union or of an international public organisation.

Is private sector bribery covered by the law?

Yes. As noted above, there in an offence of corruption between individuals, who must be "the executives, directors, employees or collaborators of a commercial enterprise, company, association, foundation or organisation".

Does the law apply beyond national borders?

The general rule is that the Spanish Criminal Code applies to all residents of Spain and to any individual who commits an unlawful act in Spanish territory.

Article 23 of the Organic Law on the Judiciary ("**LOPJ**") sets out the circumstances in which Spanish jurisdiction may apply where the offence was committed outside Spain:

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

between individuals or private parties; and

• where the offence is committed outside Spain by a citizen of Spain or any other country, if interests especially relevant to all of humanity are harmed (the principle of universal jurisdiction).

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

However, the offence of bribing a foreign official (corruption in international business transactions foreseen in article 286 *ter*) is subject to some extraterritorial jurisdiction.

If the bribe was paid or received in Spain but the benefit, such as awarding a contract, took place in another country, the person who paid the bribe can be prosecuted in Spain if the following requirements are met: (i) an offer, promise or grant of any undue pecuniary or other advantage (the bribe) is made directly or through intermediaries, to a foreign public official or a third person with the official's acquiescence; (ii) the bribe aims to obtain or retain a business or other improper advantage in the conduct of international business; and (iii) the bribe must seek to influence the foreign official so that he or she acts or refrains from acting in relation to the performance of official duties.

How are gifts and hospitality treated?

Gifts and hospitality may be considered bribes if they meet the criteria set out

above in the statement of the offences. However, it is generally accepted that gifts and hospitality of low value which do not relate to an unjustified benefit or advantage are unlikely to be considered bribes.

Is there an exemption for facilitation payments?

No. Article 420 of the Criminal Code provides that it is an offence where a person offers or gives (or where an authority or civil servant receives or solicits) gifts, favours or remuneration or any kind of offer or promise to carry out an act inherent to the office of the recipient.

How is bribery through intermediaries treated?

Legal entities may be liable for bribery carried out through intermediaries where such intermediaries were performing corporate activities on behalf of the legal entity, in the circumstances set out below.

Are companies liable for the actions of their subsidiaries?

According to Article 31 bis of the Spanish Criminal Code, "legal entities shall be held criminally accountable for offences committed in their name or on their behalf, and for their benefit, by their legal representatives and *de facto* or *de jure* administrators" and for "offences committed when performing corporate activities on behalf of the company and for its benefit, by parties who, while subject to the authority of the legal entities mentioned in the preceding paragraph, were able to perpetrate the acts because due control was not exercised over them, in view of the specific circumstances of the case".

Predicate offences for the purposes of Article 31 *bis* include bribery and corruption between individuals.

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

Are companies required, or is it a defence, to have compliance procedures in place?

Spanish law does not impose a specific obligation on companies to have anti-bribery internal controls in place. However, having implemented such controls can be an effective defence to corporate liability under section 31 *bis* of the Criminal Code.

Organic Law 1/2015, amending section 31 *bis* of the Criminal Code, aimed to clarify what constitutes "due control", and introduced grounds for an exemption from criminal liability for legal persons able to demonstrate that they possess and have efficiently implemented a crime prevention or compliance programme which meets specified requirements.

These requirements include (a) risk assessment; (b) corporate governance procedures on decision-making; (c) due diligence; (d) whistleblowing; (e) a disciplinary system; and (f) verification of and modifications to the programme as required.

What are the penalties?

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

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

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

For passive corruption offences:

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

For active corruption offences:

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

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

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

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

In addition, the judge may also order that:

- the legal entity be wound up;
- its activities be suspended for not more than five years;
- its premises and establishments be closed for not more than five years;
- the court intervene in the entity's administration, in order to safeguard the rights of the employees or

creditors, for not more than five years; and

• the entity be prohibited from carrying out, in the future, the activity during the exercise of which the offence was committed, concealed or favoured.

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

TURKEY

What is the definition of briberv?

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

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

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

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

There is also a specific offence of corruption in connection with public tenders (ihaleye fesat karıştırma). The Criminal Code (Article 235) defines this offence as engaging in mischief (defined as certain fraudulent or corrupt acts), forceful acts or duress, disclosing information in relation to tender offers which were meant to be kept confidential as per public procurement legislation or tender specifications, making

engagements in order to influence the tender conditions and price during (i) tenders relating to the purchase, sale or rental of goods and services on behalf of public institutions or corporations; or (ii) construction tenders.

