A GUIDE TO ANTI-CORRUPTION LEGISLATION IN ASIA PACIFIC 6TH EDITION

CLIFFORD CHANCE'S ASIA PACIFIC ANTI-CORRUPTION GROUP

Risks arising from bribery and corruption continue to intensify in Asia Pacific as a number of countries in the region adopt more stringent anti-bribery and corruption measures.

Consequently, it is increasingly important for companies to detect, respond to and prevent bribery and corruption.

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

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

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

FOREWORD

Welcome to the latest edition of our Guide to Anti-Corruption Legislation in Asia Pacific. Businesses need to ensure that they are compliant with applicable anti-corruption laws in each of the countries in which they operate as well as with applicable international anti-corruption legislation with extraterritorial reach, such as the US Foreign Corrupt Practices Act and the UK Bribery Act.

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

To assist businesses to navigate their way through the different anti-corruption regimes, we have produced this Guide which sets out the legislative anti-bribery framework in thirteen major jurisdictions across Asia Pacific and, in Annexures 1 and 2 respectively, we have summarised the provisions of the US Foreign Corrupt Practices Act and UK Bribery Act. For each jurisdiction, we also offer insight and analysis in relation to the enforcement of the relevant legislation.

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



by Wendy Wysong



INTRODUCTION

The purpose of this Guide is to provide an up-to-date overview of the anti-corruption regimes in Asia Pacific. Bribery and corruption issues in Asia Pacific continue to grab international headlines: a widespread corruption crackdown continues in the PRC and revelations surrounding the 1MDB scandal in Malaysia continue to emerge. Local and international businesses alike should be aware of the applicable corruption laws in each of their operating jurisdictions in Asia Pacific and the penalties associated with breach.

Corruption is a global phenomenon which presents an increasingly significant risk in Asia Pacific. Contracting with intermediaries and agents, providing corporate hospitality, giving charitable donations, hiring employees, dealing with state-owned enterprises, starting up operations abroad, or just carrying on daily business, all raise anti-corruption risks. Perhaps a local government official has asked for a favour or an agent offers to arrange a private meeting with the government minister awarding a contract. Maybe a customs official will demand an "expediting fee" before releasing a company's goods or an agreement inherited as part of a takeover or merger situation seems to involve unusually high fees.

Corruption is illegal everywhere in Asia Pacific and all the countries included in this handbook (except Taiwan) have signed the United Nations Convention against Corruption. As the global fight against corruption gains ever greater prominence, countries across the region have sought to increase awareness of corruption and strengthen their anti-corruption frameworks.

To illustrate, 2018 saw some high-profile enforcement actions in Australia and in April the government there stated its intention to increase tenfold the maximum penalties for corporations found quilty of offences under the Corporations Act. In Malaysia, it was

announced that from 2020 commercial organisations will be liable for the corrupt acts of their associated persons, effectively exposing an organisation and its management to strict liability unless it can prove it had adequate policies and procedures in place to prevent bribery. Further, in India, amongst other legislative developments, there have been significant amendments to the Prevention of Corruption Act, one of its core anti-bribery statutes.

Countries in Asia Pacific have taken increasingly proactive steps to improve cooperation with other regional and worldwide enforcement authorities. However, what constitutes corruption still varies from jurisdiction to jurisdiction. Significant differences remain, causing headaches for multinationals seeking to implement a global anti-corruption policy. For instance, private sector bribery is expressly criminalised in more and more countries, including Hong Kong, Singapore, the PRC, Vietnam,¹ and in Malaysia, but not in Japan,² India or Indonesia.³ Facilitation payments are exempt in Australia under certain conditions, but not in other countries.

Giving a bribe to a foreign public official is a criminal offence in Taiwan and Thailand but not in the Philippines. Such discrepancies amplify the murky grey area between acceptable corporate behaviour and corruption for companies doing business in Asia Pacific.

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

¹ As of 1 January 2018, when the Penal Code becomes effective.

² Private sector bribery is only criminalised in specific cases.

³ Private sector bribery is only criminalised to the extent that the bribery is intended to cause a person to do something or refrain from doing something in his or her line of duty in contravention of his or her authority or obligations affecting the public good.

This Guide does not purport to be comprehensive or constitute any legal advice. It is only a guide. The information and the laws referred to are correct as on 21 November 2018 but may change quickly. If you would like advice or further information on anything contained in this Guide, please contact Clifford Chance.

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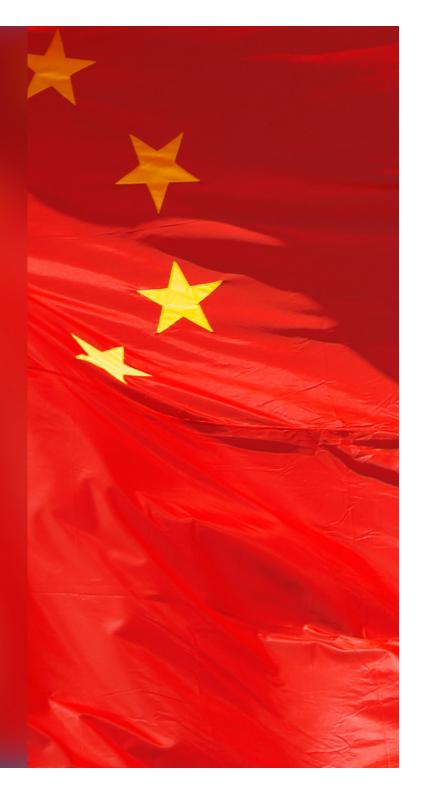
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COMPARISON **TABLE**

COMPARISON TABLE

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

ANTI-CORRUPTION
LEGISLATION
IN THE PEOPLE'S
REPUBLIC OF
CHINA



ANTI-CORRUPTION LEGISLATION IN THE PEOPLE'S REPUBLIC OF CHINA CONTRIBUTED BY CLIFFORD CHANCE (SHANGHAI AND HONG KONG OFFICES)

Key points:

Key legislation	Criminal Law
-, -0	 Anti-Unfair Competition Law (amended in 2017 and taking effect 1 January 2018, the 2017 AUCL)
	 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 (the 2016 Interpretation)
	 Interpretation of Several Issues Concerning the Application of Law in Handling Criminal Cases of Bribery, promulgated jointly by the Supreme People's Court and the Supreme People's Procuratorate on 26 December 2012 (the 2012 Interpretation)
	 Opinions on Several Issues of Application of Law concerning the Handling of Criminal Cases of Commercial Bribery, promulgated jointly by the Supreme People's Court and the Supreme People's Procuratorate on 20 November 2008 (the 2008 Opinions)
	 Rules on the Standard for Filing Cases that are Directly Filed for Investigation by the People's Procuratorate (Trial), promulgated by the Supreme People's Procuratorate on 16 September 1999 (the 1999 Rules)
	 Provisional Measures on Prohibition of Commercial Bribery promulgated by the former State Administration of Industry and Commerce (currently State Administration for Market Regulation) on 15 November 1996 (the 1996 Measures)
Private sector bribery	Yes
Extraterritorial effect	Yes
Exemption for facilitating payment	No

Defences	Criminal Law: • Extortion payments with no quid pro quo 2017 AUCL: • Small gifts for marketing and promotional purposes
	Individual employee's conduct of bribery which is irrelevant to seeking transaction opportunities or competitive advantages for the employer
Penalties for individuals	Criminal Law: Bribing public officials or public entities: criminal detention, fixed term or life imprisonment, criminal fine or confiscation of property
	• Bribing non-public officials: criminal detention or imprisonment of up to 10 years; criminal fine
	 Receiving bribes as a public official: criminal detention, fixed term or life imprisonment, up to the death penalty; criminal fine or confiscation of property
	 Receiving bribes as a non-public official: criminal detention or imprisonment of up to 20 years; confiscation of property
	 2017 AUCL: An administrative fine ranging from CNY100,000 (approx. US\$15,000) to CNY3 million (approx. US\$453,000) and confiscation of illegal income
Penalties for companies	Criminal Law: Unlimited criminal fine
	 2017 AUCL: An administrative fine ranging from CNY100,000 (approx. US\$15,000) to CNY3 million (approx. US\$453,000) and confiscation of illegal income, and revocation of business license in severe cases

Collateral consequences

The Supreme People's Procuratorate has set up a public database of convicted bribe givers (criminals), which has been connected to local databases across the nation. In many industries and regions, the authority has set up blacklists, which prohibit entities that have been convicted of bribery from being involved in public tenders

Blacklisted for public procurement in healthcare sector:

In accordance with the Provisions on the Blacklisting of Commercial Bribery in Healthcare Procurement, which took effect on 1 March 2014 and apply to the procurement of drugs, medical equipment and consumables, a company shall be blacklisted if its offence of paying bribes:

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

Penalties for blacklisted companies include being barred from procurement tenders by public hospitals from provincial level to national level for two years, depending on the number of times a company is blacklisted

Anti-corruption treaties

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

What is the definition of a bribe?

Anti-bribery rules are mainly set out in the Criminal Law and the 2017 AUCL.

A bribe under the Criminal Law refers to money or property provided in return for an "illegitimate interest". It also refers to money or property received or requested by the relevant individuals or entities for the purpose of securing/providing benefits by taking advantage of their positions. The 2016 Interpretation has particularly expanded the definition of "money and property" to cover benefits that can be measured or obtained by money, such as home renovation, debt relief, membership services and travel.

The 2017 AUCL covers commercial bribes paid by business operators to: (i) employees of the transaction counterparties; (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 transactions. It remains unclear whether benefits provided to transaction counterparties off-the-books still constitute commercial bribery. Pursuant to the 1996 Measures (which are expected to be updated for the purpose of implementing the 2017 AUCL), a "commercial bribe" refers to: (i) any money or property such as promotional fees, advertising fees, sponsorship, research fees, service fees, consultation fees or commissions; or (ii) other forms of benefit such as overseas trips, provided to an entity or an individual for the purpose of selling or purchasing goods.

Unlike the 2017 AUCL, the Criminal Law and relevant judicial interpretations set out a monetary threshold for initiating criminal investigations. Specifically, a criminal investigation shall be commenced when the bribe offered to a public official by an

individual is at least CNY30,000 (approx. US\$4,530), in the absence of specific circumstances, or, when offered by an entity, is at least CNY200,000 (approx. US\$30,150). When the bribe offered by an individual to a state organ, state-owned enterprise, public institution or association (entity or entities) is at least CNY100,000 (approx. US\$15,070) or, when offered by an entity, is at least CNY200,000 (approx. US\$30,150).

However, lower thresholds will not apply to the offence of offering a bribe to a public official or an entity if: (i) illegal income was used for the bribe; (ii) bribes were paid to three or more public officials or entities; (iii) the bribe was paid to a judicial official, or had the effect of prejudicing judicial justice etc.; (iv) the bribe caused economic damages of more than CNY500,000 (approx. US\$75,350); (v) the bribes were paid to public officials whose duties involve food, drug, safety production, environmental protection, etc. for illegal conduct; or (vi) the bribes were paid for job/position promotion or adjustment, etc.

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

Both soliciting and accepting bribes are equally criminalised under the Criminal Law.

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

Domestic public official

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

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

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

Foreign public official

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

Is private sector bribery covered by the law?

Yes, as provided under Articles 163 and 164 of the Criminal Law. It is a crime for any individual from a private entity (or any non-public official from a public entity) to request or receive money or property for the purpose of securing/providing an illegitimate benefit by taking advantage of his or her position. It is also a crime for any individual or entity to provide money or property to any person from a private company (or any non-public official from a public entity) with the intention of seeking an illegitimate interest. The 2017 AUCL also covers private sector bribery from the perspective of administrative law. Under the 2017 AUCL, it is an offence for a business operator to bribe any: (i) employee of the transaction counterparty; (ii) entity or individual entrusted by the transaction counterparty to handle relevant matters; and (iii) entity or individual that takes advantage of their positions or influence to affect the transactions. The 1996 Measures provide a more detailed interpretation of the 2017 AUCL.

Does the law apply beyond national boundaries?

Yes, the Criminal Law has extraterritorial effect.

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

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

The 2017 AUCL may also have extraterritorial effect when, for example, both the bribe giver and 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: (i) the background of the gift (e.g. whether the parties are relatives or friends and the history of their personal relationship); (ii) the value of the gift; (iii) the timing, form and context of the gift; and (iv) whether the gift giver requested the receiver to act in a certain way in his or her relevant position or whether the receiver takes advantage of his or her position in the relevant entity. Hospitality, particularly if excessive or lavish, may be regarded as a bribe if the other elements of bribery are satisfied.

The 2017 AUCL and the 1996 Measures are silent on how to distinguish legitimate gifts or items of hospitality from commercial bribes. The scope of bribes defined under the 2017 AUCL and the 1996 Measures includes "other forms" of bribes which is sufficiently wide to cover any kind of gift and hospitality. However, gifts of nominal value, provided in accordance with relevant market practice, are exempted. In practice, reasonable and occasional hospitality is unlikely to be investigated or penalised.

How is bribery through intermediaries treated?

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

Similarly, the 2017 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 positions or influence to affect the transactions for the purposes of seeking transaction 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 subsidiaries, and not liable for its subsidiary's actions, unless the company itself is involved in such action. For instance, a parent company may be held liable if it authorised or instructed its subsidiary to commit the bribery or if it had knowledge that its subsidiary was involved in such criminal conduct.

The 2017 AUCL and the 1996 Measures are silent on a company's liability for its subsidiary's acts. Even if, in principle, a company is legally independent from its subsidiary and therefore not liable for its subsidiary's conduct, the rules on principal-agent relationship under PRC civil law may apply. In other words, if the subsidiary involved in bribery is used as an agent by the parent company, the latter may be held liable, as described in the preceding section on bribery through intermediaries.

Is there an exemption for facilitating payments?

No, there are no specific provisions for exemptions under either the Criminal Law or the 2017 AUCL.

Is there a defence for having adequate compliance procedures?

No, such a defence is not available under the Criminal Law or the 2017 AUCL. However, if a payment is made under extortion and no illegitimate interest is obtained in return (i.e. no quid pro quo), the payment should not be regarded as a bribe under the Criminal Law. This exemption does not exist under the 2017 AUCL. Furthermore, the 2017 AUCL provides that an employee's conduct of bribery shall be deemed as the employer's conduct, unless the employer can prove that the employee's action is irrelevant to seeking transaction opportunities or competitive advantages for the employer. In practice, the PRC regulators will likely consider the adequacy of an employer's compliance procedures when assessing the evidence advanced by an employer to prove its employee's conduct of bribery is irrelevant to seeking transaction opportunities or competitive advantages for the employer.

What are the enforcement trends in the business area?

As envisaged in our 5th edition in February 2018, the nationwide anti-corruption crackdown that started in 2012 continues. According to the Central Commission for Discipline Inspection (CCDI), the anti-corruption watchdog of the Communist Party of China, as of October 2017, over 1.5 million corruption-related cases have been docketed. Over 1.5 million individuals have been disciplined, including approximately 8,900 officials at or above department head level and 63,000 officials at or above county-head level. 58,000 individuals were prosecuted.

Since 2013, PRC regulators have also been actively pursuing commercial sector bribery cases. The initial focus of the investigations was on medical products and the healthcare industry, targeting major multinationals. The GSK investigation has been the highest profile case. As a result, multinationals are treating local investigations much more seriously, both in reaction to the significant fines being imposed by PRC authorities, but also given the likelihood of triggering extraterritorial investigations by US and UK authorities.

This trend continued in 2018. At the year end, the Shanghai Administration of Industry and Commerce (Shanghai AIC) announced a series of administrative penalties imposed on multinational pharmaceutical companies including Bristol-Myers Squibb, China NT Pharma Group, and Chiesi Farmaceutici for commercial bribery. The enforcement actions targeted the pharmaceutical companies' provision of benefits to doctors in the form of conference sponsorship, meals, gifts, travel and related expenses for the purpose of promoting sales of pharmaceuticals to relevant hospitals. The penalties were mainly disgorgement of revenues obtained through offering bribes ranging from CNY300,000 to 11.4 million (approximately US\$45,200 to 1.72 million), as well as administrative fines ranging from CNY100,000 to 180,000 (approximately US\$15,100 to 17,200).

Furthermore, given the uncertainties arising out of the 2017 AUCL, the PRC regulators are expected to update the implementation rules, including but not limited to an update of the 1996 Measures, in the foreseeable future to provide specific guidance for business operators in the PRC.

Another remarkable trend is the strengthening of cross-border cooperation. According to the Anti-Corruption Coordination Task Force of the Communist Party of China, since launching the "Sky Net" campaign in April 2015 (which targets suspects of corruption offences who have escaped overseas), more than 4,141 suspects (including 825 public officials) had been extradited or persuaded to return to China as of June 2018.

It is envisaged that these enforcement trends will continue over the next few years.

Any content relating to the PRC is based on our experience as international counsel representing clients in business activities in the PRC and should not be construed as constituting a legal opinion or legal advice on the application of, or in respect of, PRC law. As is the case for all international law firms with offices in the PRC, while we are authorised to provide information concerning the effect of the Chinese legal environment, we are not permitted to engage in Chinese legal affairs. Should the services of a Chinese domestic law firm be required, we would be glad to recommend one.



ANTI-CORRUPTION LEGISLATION IN HONG KONG CONTRIBUTED BY CLIFFORD CHANCE (HONG KONG OFFICE)

Key points:

Kay logislation	Provention of Priham Ordinance (Cap. 201)
Key legislation	Prevention of Bribery Ordinance (Cap. 201)
Private sector bribery	Yes
Extraterritorial effect	Yes, with limitations
Exemption for facilitating payment	No
Defences	Statutory defences of: (i) "lawful authority", i.e. sourced in a positive rule of law that authorises an action; and (ii) "reasonable excuse", a deliberately vague term left for the courts to decide
Penalties for individuals	Penalties for individuals on indictment, maximum penalties for:
	 Possession of unexplained property: fine of HKD1 million (approx.US\$128,000) and imprisonment for 10 years
	 Bribery in relation to any contract with a public body or for procuring withdrawal of tenders: fine of HKD500,000 (approx. US\$64,000) and imprisonment for 10 years
	 Other bribery offences: fine of HKD500,000 (approx. US\$64,000) and imprisonment for seven years
	On summary conviction, maximum penalties for:
	 Soliciting or accepting an advantage: fine of HKD100,000 (approx.US\$12,800) and imprisonment for one year
	 Possession of unexplained property: fine of HKD500,000 (approx.US\$64,000) and imprisonment for three years
	 Other bribery offences: fine of HKD100,000 (approx. US\$12,800) and imprisonment for three years

Penalties for companies	Same as the penalties for individuals
Collateral consequences	The Organized and Serious Crimes Ordinance (OSCO) contains a restraint and confiscation regime in respect of proceeds of crime. The proceeds of the specified offence must be HKD100,000 (approx. US\$12,800) or more for OSCO to apply The Criminal Procedure Ordinance (CPO) is the main forfeiture legislation in respect of property that has come into the possession of a court or of a law enforcement agency arising from the commission of a criminal offence. It applies to property in the possession of the Independent Commission Against Corruption (ICAC)
Anti-corruption treaties	 Hong Kong is party to a number of international and regional anti-corruption conventions and organisations, including the: United Nations Convention against Corruption United Nations Convention against Transnational Organised Crime Anti-Corruption Initiative for Asia Pacific Financial Action Task Force on Money Laundering Hong Kong is not a member of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

What is the definition of a bribe?

The Prevention of Bribery Ordinance (POBO) adopts the neutral word "advantage" instead of "bribe". What makes an "advantage" a "bribe" is the illegitimate purpose for which it is offered, solicited or accepted. "Advantage" is broadly drafted under the POBO to capture a wide range of circumstances in which bribes may be offered, including, in particular, money, gifts, loans, commissions, offices, contracts, services, favours and discharge of liability in whole or in part.

There is no de minimis threshold. Our view is that, given the wide scope of "advantage", the courts would be wary of applying the de minimis approach and of allowing themselves to be influenced by the insubstantial nature of the benefit in determining whether it is an advantage. However, evidence of the insignificance of the advantage may be regarded as relevant to the proof of the illegitimate purpose or the establishment of a defence.

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

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

Domestic public official

Public servant is defined under the POBO to mean: (i) any prescribed officer; and (ii) any employee of a public body. Prescribed officers include government officials, officials of the Hong Kong Monetary Authority, members of the ICAC, iudicial officers and the Chairman of the Public Service Commission in Hong Kong. Public body is defined to mean the Hong Kong Government, the Executive Council, the Legislative

Council, any District Council, any board, commission, committee or other body, whether paid or unpaid, appointed by or on behalf of the Chief Executive or the Chief Executive in Council and any board, commission, committee or other body (including government owned enterprises) as set forth in Schedule 1 to the POBO. The concept of public servant is far broader than merely the civil service and encompasses all persons employed by, or associated in any way with, an organisation which the government decides has such a substantial and important role in the public affairs of Hong Kong that it should constitute a public body. For instance, any member of a club or an association vested with any responsibility for the conduct or management of its affairs is considered a public servant. "Club" is not defined and should be given its general meaning.

Foreign public official

The POBO does not expressly apply to foreign public officials, but case law shows that personnel employed by foreign governmental bodies in Hong Kong are also covered by the POBO. As such, while 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 the POBO. Under section 9 of the POBO, private sector bribery is defined as any solicitation to, or offer to or acceptance by, an agent, without the permission of the principal, of any advantage for doing or forbearing to do any act in relation to his principal's affairs or business. The permission of the principal can be given before or reasonably after the offer or acceptance of such advantage. The principal-agent relationship includes where a person is employed by another or where a person is acting for another. A principal may therefore include, for example, an employer, an investor, a company director or a fund. These offences are punished by a fine of up to HKD500,000 (approx. US\$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, has extraterritorial effect, since there is express reference to the advantage being offered "whether in Hong Kong or elsewhere" in the section. For other corruption offences (i.e. under sections 5 (Bribery for giving assistance in regard to contracts), 6 (Bribery for procuring withdrawal of tenders), 7 (Bribery in relation to auctions), 8 (Bribery of public servants by persons having dealings with public bodies) and 9 (Corrupt transactions with agents) of the POBO), the position is less certain as there is no such inclusion of the words "whether in Hong Kong or elsewhere". Such omission may well be construed as a legislative intention not to afford extraterritorial effect to these sections. Indeed, case law suggests that, with regard to section 9 of the POBO, the whole course of the offer, solicitation or acceptance of illegal advantage should take place within the Hong Kong jurisdiction in order to be caught by the section. The same logic should therefore also apply to sections 5 to 8.