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

"Public official" is defined widely; any individual who is involved in a public function continuously, temporarily or provisionally can be considered as a public official (i.e., whether appointed, elected or otherwise involved). (For a list of other individuals subject to the antibribery laws see the section on private sector bribery below.)

In line with the OECD Convention, there is also a specific offence of bribing a foreign public official. The Criminal Code (Article 252(9)) qualifies the following as foreign public officials:

- (i) public officials elected or designated in a foreign country;
- (ii) judges, jury members and other officers working for international or supranational or foreign state courts;
- (iii) international or supranational parliament members;
- (iv) those who conduct public transactions for a foreign country, including public bodies and public enterprises;
- (v) citizen or foreigner arbitrators appointed within the scope of arbitration method used for the purpose of settlement of a legal dispute; and
- (vi) officers or representatives of international or supranational

organisations incorporated based on an international agreement.

Is private sector bribery covered by the law?

Under the Turkish Criminal Code, the offence of bribery also applies to benefits offered or promised to individuals, whether or not they are public officials, acting in the name of the following entities:

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

Otherwise, bribery of individuals in the private sector is not covered.

Does the law apply beyond national boundaries?

Yes. The anti-bribery provisions of the Turkish Criminal Code apply to activities outside Turkey if:

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

How are gifts and hospitality treated?

Under the Turkish Criminal Code, any benefit (with no minimum threshold) provided to a public official in the circumstances set out above, may constitute a bribe.

Law No. 657 on Civil Servants prohibits civil servants from:

- requesting gifts directly or through an intermediary;
- accepting gifts with the intention of taking an advantage even while not exercising their duties; or
- asking for or accepting a monetary loan from their principals.

Gifts are defined in the Public Officials' Ethics Regulation as any benefit or goods (with or without economic value) provided to a public official that may affect decisions or the execution of duty by that public official. Exceptions to the prohibition on the acceptance of gifts are books, magazines, calendars or marketing materials that are distributed to the public as gifts.

Gifts of greeting, farewell and celebration, scholarships, travel, cost-free accommodation and gifts vouchers from persons who have work, service or beneficiary relationships with the institutions for which the public official works, regardless of economic value, are prohibited.

Gifts from foreign countries, international organisations and foreign citizens/companies

Under Law No. 3628 Concerning the Declaration of Wealth, Combating Bribery and Corruption public officials are permitted to accept gifts or grants from foreign citizens/companies up to a value of ten months' worth of monthly wage (monthly wage is subject to revision each year, TRY 20,200 for 2019), provided there is no corrupt intent. Gifts above that amount must be returned.

Is there an exemption for facilitation payments?

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

How is bribery through intermediaries treated?

Under the Misdemeanours Law, a company could be held liable for the corrupt actions of a third party agent engaged by that company if the relevant agent were to commit a corrupt act while obtaining or retaining business or a business advantage for that company and if the company were shown to have the requisite intent.

Pursuant to the Misdemeanours Law (see below), if an organ or representative of a private legal entity, or a person appointed within the scope of the legal entity's activities, commits an offence of bribery for the benefit of that legal entity, that legal entity may be liable to an administrative penalty.

Are companies liable for the actions of their subsidiaries?

Although companies are not subject to criminal liability in Turkey, Article 43/A of the Misdemeanours Law (Law No 5326) stipulates that a private legal person may be fined in respect of a bribery offence committed by:

- (i) a representative of the legal person;
- (ii) an entity that is an organ of the legal person; or
- (iii) a person who is not a representative of the private legal person but who has duties within the commercial activities of such legal person,

in each case, where the offence was committed for the benefit of the relevant private legal person.

In addition, the Turkish Criminal Code and the Turkish Commercial Code (Law No. 6102) provide that directors or board members of commercial companies shall be liable for the conduct of their employees, agents and officers if they expressly or tacitly authorised or permitted the commission of the offences.

Are companies required, or is it a defence, to have compliance procedures in place?