How are gifts and hospitality treated?

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

Under the POBO, there is no specified monetary value or threshold that would generally be considered reasonable or customary for a gift accepted by a public officer in his public capacity or by a private sector agent. However, there are several types of entertainment, gifts and advantages which are generally permitted under Hong Kong law. Examples of generally permitted exceptions include: promotional items of insignificant value, offered free of charge to clients in compliance with the practice of the industry; client meals of modest value that are held for general goodwill purposes; training programsmes 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. In deciding whether or not the advantage should be construed as a bribe, the substance, the position of the agent, the relationship between the donor and the agent and whether or not an obligation might be created must all be considered.

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

How is bribery through intermediaries treated?

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

Are companies liable for the actions of their subsidiaries?

There does not appear to be any case law in Hong Kong which directly relates to parent companies' liability for bribes or corruption committed by their subsidiaries. However, it has been accepted in Hong Kong case law that, as a matter of general principle in the context of public policy or illegality, the courts are inclined to look at the substance of the entity and its activities, rather than its form. Thus, in an extreme case, such as where 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 subsidiary, particularly a wholly owned subsidiary.

Is there an exemption for facilitating payments?

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

Is there a defence for having adequate compliance procedures?

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

What are the enforcement trends in the business area?

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

Hong Kong will see greater cooperation between international authorities in combating corruption, including the UK and the PRC. The courts in Hong Kong have consistently reiterated that they are intolerant of corruption. In more recent times, Hong Kong has increased its reliance on regulatory supervision in preventing corruption. The ICAC, for example, provides corruption prevention advice to the private sector upon request and holds thematic seminars for business organisations to equip them with the legal knowledge and skills to prevent corruption, as well as an annual symposium attended by international anti-corruption agencies, non-governmental organisations and private sector businesses.

ANTI-CORRUPTION LEGISLATION IN JAPAN



ANTI-CORRUPTION LEGISLATION IN JAPAN CONTRIBUTED BY CLIFFORD CHANCE (TOKYO OFFICE)

Key points:

Key legislation	Japanese Criminal Code
	Unfair Competition Prevention Act
	Punishment of Organised Crimes and Control of Crime Proceeds Act
Private sector bribery	Generally no, but there are several laws that criminalise certain types of private sector bribery
Extraterritorial effect	Yes
Exemption for facilitating payment	No
Defences	No
Penalties for individuals	• For bribing a domestic public official: imprisonment of up to three years or fine of up to JPY2.5 million (approx. US\$22,727)
	 For bribing a foreign public official: imprisonment of up to five years and/or fine of up to JPY5 million (approx. US\$45,454)
Penalties for companies	For bribing a domestic public official: nil
	 For bribing a foreign public official: fine of up to JPY300 million (approx. US\$2.73 million)
Collateral consequences	Suspension of the right to vote, ineligibility for directorship during the term of imprisonment, and possible ban from public tender for companies
Anti-corruption treaties	 United Nations Convention against Corruption (signed and approved, but not ratified)
	OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-Bribery Convention)
	Member of the Financial Action Task Force
	 United Nations Convention against Transnational Organised Crime (signed and accepted)

What is the definition of a bribe?

The offences of bribery are set out in the Japanese Criminal Code (Law No. 45 of 1907, as amended) (the Criminal Code) and the Unfair Competition Prevention Act (Law No. 47 of 1993, as amended) (the UCPA). The Criminal Code deals with the bribery of public officials belonging to Japanese governmental/ official bodies, while 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 or her duties and provides penalties for both the public official and the individual who offers, gives or promises such a bribe. Recently, the Criminal Code was amended to widen the territorial scope to capture a bribe given by a Japanese national to a Japanese government/official 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 such an official act or refrain from acting in a particular way in relation to his or her duties, or having the official use his or 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 or promisor of the bribe.

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

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

Domestic public official

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

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

Foreign public official

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

- an official of a foreign national or local government
- a person engaged in the performance of duties for an entity established under foreign laws and regulations in order to perform specific duties in respect of public interests

- a person engaged in the performance of duties for an entity: (a) a majority stake of which is owned, or a majority of the officers (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 a cabinet ordinance.
- an official of an international organisation consisting of governments or intergovernmental organisations (IO) or
- a person engaged in the performance of duties over which a national or local government or an IO has power and authority and which are delegated to such a person by a national or local government or an IO.

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

Is private sector bribery covered by the law?

Under Japanese law there are no general criminal laws against bribery in the private sector.

However, there are several laws addressing private sector bribery in specific situations, for example:

· Certain laws in relation to specific companies which perform public services include laws prohibiting the bribery of employees. For example, the Nippon Telegraph and Telephone (NTT) Corporation Act (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 or 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 levied as a further penalty.

Does the law apply beyond national boundaries?

Yes.

Under the Criminal Code, public officials can be found guilty of being bribed even where the bribery was committed outside Japan. Recently, the Criminal Code was amended to widen the territorial scope to capture a bribe given by a Japanese national to a Japanese government/official whilst outside of Japan.

Any person, whether a foreign national or a Japanese national 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 Japan.

How are gifts and hospitality treated?

Gifts or hospitality can be 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 shall be taken into account in order to determine whether a gift or hospitality is given within the bounds of social courtesy or not: the relationship of the giver and the receiver; the value of the gift; the social status of the giver and the receiver; and the social circumstances.

How is bribery through intermediaries treated?

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

Are companies liable for the actions of their subsidiaries?

There is no provision 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 bribegiving employee of the subsidiary could be seen as virtually an employee of the parent. Parent companies are expected to ensure that subsidiaries establish and operate systems to prevent bribery as appropriate to the degree of risk, as indicated in the Guidelines for the Prevention of Bribery of Foreign Public Officials released by the Ministry of Economy, Trade and Industry in 2004, as subsequently amended (METI Guidelines).

Is there an exemption for facilitating payments?

Under the Criminal Code, there is no exemption for facilitating payments. The UCPA does not make an exemption for facilitation payments either. However, if a person makes a payment to a foreign public official purely for the purpose of

facilitating a normal administrative service to which he or she is entitled, it is generally understood that such a payment will not constitute bribery, as it is not thought that there is an improper business advantage. However, 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 such a payment.

Is there a defence for having adequate compliance procedures?

No. However, a Supreme Court ruling indicates that for a company to escape liability for an employee's actions, the company should have taken action to prevent the violation in the form of proactive and specific instructions. Also, the existence of a strong compliance programme may be taken into consideration by the courts in determining penalties.

What are the enforcement trends in the business area?

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

In response to the OECD Working Group on Bribery's (Working Group) report in December 2011 relating to Japan's application of the OECD Anti-Bribery Convention, Japan publicly released in February 2014 a written response to the OECD. In the response, Japan disclosed certain enhancements, increased resources and additional steps it was taking to investigate and prosecute foreign bribery more effectively. In particular, Japan reported taking several measures, including: raising the profile of its foreign bribery law, such as additional training for its prosecutors and police; strengthening coordination with law enforcement authorities; enhancing the use of mutual legal assistance requests; including foreign bribery enforcement explicitly within the duties of economic and financial crimes prosecutors; focusing on suspicious transactions reports to detect foreign bribery cases; increasing awareness of foreign bribery law amongst Japanese companies; and utilising overseas missions to detect foreign bribery by Japanese companies. These developments have the potential for facilitating more active detection, investigation and prosecution of foreign bribery cases. The OECD Working Group on Bribery in International Transactions sent a high-level mission to Japan in June 2016 to urge the government to step up its efforts to fight international bribery. The OECD issued a statement imploring Japan to "make fighting international bribery a priority" noting that, amongst other things, prosecutions for bribery offences have been few and far between and legislation allowing for the confiscation of proceeds of bribery has yet to be enacted.

In a recent high-profile case of public sector bribery, senior officials at the Ministry of Education, Culture, Sports, Science and Technology were arrested and indicted for (i) overseeing a system whereby retired Ministry officials were able to illegally secure lucrative positions at institutions which were previously supervised by the same officials, and (ii) providing government subsidies to a top university in exchange for promises to modify entrance exam results for the son of a Ministry official.

Plea-Bargaining

As of June 2018, persons accused of certain crimes (including bribery) are now able to enter into plea bargain arrangements. This means that they may receive lighter punishment (or no punishment) for their own crimes provided that they reveal information which may be used to prosecute otherimplicated persons. However, plea bargain arrangements are likely to be available only in very limited circumstances.

Doubts have since been raised as to the effect of such a regime. Early examples of enforcement have stoked fears that corporations may seek to use the plea-bargaining regime to potentially recuse themselves of wrongdoing and instead scapegoat their employees. This is despite the fact that guidance issued by the Supreme Prosecutors Office in March 2018 provides that plea-bargaining agreements should only be struck in cases where the public would be expected to support their use.





ANTI-CORRUPTION LEGISLATION IN SINGAPORE CONTRIBUTED BY CLIFFORD CHANCE ASIA*

Key points:

Key legislation	Prevention of Corruption Act (Cap 241) (the PCA)
	Penal Code (Cap 224) (the Penal Code)
Private sector bribery	Yes
Extraterritorial effect	Yes
Exemption for facilitating payment	No
Defences	None
Penalties	For private sector bribery:
	• Fine not exceeding SGD100,000 (approx. US\$73,150)
	Imprisonment for a term not exceeding five years or both
	For public sector bribery:
	• Fine not exceeding SGD100,000 (approx. US\$73,150)
	Imprisonment for a term not exceeding seven years or both
Collateral consequences	Where a person is convicted for accepting gratification in contravention of the PCA, if the value of that gratification can be assessed, the amount of gratification accepted may be recoverable as a penalty
	See also consequences under the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 65A)
Anti-corruption treaties	United Nations Convention Against Corruption
	Member of the Financial Action Task Force
	Asia Pacific Economic Cooperation Anti-Corruption & Transparency Experts' Working Group
	Asian Development Bank (ADB)/OECD Anti-Corruption Initiative for Asia-Pacific
	South East Asia – Parties Against Corruption

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

What is the definition of a bribe?

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

- (a) money or any gift, loan, fee, reward, commission, valuable security or other property or interest in property of any description, whether movable or immovable
- (b) any office, employment, or contract
- (c) any payment, release, discharge or liquidation of any loan, obligation, or other liability whether in whole or in part
- (d) any other service, favour or advantage of any description 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, including the exercise or forbearance from the exercise of any right or any official power or duty and
- (e) any offer, undertaking or promise of any gratification within the meaning of paragraphs (a), (b), (c) and (d) above.

The PCA prohibits any person (by himself or in conjunction with others) from:

- bribing, i.e. giving, promising, or offering or
- being bribed, i.e. soliciting, receiving, or agreeing to receive, for himself or others, any gratification as an (i) inducement to, or (ii) reward for, or (iii) otherwise on account of:
 - any person doing or forbearing to do anything in respect of any matter or transaction (whether actual or proposed) or
 - any member, officer or servant of a public body doing or forbearing to do anything in respect of any matter or transaction (whether actual or proposed), in which such a public body is concerned.