There are no requirements in Turkish law for companies to have specific anti-bribery internal controls, and no specific statutory defence is available. Turkish law does not recognise any measures to mitigate the liability of a company for corrupt acts of its third party agents. The Regulation on Programme of Compliance with Obligations of Anti-Money Laundering and Combating Terrorism Financing requires banks, capital markets brokerage houses, insurance and pension companies to develop a compliance programme that includes policies and procedures, risk management activities, internal training and internal supervision and controls. These entities are also required to appoint a compliance officer and to establish a compliance unit to monitor and control the fulfilment of relevant legal requirements.

What are the penalties?

The maximum penalty for a bribery offence under the Turkish Criminal Code is 12 years imprisonment (for both the receiver and the payer of the bribe). This penalty may also be imposed on:

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

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

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

Where an organ or representative of a legal entity, or a person performing duties for a legal entity, commits a corruption or bid-rigging offence for the benefit of the legal entity, the legal entity may be subject to an administrative fine of between TRY 10,000 and TRY 2 million. In addition, where a bribe has led to a benefit for a legal person, further measures may be imposed, *e.g.* a licence or authorisation may be revoked, and assets or benefits may be confiscated.

UKRAINE

What is the definition of bribery?

The offences relating to bribery and corruption are contained in several legislative acts in Ukraine. The relevant acts include the Law of Ukraine "On Preventing Corruption" No. 1700-VII dated 14 October 2014 (the "**Anti-Corruption Law**"), the Criminal Code of Ukraine No. 2341-III

dated 5 April 2001 (the "**Criminal Code**") and the Code of Ukraine on Administrative Offences No. 8073-X dated 7 December 1984 (the "**Code of Administrative Offences**").

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

Bribery

Active bribery

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

Passive bribery

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

Illicit enrichment

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

Trading in influence

Active trading in influence

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

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

Other related corrupt acts Extortion

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

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

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

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

A public official means an individual who, on a permanent or temporary basis, performs functions of a state or local government representative and holds a position with organisational and regulatory powers (i.e., is entitled to manage other employees of the entity and is responsible for some field of work) or administrative and asset management powers (*i.e.*, is entitled to manage and/or dispose of assets) at the state or local government authorities or at a state/municipal enterprise. A state or municipal enterprise here means a company where a state or a local government, respectively, holds 50 or more per cent of shares or votes or has other decisive influence on the company's activity.

The above public officials include, but are not limited to, members of Parliament, deputies of local governments, ministers, judges, and the management of stateowned enterprises.

There are separate corruption offences related to individuals rendering public services (including, without limitation, auditors, notaries, state registrars, public experts and private enforcement officers acting on behalf of a public authority).

A foreign public official is defined by the Criminal Code as an individual holding a position in the legislative, executive or judicial authorities of a foreign state, including juries, as well as foreign СНАМСЕ

arbitrators, officials of international nongovernmental organisations (*i.e.*, any individuals authorised to act on behalf of such organisations), members of international parliamentary assemblies in which Ukraine is a member, and judges and officials of international courts.

Is private sector bribery covered by the law?

Yes, Ukrainian anti-corruption laws also apply to bribery of private sector individuals, particularly company officers.

Employees of private sector legal entities are considered officers if the employee has:

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

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

Does the law apply beyond national boundaries?

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

How are gifts and hospitality treated?

The Anti-Corruption Law provides that public officials cannot request, ask for or accept gifts for themselves or related persons from either individuals or companies:

- if such gifts are related to them holding a position of a public official; or
- if the giver is subordinated to such public official.

In all other cases, public officials are allowed to accept common hospitalities with the value of up to UAH 1,921 (approximately EUR 60) per gift, and up to UAH 3,842 (approximately EUR 120) for aggregated gifts from one person within one year. The specific value of permitted gifts may be subject to change.

As regards company officers and individuals rendering public services, there are no restrictions for gifts. Ukrainian anti-bribery laws use the terminology of "undue advantage", which is wide enough to include gifts and hospitality. These may therefore constitute bribes if the other elements of a bribery offence are present.

Is there an exemption for facilitation payments?

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

How is bribery through intermediaries treated?

Usually bribery through intermediaries is equal to direct bribery and is also a

violation. For instance, the Criminal Code provides that an undue advantage received by a third party related to a public official or company officer constitutes a criminal offence equal to the one where such undue advantage is given directly to a public official or company officer.

The same principle applies to cases where an undue advantage is promised, offered, and/or given to a public official or company officer, so that a third party could benefit from such officer/official acting or refraining from acting in the exercise of his or her official duties.

Are companies liable for the actions of their subsidiaries?

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

At the same time, the Anti-Corruption Law makes shareholders (both individuals and legal entities) responsible for monitoring corruption risks and taking measures to address such risks. The law does not provide any explicit liability that can be imposed on shareholders for failure to perform this obligation. However, companies may provide certain liability measures for shareholders in their internal compliance policies.

Are companies required, or is it a defence, to have compliance procedures in place?

Compliance procedures are required by law. The requirements for an adequate compliance system are more detailed for public companies, but Ukrainian law also imposes potential liability for failure to prevent corruption by company officers of private companies in cases of conduct amounting to bribery by their subordinates.

The Anti-Corruption Law provides that the following companies are obliged to have an anti-corruption programme:

- state and municipal enterprises with an average number of employees amounting to 50, and an annual income amounting to UAH 70 million; and
- companies (including foreign-owned companies) which participate in the public procurement procedure for projects equal to or exceeding UAH 20 million.

Further, almost all public authorities are required to have anti-corruption programmes.

It should be noted that the Criminal Code provides that a company can be subject to criminal liability if its officers' failure to perform their duties regarding the implementation of anti-corruption measures set out by law or by the company's statutory documents led to the commission of corruption offences.

What are the penalties?

Penalties for corruption offences vary significantly.

For individuals such penalties include:

- fines of up to UAH 25,500 (approximately EUR 796);
- confiscation of property;
- debarment from certain positions and types of activities for up to three years;
- restriction of freedom for a period of up to five years; and/or
- imprisonment for a period of up to 12 years.

For companies:

- if a company officer or any of the company's authorised representatives commits a corruption offence and the company receives an undue advantage, a court may impose on the company a fine of up to double the amount of the undue advantage;
- if a company does not receive any undue advantage, or its amount cannot be assessed, a fine of up to UAH

850,000 (approximately EUR 26,560) may be imposed on it; and

• in limited cases (*e.g.*, where misuse of office results in unlawful acquisition of firearms) a company which benefits from a corruption offence may be subject to the confiscation of property.

UNITED ARAB EMIRATES

What is the definition of bribery?

Articles 234 to 239 *bis* of UAE Federal Law No.3 of 1987 (the "**Federal Penal Code**") provide that the following constitute offences:

- a public servant, a person assigned to a public service, a foreign public servant or an employee of an international organisation who directly or indirectly requests or accepts for himself or for another person an unentitled gift, grant or privilege (or the promise thereof) of any kind:
 - (i) in return for performing or failing to perform an act in breach of his official duties;
 - (ii) pursuant to the completion or abstention from doing an act in breach of his official duties; or
 - (iii) in return for performing or failing to perform an act that is wrongly believed or which he believes to be within his official duties;
- 2. a manager or employee of a private sector establishment who requests or accepts, directly or indirectly, for himself or for another person, an unentitled gift, grant or privilege in return for performing or failing to perform an act included in the duties of his office, or in breach of such duties, even if he did not intend to perform the act or to breach the duties, or if he has already performed/ refrained from performing the act or breached his duties;
- anyone who, directly or indirectly, offers or promises to a public servant or a person assigned to a public service, a foreign public servant or an employee of an international organisation, an unentitled gift, grant

- or privilege of any kind in return for performing, or abstaining from performing an act in breach of his official duties (even if the public servant rejects the offer, grant or privilege); and
- 4. anyone who requests or accepts for himself or another person a grant, privilege or benefit of any kind in return for his exercise of influence over [an individual who can be guilty of a bribery offence] in order to influence the individual to offer, demand, accept, receive or promise a bribe.

There are other Federal and emirate-level regulations that deal with bribery and which may apply. For example, in the emirate of Dubai, under Article 122 of the Dubai Penal Code it is an offence to offer anything of value to a public servant without consideration if the offeror is party in a proceeding or a transaction with that public servant. Criminal intent is not prima facie required. Provisions of the Dubai Penal Code which conflicted with the Federal Penal Code were repealed by Dubai Law No.4 of 1994. Since the Federal Penal Code does require a corrupt intent, it is arguable that the offence in the Dubai Penal Code following such repeal requires corrupt intent, but the legal position is not clear. Advice should be obtained on a case-by-case basis to ascertain the extent to which other regulations may be relevant.

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

Article 5 of the Federal Penal Code defines a "public servant".