- The term "person" covers companies as well as individuals
- The PCA prohibits certain corrupt dealings by or with "agents" in relation to their "principal's affairs or business". These terms are defined to cover both the public and private sector
- There is no de minimis threshold.
- The PCA stipulates that evidence that any such gratification is customary in any profession, trade, vocation or calling is inadmissible in any civil or criminal proceedings
- Under the Penal Code, "gratification" is the term used but not expressly defined. However, the explanatory notes to the relevant section stipulate that the word is not restricted to pecuniary gratifications, or to gratifications estimable in money.

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

Domestic public official

The PCA does not define "public official", but rather makes express reference, by way of example, to certain types of public officials, namely a "member of parliament", "public body" with the power to act underwritten by law and also a general reference to a "person in the employment of the government or any department thereof". As noted above, the PCA contains express prohibitions with respect to dealings with "agents" in relation to their "principal's affairs or business". "Agent" includes 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 or her, there is a rebuttable presumption that where the gratification has been paid or given to or received by a public official, it has been paid or given and received corruptly.

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

Foreign public official

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

Is private sector bribery covered by the law?

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

Does the law apply beyond national boundaries?

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

The PCA expressly states that its provisions apply to citizens outside as well as within Singapore. Where an offence under the PCA is committed by a citizen in any place outside Singapore, he or 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 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, is deemed to have committed that act or omission in Singapore.

The Penal Code also provides that any person liable to be tried for an offence committed beyond the limits of Singapore is to be dealt with according to the provisions of the Penal Code for such act, in the same manner as if the act had been committed within Singapore.

How are gifts and hospitality treated?

As the statutory definition of "gratification" under the PCA is very wide, gifts and hospitalities (including sexual favours) fall within its scope. Under the Penal Code, although the term "gratification" is not defined, the explanatory notes make clear that the term is not restricted to gratification in monetary terms and would presumably cover gifts and hospitality.

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

How is bribery through intermediaries treated?

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

The Penal Code does not expressly provide for the liability of the principal for acts of intermediaries.

Are companies liable for the actions of their subsidiaries?

No, the laws do not provide for the liability of a parent company for the actions of its subsidiaries.

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 yet prosecuted under the PCA and/or Penal Code.

Is there an exemption for facilitating payments?

There is no exemption for facilitating payments under the PCA and Penal Code, or under any other law. Indeed, the PCA expressly prohibits the offering of any gratification to a member of a public body or reward for the official's "performing, or ... expediting ... the performance" of any official act.

Is there a defence for having adequate compliance procedures?

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

What are the enforcement trends in the business area?

Singapore has earned a reputation for being one of the least corrupt nations. Since the inception of the Corruption

Perceptions Index (CPI) by Transparency International in 2005, Singapore has been ranked consistently amongst the least corrupt countries in the world. In the past 5 years, Singapore has been placed amongst the top 10 globally, and was tied at 6th place with Sweden in 2017. Singapore scored 84 on a scale where zero denotes a country with a very high risk of corruption and 100 denotes a very clean country.

Singapore was also been ranked top in the 2017 Political and Economic Risk Consultancy (PERC) annual survey as the country where perceptions of corruption are most favourable amongst 16 major Asia-Pacific economies and the USA, a position it has maintained since 1995.

Singapore has been ranked consistently well by the World Bank in the area of control of corruption. In the past 5 years, it has maintained a top 10 position.

Corruption in Singapore remains low and under control. The number of complaints received by the Singapore Corrupt Practices Investigation Bureau (CPIB) fell by 3.7% from 808 in 2016 to 778 in 2017. A total of 103 cases were subsequently pursued, down from 118 cases in 2016, which is an all-time low. The majority of non-pursuable cases were because of insufficient, vague or unsubstantiated information. In 2017, 141 individuals were prosecuted for corruption offences; 94% of them were private sector employees. The majority received custodial sentences.

A new voluntary Singapore Standard, the SS ISO 37001, was launched by the CPIB and the Standards, Productivity and Innovation Board on 12 April 2017 to help Singapore companies strengthen their anti-bribery compliance systems and processes. Companies venturing overseas can adopt the

standard to benchmark the integrity of their governance processes against international standards and practices.

Singapore continues to increase its cooperation with other governments. In June 2017, two Singaporeans were charged in court for offences under the PCA and Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act for, amongst other things, obtaining gratification in Shanghai involving about CNY11.1 million (SGD2.3 million) as a reward for assisting two Chinese logistics companies in securing contracts with Seagate Technology International. In the course of its investigation, the CPIB worked with the Chinese authorities and received valuable assistance from them, leveraging on its framework for international cooperation with overseas legal, law enforcement and regulatory agencies.

On 5 July 2017, the CPIB joined law enforcement agencies from Australia, Canada, New Zealand, the UK and US in launching a new International Anti-Corruption Coordination Centre (IACCC). The multinational centre is intended to coordinate law enforcement action against global grand corruption. Grand corruption includes acts of corruption by politically exposed persons that may involve vast quantities of assets and those that threaten political stability and sustainable development. These can comprise bribery of public officials, embezzlement, abuse of functions or the laundering of the proceeds of crime. The London-based IACCC is envisaged to improve information sharing by bringing together specialist law enforcement officers from multiple jurisdictions into a single location. As part of its commitment as a founding member, CPIB will be contributing an officer to serve at the IACCC.

There is a developing expectation that senior officers should be taking a stand against corrupt practices. On 26 September 2016, a senior executive involved in one of the largest corporate graft

scandals in Singapore, concerning shipbuilder ST Marine, was sentenced to 20 weeks' jail and a fine of SGD100,000 (approx. US\$73,150). Mok Kim Whang was the company's senior vicepresident from June 2000 to July 2004 and was found to have continued a pre-existing practice at ST Marine of paying bribes to its customers' employees and covering up the kickbacks with a false paper trail of "entertainment expenses". The sentencing judge remarked that the jail term for Mok "adequately recognises the need to send a strong signal to deter like-minded offenders that there are painful consequences that will flow from weakwilled corporate executives". Significantly, the judge noted that it will be "incumbent on senior officers to take a stand and if it is not possible to put an end to such illegal activities - then they should part company or ... report the activities to the authorities".

In March 2018, the Criminal Justice Reform Act was passed by the Singapore Parliament, encompassing a wide range of revisions to the Criminal Procedure Code. In particular, a Deferred Prosecution Agreement (DPA) framework was introduced in the Criminal Procedure Code in October 2018, which shares various similarities with the UK DPA law. Only body corporates may enter into DPAs (not individuals) in relation to certain offences. A DPA comes into effect pursuant to a declaration of the High Court. The High Court will make such a declaration if it is of the view that the DPA is in the interests of justice and the terms of the DPA are fair, reasonable and proportionate. To date, enforcement action in relation to corruption cases has typically been taken against individuals. The introduction of a DPA framework signifies a potential shift in focus towards enforcement against corporates rather than individuals

In January 2015, the Singapore Government announced that it would be reviewing the PCA with a view to keeping pace with international developments. However, to date, no details of the proposed amendments have been released.

ANTI-CORRUPTION LEGISLATION IN AUSTRALIA

ANTI-CORRUPTION LEGISLATION IN AUSTRALIA CONTRIBUTED BY CLIFFORD CHANCE (SYDNEY AND PERTH OFFICES)

Key points:

Key legislation	Commonwealth: (Criminal Code Act) Overseas: Bribery of Foreign Public Officials (Division 70) Domestic: Bribery of Commonwealth Public Officials (Divisions 141 and 142)
Private sector bribery	Yes, but covered by state, territory and federal legislation such as the Corporations Act 2001
Extraterritorial effect	Yes
Exemption for facilitating payment	Yes
Defences	In certain circumstances where the conduct is lawful in the foreign public official's country For facilitation payments in certain circumstances
Penalties for individuals	Up to ten years imprisonment and/or a fine of 10,000 penalty units (A\$2.1 million, approx. US\$1.7 million)*
Penalties for companies	 A fine of not more than the greatest of the following: 100,000 penalty units (A\$21 million, approx. US\$17 million) if the value of the benefit can be determined, three times the value of the benefit attributable to the offence conduct if the court cannot determine the value of the benefit, 10% of the annual turnover of the 12 months ending in the month the offence occurred
Collateral consequences	Criminal: proceeds of crime actions, false accounting offences Civil and Regulatory: tax adjustments and tax penalties, private or regulatory actions for breaches of directors' duties
Anti-corruption treaties	 United Nations Convention against Corruption OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-Bribery Convention) Member of the Financial Action Task Force

^{*} penalties increased from 1 July 2017

What is the definition of a bribe?

The description below, and the remainder of this chapter, focus on the key anti-corruption law contained in the Commonwealth's Criminal Code. Additional relevant Commonwealth and State/ Territory-based anti-corruption legislation provide varying definitions of a 'bribe' and 'bribery'.

A 'bribe' is not defined under the Criminal Code on a stand-alone basis. It can be described as any conduct that would constitute one or more of the bribery offences pursuant to Divisions 70, 141 and 142 of the Criminal Code. The elements to these offences are broad but can be summarised generally as: the provisioning or offering of a benefit, or the causing of a benefit to be provided, offered or promised to another person where the benefit is not legitimately due and is intended to influence an official in the exercise of official duties for the purposes of obtaining or retaining business or a business advantage. Domestic bribery also requires an element of 'dishonesty'. It is unnecessary to prove (i) that there was an intention to influence a particular official, (ii) that any official was a recipient of the benefit, or (iii) that the bribe was successful. A 'benefit' includes any advantage, and is not limited to tangible property.

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

Domestic public official

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

- a Commonwealth public official
- an officer or employee of the Commonwealth or of a state or territory
- an individual who performs work for the Commonwealth, or for a state or territory, under a contract

- an individual who holds or performs the duties of an office established by a law of the Commonwealth or of a state or territory
- an individual who is otherwise in the service of the Commonwealth or of a state or territory (including service as a member of a military force or police force)
- a member of the executive, judiciary or magistracy of the Commonwealth or of a state or territory
- a member of the legislature of the Commonwealth or of a state or territory
- an officer or employee of:
 - an authority of the Commonwealth
 - an authority of a state or territory.

Various state and federal laws also provide for their own definitions of public officials.

Foreign public official

A foreign public official is broadly defined to include:

- an employee or official of a foreign government
- · a member of the executive, judiciary or magistracy of a foreign country
- a person who performs official duties under a foreign law
- a member or officer of the legislature of a foreign country
- an employee or official of a public international organisation (such as the United Nations)
- an authorised intermediary of a foreign public official or someone who holds themselves out as an authorised intermediary.

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

Is private sector bribery covered by the law?

Private sector bribery is covered by a variety of State, Territory and Commonwealth offences (such as the Crimes Act 1900 (NSW) or the Corporations Act 2001 (Cth)).

Does the law apply beyond national boundaries?

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

How are gifts and hospitality treated?

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

How is bribery through intermediaries treated?

A bribe paid to an intermediary of a foreign public official is 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 established, the person must have intended that his or her conduct aids, abets, counsels or procures the offence.

Are companies liable for the actions of their subsidiaries?

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

Is there an exemption for facilitating payments?

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

The practical application of this defence is likely to be narrow as there is no legislative or judicial guidance as to what constitutes a benefit that is of a "minor nature".

Is there a defence for having adequate compliance procedures?

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

What are the enforcement trends in the business area?

In May 2016, the Australian government committed A\$15 million in funding to bolster law enforcement efforts to detect and combat corruption. A new specialist fraud and anti-bribery and corruption team has been formed, with teams in three major cities in Australia. Whilst enforcement of foreign bribery offences is possible against both companies and individuals, prominent recent proceedings show an emphasis on targeting individuals in senior positions for alleged wrongdoing. The following five cases provide an example of recent trends:

- 1. Civil proceedings were brought by the Australian Securities and Investments Commission (ASIC) against two executives of AWB Limited relating to conduct by AWB that contravened United Nations sanctions against Iraq. The former chairman and director was found to have breached his duties as a director under the Corporations Act for failing to make adequate enquiries. He was fined A\$50,000 (approx. US\$40,500) and banned from managing a corporation for five years. His co-defendant had all claims against him dismissed. ASIC appealed the decision but the appeal was dismissed in April 2018. ASIC has indicated they will not appeal the decision further.
- 2. The former chief financial officer of Leighton Holdings Limited, Peter Gregg, was convicted of falsification of books following a five-week trial that concluded in December 2018. Another former executive was found not guilty of aiding and abetting the commission of the offence by Mr Gregg. Leighton Holdings has been under investigation by the Australian Federal Police since 2011 for foreign bribery. These charges followed an investigation by the Australian Securities and Investments Commission under the Corporations Act, rather than under anti-bribery legislation. A sentencing hearing for Mr Gregg has been listed for January 2019.
- 3. Three individuals were convicted and sentenced for conspiracy to bribe an officer of the Iraqi government. The conspiracy involved the transfer of over A\$1 million (approx. US\$809,000) to an associate in Iraq for the purpose of making a payment to an unnamed government official. The sentence imposed was four years for each of them, with a non-parole period of two years. Two of the individuals also received fines. The conspiracy was discovered because the Australian Federal Police were intercepting the phone of an individual who was suspected of being involved in an enterprise to bribe Iraqi officials to secure government contracts. In sentencing, it was submitted, and accepted, that detection of these crimes was often difficult and the quality of evidence in this case may not be available otherwise.

- 4. In June 2018, criminal charges were brought against Sinclair Knight Merz Pty Ltd and six individuals for conspiracy to bribe foreign public officials. The investigation commenced after the company self-reported that it had, through its South-East Asian subsidiaries, made illegitimate payments to foreign public officials to secure World Bank and Asian Development Bank-financed loan projects in Vietnam and the Philippines.
- 5. Criminal proceedings brought against four individuals for foreign bribery offences were permanently stayed following a High Court decision that compulsory examinations conducted prior to charges being brought were unlawful and deprived the individuals of the right to a fair trial. The court found that the Australian Crime Commission unlawfully used its compulsory examination powers to assist the Australian Federal Police with its investigation after the individuals refused voluntary examinations with the Australian Federal Police. Further, the Australian Crime Commission made nonpublication directions which permitted dissemination of the examination material to the Australian Federal Police and the Commonwealth Direction of Public Prosecution. This material was used to compile the prosecution brief and to obtain further evidence against the accused. The court found that while there is a public interest in prosecuting suspected crime, anything other than a permanent stay would damage the integrity of the court.

The charges were part of a near decade-long case involving the first prosecutions brought under the foreign bribery provision. The conduct involved Securency and Note Printing Australia, both subsidiaries of the Reserve Bank of Australia at the time of the charges. Suppression orders were lifted in November 2018 and the full details of the case can now be reported. In 2011, both companies pleaded guilty to charges of conspiracy to bribe foreign officials and paid pecuniary penalties totaling A\$21.6 million. The conduct involved bribes and conspiracy to bribe foreign officials to secure bank note contracts in countries including Indonesia, Vietnam, Malaysia and Nepal. The Court

recognised the early entry of guilty pleas as having utilitarian value considering the nature of the offences and the large volume of evidence that would have been involved at trial. Employees of both companies were charged and sentenced as part of the proceedings, which were finally concluded in November with the guilty plea of a former Note Printing Australia executive.

A trend towards greater regulation in areas associated with foreign bribery is imminent given developments in the law and a swathe of consultation processes that have recently been finalised. The Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017 (the Bill) has been introduced in Parliament and includes a new strict liability corporate offence of failing to prevent foreign bribery, which will mean that a company will be automatically liable for foreign bribery unless it can establish that it had "adequate procedures" in place. Under the Bill, the government is required to publish guidance on the steps a company can take to prevent bribery of foreign public officials. These changes will expand the breadth of offences relating to foreign bribery, as well as provide additional defences. The Bill introduces a Deferred Prosecution Agreement Scheme which will apply to anti money-laundering and sanctions offences, foreign bribery and specific offences under the Criminal Code and the Corporations Act. At this stage, it is not clear when the Bill will be passed and become law.

In March 2016, in compliance with the OECD's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, the Criminal Code was amended to introduce new offences for false dealing with accounting documents. As vet, there have been no charges brought under this new offence.

In December 2017, the Australian Federal Police and the Commonwealth Department of Public Prosecutions released joint best practice guidelines on the self-reporting of foreign bribery and related offences by a corporation. The Guidelines outline how the AFP and CDPP will treat the investigation and prosecution of a company that self-reports, and how selfreporting affects sentencing.

A Senate enquiry report regarding foreign bribery was released in March 2018, recommending, amongst other things, swift implementation of the recommendations in the Phase 4 OECD report, as well as the introduction of a debarment framework that would ensure that companies disclose that they had been found guilty of foreign bribery offences and that agencies be given power to preclude them from being awarded tenders or contracts. The Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017 was introduced to Parliament in December 2017. The purpose of the Bill is to broaden the whistleblower protections in the Corporations Act to cover current and former employees and associates, suppliers of services or goods to the regulated entity. The Senate Economics Legislation Committee recommended the bill for passing but as at the date of this chapter's publication, the Bill has not yet been put to a vote in the Senate. The Bill requires public companies to have whistleblower policies.

In April 2018, the government announced its intention to increase maximum penalties under Australia's Corporations law tenfold. Corporations found to have committed criminal offences under the Corporations Act will be subject to a maximum penalty of AU\$9.45 million (increased from AU\$1 million), or, alternatively, three times the benefit(s) received, or 10% of annual turnover. Individuals will be subject to a maximum penalty of AU\$945,000 (up from AU\$100,000), or three times the benefit(s) received. The maximum penalty of ten years' imprisonment for individuals will remain. The increase in civil sanctions will be even higher. Corporations may face maximum penalties of AU\$10.5 million (increased from AU\$1 million), while individuals may face penalties up to AU\$1.05 million (increased from AU\$200,000).



ANTI-CORRUPTION LEGISLATION IN THAILAND CONTRIBUTED BY CHANDLER MHM LIMITED

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Key points:

Key legislation	 The Thai Criminal Code covers offering and accepting bribes, as well as the role of an intermediary Organic Act on Counter Corruption (amended)
	Act Concerning Offences Relating to the Submission of Bids to State Agencies
	Act on Offences of Employees in Government Organisations or Agencies
Private sector bribery	No specific legislation, except for bribery in the context of a public bidding process
Extraterritorial effect	Yes
Exemption for facilitating payment	No
Defences	None
Penalties for individuals	Depending on the severity of the offence imprisonment up to life, a fine of up to THB400,000 (approx. US\$12,000) or the death penalty
Penalties for companies	The company could be held liable for an offence committed by its employee, agent, representative or affiliate if it appears that it does not have appropriate measures in place to prevent the commission of the offence by such person or entity. Penalties include a fine of up to twice the value of the damages sustained or the benefits received by the person committing the offence
Collateral consequences	All properties or pecuniary benefits given or received as a bribe (including all properties and benefits used in committing the offence) shall be forfeited, except for those belonging to third parties not involved in the commission of the offence
Anti-corruption treaties	United Nations Convention against Corruption

What is the definition of a bribe?

Bribery is a criminal offence. Public officials are prohibited from requesting or accepting a bribe. No person may give a bribe to public officials for performing wrongful actions. While the law does not provide a precise definition of bribery, it can be interpreted as meaning property or any other benefits, pecuniary or non-pecuniary, received by a public official for performing or omitting to perform his or her functions, regardless of whether such action is a wrongful act. It shall also mean property or any other benefits, pecuniary or non-pecuniary, given to induce a public official to wrongfully discharge, omit to discharge or delay the performance of any duty.

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

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

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

Domestic public official

While the Thai Criminal Code does not provide a definition of "public official", the Supreme Court has held that the title "public official" means a person who is appointed by the Thai government to perform official functions and includes any official appointed by special law.

Members of state legislative assemblies, provincial assemblies and municipal assemblies as well as judicial officials also fall under the anti-bribery provisions of the Thai Criminal Code.

According to the Organic Act on Counter Corruption, the term "State official" includes in particular those holding a political position, government or local officials, persons performing duties in a state-owned enterprise or a state agency, local administrators and members of a local assembly not holding a political position, and officials under the law on local administration. It also includes a member of a board, commission, committee or sub-committee, employee of a government agency, state-owned enterprise or state agency and persons exercising the state's administrative power in the performance of a particular act under the law, through governmental bureaucratic channels, a state-owned enterprise or any other state undertaking.

The Act on Offences of Employees in Government Organisations or Agencies sets out that an "employee" in a government organisation or agency may be punished for receiving or soliciting bribes in the same way public officials are under the Thai Criminal Code. This includes presidents, vice presidents, directors or any person working in any organisation, limited company, registered partnership or any other agency where 50% or more of its capital is held by the Thai government.

Foreign public official

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

"Foreign public officials" means any person holding a legislative, administrative or judicial office for a foreign country or any person exercising a public function for a foreign country,

including for a state agency or state enterprise, whether appointed or elected, whether in a permanent or temporary position and regardless of whether such official receives a salary or other remuneration.

"Officials of international public organisations" means any official or agent of a public international organisation.

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

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

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

The penalties imposed by the Amendment Act for the above offences include fines of between THB100,000 (approx. US\$3,000) and THB400,000 (approx. US\$12,000), imprisonment (of between five years to life) and the death penalty, depending on the severity of the offence.

Is private sector bribery covered by the law?

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

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

From 1 January 2015, any person or legal entity involved in a project with government agencies which has a value of more than THB500,000 (approx. US\$15,120) has had to prepare and submit a revenue and expense account for the project to the Revenue Department.

Does the law apply beyond national boundaries?

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

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

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

How are gifts and hospitality treated?

Gifts and hospitality are treated separately from a bribe. Any state official is allowed to receive property or any other benefit as a gift if the gift is given on a traditional, customary or cultural occasion or on an occasion where it is required by the customs practised in society only:

• from a relative if the value of the gift is proportionate to the official's living standard

- from any person or entity (other than a relative) if the value of the gift does not exceed THB3,000 (approx. US\$90) on each occasion
- on an occasion when the gift is given to the public in general (and not only to the public official).

A state official can receive a gift which does not comply with the above conditions or which has a value exceeding THB3,000 (approx. US\$90) if the official reports the gift to his or her relevant superior and is granted specific permission to keep it.

How is bribery through intermediaries treated?