"A public servant shall be defined in the present Law as any person who holds

a federal or local function, whether legislative, executive, administrative or judicial, whether appointed or elected, including:

- Persons entrusted with a public duty and employees of ministries and government departments;
- (ii) members of the armed forces;
- (iii) employees of security agencies;
- (iv) members of the judiciary, chairmen and members of legislative, advisory and municipal councils;
- (v) any person assigned to a certain task by a public authority, within the extent of the delegated task;
- (vi) chairmen and members of boards of directors, directors and any employees of public bodies and establishments, and companies wholly or partially owned by the federal or local governments;
- (vii)chairmen and members of the boards of directors, directors and other employees of associations and societies for the public welfare.

Any person who is not included in the categories above, and who carries on activities which are related to public service under a delegation by a Public Servant who may duly delegate such duty under the laws or regulations in relation to the delegated duty shall be deemed a Public Servant under the present Law."

Article 234 includes "foreign public servants" in the list of people who may commit an offence under the bribery provisions of the Federal Penal Code, however the term itself has not been defined.

Is private sector bribery covered by the law?

Yes, as noted above, it is an offence for a manager or employee of a private sector establishment to request or accept a bribe. Unlike the public sector provisions, it is not an offence for a private sector manager or employee to offer a bribe (unless the bribe is offered to a person assigned to a public service, a foreign public servant or an employee of an international organisation, as referred to above).

Does the law apply beyond national boundaries?

Yes, it applies where:

- (a) a UAE citizen, while in a foreign country, become involved in an act which is considered a crime under the provisions of the Federal Penal Code, whether as a principal or an accessory. Offending citizens shall be sanctioned on their return to the country, provided the act is punishable in accordance with the Federal Penal Code;
- (b) the victim is a UAE citizen, the crime is committed by an employee of the UAE public of private sector, or the crime affects UAE public property; and
- (c) any individual who commits a crime under the Federal Penal Code in a foreign country has not already been the subject of an acquittal or conviction by a foreign court and subsequently served any sentence.

How are gifts and hospitality treated?

UAE law uses broad language such as gift, privilege or grant, which can include gifts and hospitality, where the other elements of the offence are present.

Is there an exemption for facilitation payments?

There is no exemption for facilitation payments. Accordingly, any payment to a public official to facilitate or expedite a routine governmental action will be considered a bribe if the other elements of the offence are present.

How is bribery through intermediaries treated?

The bribery offences under the Federal Penal Code encompass both direct and indirect requests, promises and acceptances, therefore including bribes offered through intermediaries.

Furthermore, Article 65 of the Federal Penal Code provides that a body corporate is criminally liable for "crimes committed by its representative, directors or agents acting on its behalf or in its name".

The principal is not liable for bribery by an intermediary if it can show that the third party was acting outside its mandate, or that the principal had not instructed the intermediary in any way to commit the bribery offence.

Are companies liable for the actions of their subsidiaries?

We are not aware of any provisions which would make a company automatically liable for an offence of bribery committed by its subsidiary. As noted above, a company can be liable for an offence committed by a person acting on its behalf or in its name (which could be a subsidiary), but will not have liability where that person was acting outside the scope of its mandate, or where the company can show it had not instructed the subsidiary to commit the offence.

Are companies required, or is it a defence, to have compliance procedures in place?

We are not aware of any requirements under UAE law for companies to have anti-bribery compliance procedures in place, or of a statutory defence of having procedures in place.

The Federal Penal Code (Article 239(1)) provides that a briber or intermediary who reports the offence to the judicial or administrative authorities before it is discovered shall be exempt from punishment.

What are the penalties?

Depending on the nature of the bribe, penalties range from imprisonment for an undefined "temporary" period to imprisonment for no longer than five years.

UNITED KINGDOM

What is the definition of bribery?

The Bribery Act 2010 (the "**Bribery Act**"), which came into force on 1 July 2011, sets out the statutory offences of bribing and being bribed. The offence of bribing another person is set out in section 1.

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

- (2) Case 1 is where:
 - (a) P offers, promises or gives a financial or other advantage to another person, and
 - (b) P intends the advantage:
 - to induce a person to perform improperly a relevant function or activity, or
 - (ii) to reward a person for the improper performance of such a function or activity.
- (3) Case 2 is where:
 - (a) P offers, promises or gives a financial or other advantage to another person, and
 - (b) P knows or believes that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity.
- (4) In case 1 it does not matter whether the person to whom the advantage is offered, promised or given is the same person who is to perform or has performed, the function or activity concerned" (section 1, Bribery Act).