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

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

Any person giving money to the intermediary upon the intermediary's demand so that the intermediary can bribe another person, shall only be criminally liable if a bribe is given or offered or agreed to be given or offered to a public official. In this case, the person giving money to the intermediary shall be punished as a supporter in committing bribery by receiving two-thirds of the penalty (i.e. fine or imprisonment) imposed for a bribery offence.

Are companies liable for the actions of their subsidiaries?

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

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

On 23 March 2017, the NACC published a handbook on corporate measures which should be adopted by companies in order to prevent bribery of public officials, foreign public officials and officials of international public organisations (the Handbook). The preparation of the Handbook was based on best practice guidance published by the United Nations Office on Drugs and Crime, the Organisation for Economic

Co-operation and Development and Transparency International, as well as on ISO 37001.

The measures recommended by the NACC in the Handbook include:

- senior management should clearly articulate zero-tolerance of corruption, including applying internal controls to prevent corruption
- companies should monitor and assess corruption risks, including preparing appropriate measures to prevent and combat corruption
- companies should adopt clear policies on facilitation payments, gifts and hospitality expenditures
- companies should conduct due diligence on their joint venture partners, business partners, adviser and agents
- companies should adopt adequate internal controls and good accounting standards
- companies should adopt measures and controls to detect and report violations
- companies should carry out periodic reviews and evaluations of their anti-corruption programme.

Is there an exemption for facilitating payments?

Under the Thai Penal Code, a person who gives property or any other benefit to a public official to exercise his or her normal functions shall not be subject to criminal liability. However, the public official who accepts such property or benefit for any purpose whatsoever (whether to exercise his or her duty in a wrongful or lawful manner) will be criminally liable.

Is there a defence for having adequate compliance procedures?

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

What are the enforcement trends in the business area?

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

However, Thailand is currently making greater efforts against corruption and bribery after ratifying the United Nations Convention against Corruption. Since the military coup in May 2014 the government says, "Great efforts have been made to combat corruption and bribery, including: reforming anti-corruption laws, establishing a new anti-corruption watchdog and specialised corruption courts and improving and accelerating investigation and enforcement proceedings." As a result, investigation and enforcement activities for corruption offences have become more widespread. A general trend has been for the focus of corruption investigation proceedings to expand beyond just high-ranking political officials, to now include state officials, local government officials and those of state enterprises.

To address the increasing number of corruption cases brought to the NACC and the courts, the government has recently adopted legislation intended to increase efficiency in the judicial system and, in particular, to address the increasing number of corruption cases brought to the NACC and the courts. The Act on the Establishment of Criminal Courts for Corruption and Misconduct Offences B.E. 2559 (2016) (the Corruption Court Act) (which became effective from 17 August 2016) establishes two types of specialised corruption courts (the Corruption Courts) with jurisdiction to hear corruption and misconduct cases involving 'public officials'. Excluded from the ambit of the Corruption Courts are cases within the jurisdiction of the Supreme Court's Criminal Division for Persons Holding Political Positions, set up in 1999 specifically to handle corruption and misconduct cases involving persons holding political positions in Thailand.

"Public officials" include state officials, foreign public officials and officials of international public organisations pursuant to the Organic Act on Counter Corruption and officials pursuant to the Thai Criminal Code (e.g. officials of the Thai government and police officers).

The Corruption Court Act provides for the establishment of:

- the Central Criminal Court for Corruption and Misconduct Cases (the Central Corruption Court), with jurisdiction over Bangkok, Samut Prakan, Samut Sakhon, Nakhon Pathom, Nonthaburi and Pathum Thani provinces
- the Regional Criminal Courts for Corruption and Misconduct Cases (the Regional Corruption Courts), with jurisdiction over the areas specified in the relevant Royal Decree.

The Central Corruption Court was formally opened on 1 October 2016, while the Royal Decree establishing the Regional Criminal Courts was published in the Royal Gazette on 18 February 2017. Nine Regional Corruption Courts will cover the remaining 71 provinces; seven of these were opened on 1 April 2017. The Central Corruption Court may accept or reject any case arising outside the provinces specified above that has been filed with it.

The Corruption Courts now have explicit jurisdiction over criminal cases in which:

- public officials are charged with malfeasance in office or irregularities
- public officials or individuals are charged with money laundering in relation to malfeasance in office or irregularities or violations of laws on the submission of bids to government agencies, laws on public-private partnerships or other laws combating corruption
- individuals are charged with giving or receiving bribes, coercing or using influence to force public officials to act or not to act in accordance with the Criminal Code or other laws
- individuals are charged with deliberately refusing to declare assets, falsely declaring assets or covering up assets that should have been declared.



ANTI-CORRUPTION LEGISLATION IN SOUTH KOREA CONTRIBUTED BY BAE, KIM & LEE LLC

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Key points:

Key legislation	Korean Criminal Code (Criminal Code)
	Aggravated Punishment of Specific Crimes Act (Specific Crimes Act)
	Aggravated Punishment of Specific Economic Crimes Act (Specific Economic Crimes Act)
	 Act on the Prevention of Corruption and the Establishment and Management of the Anti-Corruption and Civil Rights Commission
	Code of Conduct for Public Officials of Korea (CoC)
	 Combating Bribery of Foreign Public Officials in International Business Transactions Act (Foreign Bribery Act)
	• Improper Solicitation and Graft Act (the Graft Act), also commonly known as the "Kim Young-ran Act"
Private sector bribery	Yes
Extraterritorial effect	No
Exemption for facilitating payment	No
Defences	The CoC, Graft Act and Foreign Bribery Act each set out exemptions to what is considered a bribe. The CoC, and the Graft Act allow public officials to receive gifts and hospitality up to a certain threshold amount. Under the Foreign Bribery Act, a payment that would otherwise be considered a bribe is allowed if it is required or permitted under written law in the foreign official's country.

Penalties for individuals

For public sector bribery:

Bribes in connection with domestic public officials:

- Under the Graft Act, a domestic public official who receives over KRW1 million (approx. US\$909) on a single occasion or, over the course of a year, KRW3 million (approx. US\$2,727) in aggregate, is subject to: (i) imprisonment of up to three years; or (ii) a fine of up to KRW30 million (approx. US\$27,273)
- Under the Graft Act, a domestic public official who receives, or a bribe giver who gives, a bribe amounting to KRW1 million (approx. US\$909) or less on a single occasion or, over the course of a year, KRW3 million (approx. US\$2,727) in aggregate, is subject to a maximum fine of two to five times the pecuniary benefit of the bribe
- Under the Specific Crimes Act, a public official who: (i) accepts a bribe; (ii) causes a bribe to be given to a third party; or (iii) takes advantage of their position, demands or agrees to receive a bribe, is subject to a fine of two to five times the amount of the accepted bribe and imprisonment, as follows:
- if the bribe is KRW100 million (approx. US\$90,909) or more, an indefinite term (but such term subject to a maximum of 30 years under the Criminal Code) or not less than 10 years
- if the bribe is more than KRW50 million (approx. US\$45,455) or more but less than KRW 100 million (approx. US\$90,909), not less than 7 years
- if the bribe is KRW30 million (approx. US\$27,273) or more but less than KRW50 million (approx. US\$45,455), not less than 5 years
- Under the Criminal Code, if the bribe is equal to or less than KRW30 million (approx. US\$27,273), a public official is subject to imprisonment of up to 5 years or suspension of qualifications of up to 10 years

Bribes in connection with foreign public officials:

- A person who bribes a foreign public official may be subject to: (i) imprisonment of up to five years; or (ii) a fine of up to KRW20 million (approx. US\$18,182)
- If the pecuniary benefit derived from the unlawful activity exceeds KRW10 million (approx. US\$9,091), the bribe giver will be subject to: (i) imprisonment of up to five years; or (ii) a maximum fine of twice the pecuniary benefit of the bribe

Penalties for individuals (continued)	For private sector bribery:
	• A bribe receiver may be subject to: (i) up to life imprisonment; and (ii) a fine of two to five times the value of the bribe, depending on the size of the bribe
	• A bribe giver may be subject to: (i) up to five years imprisonment; and (ii) a fine of up to KRW30 million (approx. US\$27,273)
Penalties for companies	 For bribing a domestic public official: under the Graft Act, companies may be jointly liable for their employees' violations and may be subject to a fine of up to KRW30million (approx. US\$27,273), unless the company has shown "due attention and supervision" to prevent the violation in question For bribing a foreign public official: companies may be jointly liable for their employee's violation and may be subject to a fine of up to KRW1 billion (approx. US\$909,091). If the pecuniary advantage derived from the bribe exceeds KRW500 million (approx. US\$454,545) the fine is twice the pecuniary advantage received However, a company is not liable for the foreign bribery offences committed by its employees if it proves it has shown "due attention and supervision" to prevent the violation in question
Collateral consequences	 Any benefits given to public officials or persons who knew about the bribery are forfeited. If the benefits cannot be forfeited, an equivalent amount is to be recovered from the bribe receiver
	 Under the Contracts to Which the State is a Party Act, a company can be debarred from government procurement contracts for up to two years if an employee has, in relation to the bidding, conclusion or execution of a contract with a government authority, offered a bribe to a public official of such authority
	The Defence Acquisition Program Act has a similar provision with respect to defence procurement contracts, which restricts a company's participation in bidding and execution of contracts with a government authority for up to five years
Anti-corruption treaties	United Nations Convention against Corruption
	 OECD Convention on Bribery of Foreign Public Officials in International Business Transactions
	Member of the Financial Action Task Force

What is the definition of a bribe?

There is no explicit definition of a "bribe" in the Criminal Code. However, the term has been interpreted broadly to cover any valuable advantages received by the recipient and therefore includes money as well as other types of tangible and intangible advantages. such as gifts and acts of hospitality. Under the Criminal Code and the Specific Crimes Act, a domestic public official who solicits, promises to accept or accepts a bribe in connection with his duties may be subject to a criminal sentence. An individual who gives, offers or promises to give, a bribe to a domestic public official may also be charged with a criminal offence.

The Graft Act makes it a criminal offence for a domestic public official to receive an amount exceeding: (i) KRW1 million (approx. US\$909) or its equivalent at one time; or (ii) KRW3 million (approx. US\$2,727) or its equivalent per annum, regardless of whether there is a link to their duties. Domestic public officials are also entirely prohibited from accepting, requesting, or promising to accept cash or benefits in connection with their duties, even below the above-mentioned threshold. The Graft Act provides for certain exceptions to the prohibition of the receipt of money or valuables, such as (i) for food and drink, KRW30,000 (approx. US\$27); (ii) for gifts (excluding agricultural products or processed goods with more than 50% of agricultural content), KRW50,000 (approx. US\$45); (iii) gifts that are agricultural products or processed goods with more than 50% of agricultural content, KRW100,000 (approx. US\$91); and (iv) for funerals and festive occasions such as weddings, KRW50,000 (approx. US\$45), except in the case of condolence flowers, up to KRW100,000 (approx. US\$91). Additionally, the Graft Act prohibits the "improper solicitation" of a domestic public official's influence. The Graft Act sets out 15 forms of improper solicitation which are prohibited irrespective of whether there is any benefit offered or received in connection with it.

The CoC closely follows the Graft Act in this regard, although the monetary thresholds for exceptions are to be determined by the relevant government authority to which the public official belongs. Under the CoC, only domestic public officials (and not the bribe giver) are punishable via disciplinary action.

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

Domestic Public Official

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

The Graft Act expands the meaning of "public official" to include not only public sector employees such as government officials and covered employees of state-owned entities, but also employees of certain public and private schools, such as those established under the Elementary and Secondary Education Act, the Higher Education Act, the Early Childhood Education Act and the Private School Act as well as employees of media companies covered by Article 2(12) of the Act on Press

Arbitration and Remedies Etc. for Damage Caused by Press Reports, regardless of whether there is any state ownership or control. The Graft Act, which prohibits the receipt of bribes by domestic public officials, also prohibits the receipt, request or promise to receive bribes by the spouse of a public official in connection with his or her official duties.

Foreign Public Official

Under the Foreign Bribery Act, the scope of a "foreign public official" is broad and includes: (i) a person who provides a legislative, administrative or judiciary service for a foreign government; (ii) a person to whom a business of a foreign government is delegated; (iii) a person who works for a public statutory institution/organisation; (iv) a person who works for a corporation in which the investment made by a foreign government accounts for more than 50% of the paid-in capital, or which is controlled by a foreign government; and (v) a person who works for a public international organisation. Under the Foreign Bribery Act, the acts of giving, offering or promising a bribe to a foreign public official in connection for the purposes of obtaining an improper benefit in connection with international commercial transactions are all punishable.

Is private sector bribery covered by law?

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

In principle, the difference between private sector bribery and public sector bribery is the requirement of proof of an "improper request": whereas the request must amount to a crime of

bribery in the private sector (e.g. a request to award a bid in exchange for cash), this is not necessarily required for public sector bribery (so long as the economic benefits are connected to the public official's duties (Criminal Code) or above a certain threshold amount (Graft Act)). However, in practice, the courts have not strictly insisted on this requirement being satisfied in recent private sector bribery cases.

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

Does the law apply beyond national boundaries?

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

How are gifts and hospitality treated

There is no statutory provision which distinguishes between gifts/ hospitality and bribes. The Graft Act and the CoC set out certain exceptions that are not deemed to be bribes, which include:

• transportation, accommodation and meals which are provided by the host of official events to all of its attendants, provided that such event is related to the recipient's official duties

- items of value provided by relatives
- promotional items or souvenirs that are distributed to numerous and unspecified persons
- cash and valuables provided in order to aid a public official who is in under a financial strain due to a disease or a disaster
- otherwise such gifts/hospitality that are within socially acceptable boundaries.

Under the Graft Act, meals, gifts and other hospitality up to the following values are generally permissible: (i) for food and drink, KRW30,000 (approx. US\$27); (ii) for gifts, (excluding agricultural products or processed goods of more than 50% agricultural content), KRW50,000 (approx. US\$45); (iii) gifts that are agricultural products or processed goods of more than 50% of agricultural content, KRW100,000 (approx. US\$91); and (iv) for funerals and festive occasions such as weddings, KRW50,000 (approx. US\$45), except in the case of condolence flowers, up to KRW100,000 (approx. US\$91).

In addition to these general rules, there are some specific business sector regulations allowing for exceptions to the prohibition on giving or accepting benefits under certain conditions. The regulated business sectors include pharmaceutical and healthcare (Medical Service Act), Insurance (Insurance Business Act), financial investment (Financial Investment Services and Capital Markets Act) and defence (Code of Conduct of the Acquisition Program Administration).

How is bribery through intermediaries treated?

Under the Graft Act, the influencing of a domestic public official through a third party is prohibited. A person who influences a public official through a third party is subject to a fine not exceeding KRW10 million (approx. US\$9,091).

Under the Criminal Code and the Specific Crimes Act a domestic public official is prohibited from directing a bribe to a third party upon acceptance of an unjust request in connection with his or her duties. This offence is punishable with up to five years' imprisonment.

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

In relation to foreign public officials, the Foreign Bribery Act itself does not contain specific regulations concerning payments through intermediaries. However, in light of court precedents involving domestic public officials; which have focused on

whether the domestic public official can be deemed to have received the payment, based on the relationship between the third party and domestic public official; similar concepts are likely to apply to bribery of foreign public officials.

Are companies liable for the actions of their subsidiaries?

Companies will not be held liable for the actions of their subsidiaries in cases of bribing domestic public officials.

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

Is there an exemption for facilitating payments?

No, facilitation payments are not permitted. Under the Foreign Bribery Act there is no exemption for facilitation payments; however, payments permitted or required under written law in the foreign official's country are exempt from being considered a bribe.

Is there a defence of having adequate compliance procedures?

Yes. Under the Foreign Bribery Act the company which employed or appointed the individual will not be found guilty if the company had exercised reasonable care and supervision in order to prevent the commission of offence. The efforts made by the company to prevent criminal acts from being committed will be considered. Additionally, under the Graft Act if a company has shown "due attention and supervision" to prevent a violation of the Graft Act by its employee or agent the

company will not be liable. It is likely that Korean courts will carefully examine the company's internal compliance programme (or lack thereof) when determining if reasonable care, due attention and supervision has occurred, even if, strictly speaking, having such a programme in place would not necessarily exempt the company from criminal liability.

What are the enforcement trends in the business area?

Since coming into force on 28 September 2016, the Graft Act has brought significant change to the regulatory landscape. It has done this through introducing what is effectively a strict liability offence where the mere receipt of KRW1 million (approx. US\$909) (or KRW3 million (approx. US\$2,727) over a year) is a criminal offence and there is no need to show a connection between the bribe and a domestic public official's performance of their duties. This has drastically increased awareness of, and compliance with, anti-corruption laws and made anti-corruption a matter of sustained public debate and focus. Many Korean companies are now, for the first time, actively policing their anti-corruption or anti-bribery policies and compliance programmes or rapidly introducing them if they didn't have them before. It is also indicative of what is an avowed effort by the South Korean government to combat bribery.

Since its introduction, we have not seen any major successful prosecution actions under the Graft Act. Between September 2016 and December 2017, approximately 24,757 violations of the Graft Act were reported. To date, most violations of the Graft Act have resulted in minor fines. A principal and a vice-principal of a private elementary school (who would be deemed "public officials" under the Graft Act) were prosecuted and received a penalty of KRW7 million (approx. US\$6,364)

and KRW5 million (approx. US\$4,545), respectively. The individuals, following improper solicitation from parents, illicitly enrolled a child whose application was initially rejected. The parent was also ordered to pay an administrative fine of KRW5 million (approx. US\$4,545). A corporate entity and one of its employees were ordered to pay an administrative fine of KRW 200,000 (approx. US\$182) for violation of the Graft Act. The employee offered a public officer KRW 100,000 (approx. US\$91) in cash while submitting documents with regards to a civil complaint.

On 10 March 2017, President Park Geun-hye was removed from office, following the Constitutional Court's unanimous decision to uphold Park's impeachment by the National Assembly in December 2016. On 31 March 2017, Park was arrested on charges that included, among other things, extorting tens of millions of dollars from South Korean corporations for the benefit of foundations operated by Park's friend and confidante Choi Soon-sil, and on 24 August 2018 received a 25-year prison sentence on appeal. Further, former president Lee Myung-bak was sentenced to 15 years' imprisonment on 5 October 2018 following charges of bribery and embezzlement. Other recent high-profile corruption cases involved the Samsung Vice-Chairman Lee Jae-yong, who was arrested on 16 February 2017 on charges that he made donations to Choi's foundations in exchange for favourable treatment from Park's government and Lotte Chairman Shin Dong-bin (on 17 April 2017) on similar charges, but both have since been freed by the appellate court on suspended sentences. The Supreme Court is expected to deliver the final verdict on Park Geun-hye and Lee Jae-yong in March or April 2019, while the exact dates of the final verdicts in relation to Lee Myung-bak and Shin Dong-bin have yet to be confirmed.

The focus on domestic public officials and senior executives of South Korea's powerful chaebols represents a major shift toward accountability for members of the country's elite who for a long time seemed to enjoy a certain immunity from criminal prosecution. The trend is likely to accelerate following the arrests of former President Park and Lee Jae-yong, which have led to a public outcry against corruption at the highest levels of South Korean society.

Although there is yet to be a major case brought under the Graft Act since its introduction, the combined effects of the new law and recent enforcement actions have already left their mark on Korea's lively business culture, as noted in recent media commentaries and observed by local attorneys. Popular dining and nightlife spots have seen a decline in business, while other restaurants are now offering special menus with prices below the Graft Act's KRW30,000 (approx. US\$27) limit for food and drink.

ANTI-CORRUPTION LEGISLATION IN INDONESIA

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Key points:

Key legislation	 Law No. 31 of 1999 on the Eradication of Crimes of Corruption, as amended by Law No. 20 of 2001 (Indonesian Anti-Corruption Law) Law No. 11 of 1980 on Bribery (Indonesian Anti-Bribery Law) Law No. 7 of 2006 on the Ratification of the United Nations Convention Against Corruption, 2003 (UNCAC)
Private sector bribery	Yes, under the Indonesian Anti-Bribery Law, but only to the extent that the bribery is intended to cause a person to do something or refrain from doing something in his or her line of duty in contravention of his or her authority or obligations and affecting the public interest
Extra territorial effect	Yes, under the Indonesian Anti-Corruption Law
Exemption for facilitating payment	No
Defences	There are no specific defences for violations of the Indonesian Anti-Corruption Law or Anti-Bribery Law, although general principles of criminal law may apply to reduce penalties or defeat the application of specific allegations (e.g. the defendant proves that he or she did not engage in bribery as charged, or that the bribery was a result of force or intimidation, etc.) If a recipient of gratification (a public official) submits the required report to the Corruption Eradication Commission (KPK) within the deadline (currently 30 working days under the KPK's internal regulations) and obtains the KPK's permission, the gratification will not be categorised as a bribe

Penalties for individuals	Depending on the seriousness of the offence, penalties include:
	• imprisonment from one to 20 years
	 a fine ranging from IDR50 million (approx. US\$3,725) to IDR1 billion (approx. US\$74,500)
	life imprisonment
	in certain extreme circumstances, the death penalty
Penalties for companies	Penalties imposed on companies include:
	• a fine of an amount which equates to the sum of the fines which were imposed against the individual(s) who committed the offence plus one third of this amount and/or
	• temporary or permanent closure of its business and/or
	the payment of compensation
	In addition to the company, its management, i.e. Board of Directors, Board of Commissioners and any relevant officers may be penalised
Collateral consequences	Seizure of goods used for, or obtained from, bribery (including any company owned by the perpetrator), payment of compensation amounting to the maximum value of the property obtained from the corruption, closure of the entire company or part of the company for a period of one year and revocation of all or certain rights and/or government issued facilities/benefits
Anti-corruption treaties	United Nations Convention against Corruption

What is the definition of a bribe?

The following acts constitute "bribery" under the Indonesian Anti-Corruption Law and the Indonesian Anti-Bribery Law:

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

- receiving a gift or a promise by a judge or an advocate if the judge or advocate knows or should have known that the gift or promise is given to influence his or her decision or opinion (as applicable) on a pending cases
- providing a gratification to a public official or civil servant in relation to his or her position in contravention of his or her duties or obligations.

A "gratification" is a gift in the broadest sense, and can include money, goods, discounts, commissions, interest-free loans, travel tickets, lodgings, tours, free medication and the like.