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

- (i) that it will be performed in good faith;
- (ii) that it will be performed impartially; or
- (iii) as to the manner in which, or the reasons for which, the function or activity will be performed that arises from the position of trust the person is in.

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

Section 6 of the Bribery Act sets out a separate offence of bribing a foreign public official.

This offence has four elements:

- a person, directly or through a third party, offers, promises or gives any financial or other advantage to a foreign public official (or to another person at the official's request or with his assent);
- (ii) the person intends to influence the foreign public official in his capacity as such;

- (iii) the person intends to obtain or retain business, or an advantage in the conduct of business; and
- (iv) the official is neither permitted nor required by written law to be influenced in his capacity as a foreign public official by the offer, promise or gift.

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

Public official is not defined in the Bribery Act and is not a relevant term for the purposes of the Bribery Act offences.

Foreign public official is defined at section 6(5) of the Bribery Act 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."

Is private sector bribery covered by the law?

Yes, section 1 applies to bribery of both public officials and non-public officials.

Does the law apply beyond national boundaries?

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

"(a) a British citizen,

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

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

How are gifts and hospitality treated?

The Bribery Act offences apply to any "financial or other advantage" which includes gifts and hospitality. Gifts and hospitality may therefore be bribes where the other elements of an offence are present.

Statutory guidance on anti-bribery compliance procedures⁴⁹ (the "**UK** Guidance") states that "[b]ona fide hospitality and promotional, or other business expenditure which seeks to improve the image of a commercial organisation, better to present products and services, or establish cordial relations, is recognised as an established and important part of doing business and it is not the intention of the Act to criminalise such behaviour ... It is. however, clear that hospitality and promotional or other similar business expenditure can be employed as bribes.50"

Is there an exemption for facilitation payments?

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

Prosecution will be more likely, however, where such payments are systemic⁵¹.

How is bribery through intermediaries treated?

The offences of bribing, being bribed and bribery of a foreign public official may all be committed either directly, or indirectly, *i.e.* through a third party.

Additionally, under section 7 of the Bribery Act, a relevant commercial organisation is liable for failing to prevent bribery by an intermediary, where the intermediary was an associated person (*i.e.* was performing services for or on behalf of the commercial organisation), and was intending to obtain or retain business for the commercial organisation (see further below).

Are companies liable for the actions of their subsidiaries?

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

- "(1) A relevant commercial organisation ("C") is guilty of an offence under this section if a person ("A") associated with C bribes another person intending:
 - (a) to obtain or retain business for C, or
 - (b) to obtain or retain an advantage in the conduct of business for C.
- (2) But it is a defence for C to prove that C had in place adequate procedures designed to prevent persons associated with C from undertaking such conduct."

⁴⁹ Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing, Ministry of Justice, March 2011.

⁵⁰ Paragraph 26 of the UK Guidance.

⁵¹ Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions, 30 March 2011.

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

The UK Guidance addresses the adequate procedures companies are expected to have in place and which, if implemented, will serve as a defence to the section 7 offence.

Are companies required, or is it a defence, to have compliance procedures in place?

Companies are not generally required to have anti-bribery compliance procedures in place. However, having "adequate procedures" in place is a defence for a commercial organisation charged with an offence of failing to prevent bribery by an associated person. The UK Guidance addresses such procedures.

Firms regulated by the Financial Conduct Authority (the "**FCA**") are required to have effective anti-financial crime procedures in place, including anti-bribery compliance procedures.

What are the penalties?

The maximum penalty under the Bribery Act is imprisonment for a term not exceeding ten years or a fine, with no upper limit, or both.

Upon conviction, the offender may be ordered to pay a sum equal to the "benefit" received from the commission of the offence. A confiscation order is also enforceable against property in the possession of third parties who have received a gift from the defendant, up to the value of the gift. The court may also issue a restraint order when criminal proceedings have been or are about to be instituted to prevent dissipation of assets; this may remain in force until a confiscation order is made and fully satisfied. Persons convicted of corruption are excluded from bidding for public sector contracts, and contracts obtained through corruption may be set aside. Companies convicted of failing to prevent bribery are subject to discretionary debarment from public sector contracts.

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

Under the Crime and Courts Act 2013 (the relevant provisions of which came into force on 14 February 2014) corporate organisations are able to reach a deferred prosecution agreement with a prosecutor under which charges will be laid but not proceeded with if the organisation complies with agreed terms and conditions, typically the payment of fines and the implementation of remedial steps.

UNITED STATES

What is the definition of bribery?

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

Non-US Government Officials

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

The FCPA prohibits US "issuers"⁵², "domestic concerns"⁵³, and any person acting within the United States, from using the instrumentalities of interstate commerce in furtherance of:

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

- (1) any foreign official for purposes of:
 - (A) (i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or
 - (B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality, in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person;

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

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

- (A) (i) influencing any act or decision of such party, official, or candidate in its or his official capacity, (ii) inducing such party, official, or candidate to do or omit to do an act in violation of the lawful duty of such party, official, or candidate, or (iii) securing any improper advantage; or
- (B) inducing such party, official, or candidate to use its or his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality, in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person; or
- (3) any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office, for purposes of:
 - (A) (i) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, (ii) inducing such foreign official, political party, party official, or candidate to do or omit to do any act in violation of the lawful duty of such foreign official, political party, party official, or

⁵² An "issuer" is defined as any company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 ("Exchange Act") or that files reports with the SEC under section 15(d) of the Exchange Act. 15 U.S.C. section 78dd-1(a).

⁵³ A "domestic concern" is defined as any individual who is a citizen, national, or resident of the United States, or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States, or a territory, possession, or commonwealth of the United States. 15 U.S.C. section 78dd-2(h)(1)(A)-(B).

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candidate, or (iii) securing any improper advantage; or

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

in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person" (15 U.S.C. sections 78dd-1(a), 78dd-2(a), and 78dd-3(a)).

US Government Officials

There are a number of US federal criminal statutes that address various iterations of domestic federal public corruption. The primary domestic public bribery statute, 18 U.S.C. section 201, criminalises bribery of US federal public officials. Similar to the FCPA, the statute generally prohibits payments, offers and promises to make payments intended improperly to influence an official act. Unlike the FCPA, however, the statute also applies to the corrupt official. Specifically, the statute imposes criminal penalties on anyone who:

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

(A) to influence any official act; or

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

- (2) being a public official or person selected to be a public official, directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for:
 - (A) being influenced in the performance of any official act;
 - (B) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or
 - (C)being induced to do or omit to do any act in violation of the official duty of such official or person;
- (3) directly or indirectly, corruptly gives, offers, or promises anything of value to any person, or offers or promises such person to give anything of value to any other person or entity, with intent to influence the testimony under oath or affirmation of such firstmentioned person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorised by the laws of the United States to hear evidence or take testimony, or with intent to influence such person to absent himself therefrom;
- (4) directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity in return for being influenced in

testimony under oath or affirmation as a witness upon any such trial, hearing, or other proceeding, or in return for absenting himself therefrom; shall be fined under this title or not more than three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than 15 years, or both, and may be disqualified from holding any office of honour, trust, or profit under the United States" (18 U.S.C. section 201(b)(1)-(4)).

Local Government Officials

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

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

Private Commercial Bribery

Private commercial bribery primarily is a matter of individual state law. Most states have enacted individual commercial bribery statutes that render it a crime for a person to bribe employees of private businesses or for an employee to accept such a bribe.

For example, New York Penal Law prohibits conferring a benefit upon an agent or fiduciary without the consent of the latter's employer or principal, with the intent to influence his conduct in relation to his employer's or principal's affairs (N.Y. Penal Law section 180.00).

An individual who commits an act in violation of any state's anti-bribery law,

including bribery of local government officials and private commercial bribery, may also be liable under the federal Travel Act (18 U.S.C. section 1952) or the federal mail and wire fraud statutes (18 U.S.C. sections 1341 and 1343).

The Travel Act makes it a crime to travel in interstate commerce or use the mail or any interstate facility with the intent to commit bribery under the law of the state in which the act was committed. Similarly, the federal mail and wire fraud statutes generally prohibit the use of the mail or other instrumentalities of US commerce in furtherance of a payment in violation of a state anti-bribery law.

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

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

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

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

The FCPA specifically applies to corruption involving any "foreign official", defined under the FCPA as:

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

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

Is private sector bribery covered by the law?

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

Does the law apply beyond national boundaries?

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

How are gifts and hospitality treated?

The FCPA does not prohibit all gifts and hospitality, as the DOJ and SEC have recognized in their guidance that "[a] small gift or token of esteem or gratitude is often an appropriate way for business people to display respect" ('A Resource Guide to the U.S. Foreign Corrupt Practices Act' (November 2012), available at https://www.justice.gov/sites/default/ files/criminal-fraud/legacy/2015/01/16/ guide.pdf (the "FCPA Guide"), page 15). The FCPA also recognises an affirmative defence for "reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or on behalf of a foreign official, party, party official, or candidate and... 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" (15 U.S.C. sections 78dd-1(c)(2), 78dd-2(c)(2), 78dd-3(c)(2)).

This exception 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.

The DOJ has provided 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 are also likely to qualify as a promotional gift covered by the affirmative defence.

However, 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 particularly 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.

Is there an exemption for facilitation payments?

Yes. The FCPA has an express and narrow exception for facilitation or expediting payments - which are relatively insignificant payments made to facilitate or expedite performance of a "routine governmental action" that does not require the foreign official to exercise discretion. Routine governmental actions include obtaining permits or licenses, processing governmental papers, providing police protection, and other similar actions. 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 decisionmaking process to encourage a decision to award new business to or continue business with a particular party"

(15 U.S.C. section 78dd-1(f)(3)(B) and section 78dd-2(h)(4)(B)).

How is bribery through intermediaries treated?

As many bribery schemes involve payments through third parties, the FCPA expressly prohibits making corrupt payments to a foreign official through "any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly" (15 U.S.C. sections 78dd-1(a)(3), 78dd-2(a)(3), 78dd-3(a)(3)). As such, the FCPA prohibits knowing engagement in the prohibited conduct through a third party, such as a consultant, contractor, joint venture partner, or other business associate.

The FCPA deems a person to have the requisite knowledge to be culpable for the acts of a third party if he or she is aware that a third party is engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur. A person also is deemed to be "knowing" if "such person has a firm belief that such circumstance exists or that such result is substantially certain to occur"54. Knowledge is further established under the FCPA if a person is aware of a "high probability" of such circumstance⁵⁵. Further, a person's "conscious disregard"56, "wilful blindness"57, or "deliberate ignorance"58, of culpable conduct or suspicious circumstances may be adequate to support a violation of the FCPA.

Are companies liable for the actions of their subsidiaries?

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

Are companies required, or is it a defence, to have compliance procedures in place?

The FCPA does not expressly require that companies implement compliance procedures. And while the FCPA includes two affirmative defences to bribery violations (*i.e.*, the "local law" defence for payments lawfully made under the written laws of the foreign country (15 U.S.C. sections 78dd-1(c)(1), 78dd-2(c)(1), and 78dd-3(c)(1)), and the "reasonable and bona fide expenditure" defence detailed above), having existing compliance procedures is not a defence.

However, U.S. authorities expect that companies will adopt risk-based compliance programs and their failure to establish effective programs may lead to harsher treatment when violations are discovered. In their guidance, U.S. authorities stated that "an effective compliance program is a critical component of a company's internal controls and is essential in detecting and

^{54 15} USC § 78dd-1(f)(2)(A).

^{55 15} USC § 78dd-1(f)(2)(B).

⁵⁶ United States v. London , 66 F.3d 1227, 1242 (1st Cir. 1995).

⁵⁷ United States v. Kaplan , 832 F.2d 676, 682 (1st Cir. 1987).

⁵⁸ United States v. Manriquez Aribizo , 833 F.2d 676, 682 (1st Cir. 1987).

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preventing FCPA violations" (FCPA Guide, page 40).

A company's adoption of compliance procedures can be treated as a mitigating factor when resolving an FCPA enforcement action. The US authorities have stated that they will "consider the adequacy of a company's compliance program when deciding what, if any, action to take" in light of identified FCPA violations. As examples, the authorities stated that a compliance program may influence how charges are resolved (e.g., through a deferred prosecution agreement or a non-prosecution agreement), the amount of any penalty, or whether a monitor will be required (FCPA Guide, page 56). DOJ's US Attorney's Manual also lists "the adequacy and effectiveness of the corporation's compliance program at the time of the

offense, as well as at the time of a charging decision" among the nine factors to consider when determining whether to charge a corporation and for negotiating a plea or other agreements (section 9-28.000 *et seq.*).

What are the penalties?

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

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

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

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