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

Domestic public official

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

Foreign public official

The Indonesian Anti-Corruption Law does not expressly define a foreign public official or criminalise bribing of foreign public officials.

Is private sector bribery covered by the law?

Private sector bribery is criminalised under the Indonesian Anti-Bribery Law. Under the Indonesian Anti-Bribery Law, it is a criminal offence to, give or promise something to someone (in the private sector) in order to persuade him or her to do or not do something in his or her line of duty, contrary to his or her authority or obligations which relate to the public interest. Penalties involve imprisonment for up to five years and fines of up to IDR15 million (approx. US\$1,120). The recipient may also be sentenced to imprisonment for up to three years and fines of up to IDR15 million (approx. US\$1,120).

According to the Indonesian Anti-Bribery Law, a person's "authority and obligations" include those under his or her profession's code of ethics or his or her organisation's regulations.

Although the Indonesian Anti-Bribery Law remains in force, to date, to the best of our knowledge, there have been no prosecutions.

Does the law apply beyond national boundaries?

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

Accordingly, any person or company outside Indonesia's jurisdiction who bribes or facilitates the corruption of an Indonesian public official may be sanctioned in the same manner as any person or company who engages in bribery or facilitates corruption in Indonesia. Moreover, any public official who is found to have accepted a bribe outside of Indonesia for projects related to or within Indonesia may be deemed to have engaged in bribery.

How are gifts and hospitality treated?

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

As explained above, public officials may accept "gratification" (including birthday and wedding gifts) as long as they report the gratification to the KPK and obtain permission to keep the gratification. Recipients of gratification must report to the KPK within 30 working days of their receipt of the gratification. The KPK has 30 working days in which to decide whether the public official can keep the gratification or if the gratification will become state property.

Any gifts given to public officials because of their position which contravene their duties and obligations and which are not disclosed to the KPK are deemed to be bribes.

There is no de minimis threshold under the Indonesian Anti-Corruption Law. However, if the amount of the gratification is IDR10 million (approx. US\$745) or more, the recipient must prove that it is not a bribe and if the amount is below that, the prosecutor must prove that it is a bribe.

How is bribery through intermediaries treated?

Any use of an intermediary by a person or company to pay a bribe does not exempt the person or company from liability for bribery. In 2016, the Supreme Court issued a new regulation on Corporate Criminal Liability (CCL), under which, a company (as well as its management) may be subject to criminal sanctions if it: (i) obtained a benefit from the crime or the crime was committed in the interest of the corporation; (ii) allowed the crime to be committed; and (iii) did not take any action required to prevent it, to mitigate the consequences or to ensure compliance with the prevailing laws in order to prevent the commission of a crime. This regulation can also apply to corruption.

Moreover, any person who aids, abets or conspires to commit bribery is liable for the bribery offence.

Are companies liable for the actions of their subsidiaries?

As a general principle, a parent company is treated as a separate legal entity and is not liable for any of its subsidiaries' actions, unless the parent company itself is involved in the criminal conduct. However, this depends on the extent of the parent company's involvement in the criminal conduct. For instance, a parent company may be held liable if it authorised or instructed its subsidiary to bribe an official or if it knew that its subsidiary was involved in the criminal conduct. This principle also applies under the newly-issued Supreme Court regulation on CCL.

Is there an exemption for facilitating payments?

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

Is there a defence for having adequate compliance procedures?

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

What are the enforcement trends in the business area?

While Indonesia is typically awarded a low score in Transparency International's Corruption Perception Index, its ranking is gradually improving (in 2017, Indonesia's ranking improved to 96 out of 180 countries compared with 107 out of 175 countries in 2014).

As reported in the media and other publicly available sources, principally enforcement efforts to date have focused on areas of financial loss to the state, such as government procurement, payments to officials to issue certain decisions, tax avoidance measures and payments to judges. Enforcement is not only limited to individuals but is also aimed at corporations.

The government and the KPK are actively trying to combat corruption, particularly bribery, and through their concerted efforts, an increasing number of high-ranking public officials have been charged. For example: (i) in 2013, the KPK arrested Akil Mochtar (the Chairman of the Constitutional Court); (ii) in 2016, the KPK arrested Irman Gusman (the Head of the Regional Representative Council/DPD); (iii) in 2017, the KPK detained Patrialis Akbar (the former minister of law and human rights and a Constitutional Court judge); and(iv) in 2018 the KPK also apprehended Setya Novanto (the former chairman of the House of Representatives). They were subsequently prosecuted for bribing or accepting bribes. Increased national and international cooperation and intelligence sharing between regulators has also resulted in greater enforcement.



ANTI-CORRUPTION LEGISLATION IN VIETNAM CONTRIBUTED BY VILAF

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Key points:

Key legislation	Penal Code
	Law on Anti-Corruption 2005 (as amended)
	 Law on Anti-Corruption 2018 (effective from 1 July 2019 replacing the Law on Anti-Corruption 2005 (as amended))
	Law on Cadres and Public Officials
	Law on Public Employees
	 Decision 64 of the Prime Minister dated 10 May 2007 on giving, receiving and the handing over of gifts by state budget-funded organisations and cadres, public employees and public officials (Decision 64)
	 Decree 59 of the Government dated 17 June 2013 implementing the Law on Anti-Corruption 2005 (Decree 59)
	Law on dealing with Administrative Offences
Private sector bribery	Yes
Extra territorial effect	Yes
Exemption for facilitating payment	No
Defences	Certain circumstances are regarded as mitigating factors when determining penalties, but a robust compliance procedure is not an express mitigating factor

Penalties for individuals	 Criminal penalties (including imprisonment of up to 20 years for giving a bribe and the death penalty for receiving a bribe)
Penalties for companies	Criminal penalties are not applicable to companies under the Penal Code
Collateral consequences	 Individuals receiving a bribe may be dismissed from their official position and subject to debarment from opening or managing companies, or holding official posts for a certain period of time Bribery assets may be confiscated Possible revocation of official acts related to the bribe
Anti-corruption treaties	United Nations Convention against Corruption

What is the definition of a bribe?

A bribe is defined as: (i) money, an asset or other "material benefit" in any form, which has a value of VND2 million (approx. US\$90) or more (or less than VND2 million (approx. US\$90) if the bribe recipient was disciplined for the same offence or has a previous conviction for any corruption-related crimes which have not been expunged); or (ii) "non-material benefit", which is either provided, offered or promised to a person holding an official position or position of power "with the intent of taking advantage of his or her official position or power in order to perform or refrain from performing certain acts for the benefit of, or as requested by, the person who offers the bribe". Case law suggests that a bribe under Vietnamese law can be with money, property or other material interests which have an economic value. The Penal Code does not provide any further explanation on what constitutes a nonmaterial benefit

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

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

Domestic public official

The notion of "public officials" under Law on Anti-Corruption 2005 includes:

- Cadres: Vietnamese citizens elected, approved and appointed to hold official positions or titles for a given term of office in state agencies
- Public officials: Vietnamese citizens recruited and appointed to ranks, positions or titles in state agencies with an indefinite term of office, leaders and managerial officials in public

- non-business units of the state agencies, except professional officers working in the army and the public security forces
- Public employees: Vietnamese citizens recruited under employment contracts to work in public non-business units, which provide public services (e.g. schools or hospitals)
- Professional officials working in the army and in the public security forces
- Leaders or managerial officials in state-owned enterprises or being representatives of the State's capitals at companies
- · Persons assigned to exercise a duty or an official task and having such power.

Under the Law on Anti-Corruption 2018 (effective from 1 July 2019), general directors, members of the board and other persons holding managerial positions and/or titles in state-owned enterprises are also regarded as public officials.

Foreign public official

The Penal Code stipulates that foreign public officials consist of foreign officials and officials of public international organisations. but does not provide a detailed definition of foreign public officials.

Is private sector bribery covered by the law?

Through the adoption of the Penal Code, Vietnam has officially criminalised private sector bribery. In particular, a person holding a position or title in a company or non-governmental organisation (i) who receives a bribe; or (ii) a person who offers a bribe to such person, could be prosecuted in the same manner as public sector bribery.

The Law on Anti-Corruption 2018 (effective from 1 July 2019) covers various corrupt acts in the private sector including property embezzlement, taking or giving bribery or bribery brokerage conducted by a person holding a position or having power in a company or non-governmental organisation to facilitate the operations of such company or organisation for self-seeking purposes.

Does the law apply beyond national boundaries?

The Penal Code applies beyond national boundaries in the following cases:

- Any Vietnamese citizen committing a crime under the Penal Code (i.e. offering or receiving a bribe) outside the territory of Vietnam
- Any foreigner committing a crime outside the territory of Vietnam which infringes a Vietnamese citizen's lawful rights and interests or Vietnam's interests or under an international treaty to which Vietnam is a party

How are gifts and hospitality treated?

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

Decision 64 provides regulations on the giving and receiving of gifts by organisations, units, and "staff, public officials and officials". A gift includes, amongst other things, cash, "valuable papers" (such as shares, bonds, certificate of deposits, promissory notes etc.), goods, property, tourism benefits, medical services, education and training.

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

Subject to these prohibited circumstances, Decision 64 allows a public official to receive gifts if: (i) he or she is sick or on certain occasions such as a wedding, funeral, traditional ceremonies or New Year holiday; and (ii) the value of such gift is less than VND500.000 (approx. US\$22).

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

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

How is bribery through intermediaries treated?

The Penal Code imposes a criminal penalty on the person offering or receiving the bribe through an intermediary.

Are companies liable for the actions of their subsidiaries?

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

Is there an exemption for facilitating payments?

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

Is there a defence for having adequate compliance procedures?

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

What are the enforcement trends in the business area?

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



ANTI-CORRUPTION LEGISLATION IN MALAYSIA CONTRIBUTED BY RAHMAT LIM & PARTNERS

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Key points:

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Key legislation	Malaysian Anti-corruption Commission Act (MACC Act)
Private sector bribery	Yes
Extraterritorial effect	Yes
Exemption for facilitating payment	No
Defences	There are no defences at present. Please note, however, that the Malaysian Anti-Corruption Commission (Amendment) Act 2018 (the Amendment Act) came into force on 1 October 2018, with the exception of Section 4. Section 4 of the Amendment Act amends the MACC Act by inserting a new section 17A. When it comes into force, section 17A will introduce far-reaching corporate liability provisions seeking to penalise commercial organisations for the corrupt practices of its associated persons. An "adequate procedures" defence in respect of such an offence will be available
Penalties for individuals	For serious bribery, imprisonment up to 20 years and a fine of not less than five times the sum/value of the gratification where it is capable of being valued or is of a pecuniary nature, or MYR10,000 (approx. US\$2,400), whichever is higher. There is also a general penalty of a fine up to MYR10,000 (approx. US\$2,400) or imprisonment up to two years, or both

Penalties for companies	When it comes into force, the new section 17A of the MACC Act will introduce far- reaching corporate liability provisions seeking to penalise commercial organisations for the corrupt practices of its associated persons. Any commercial organisation which commits an offence under this section will be liable to a fine of not less than 10 times the sum or value of the gratification which is the subject of the offence, or MYR1 million (approx. US\$238,000), whichever is higher, or to imprisonment of up to 20 years, or both
Collateral consequences	No
Anti-corruption treaties	United Nations Convention against Corruption

What is the definition of a bribe?

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

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

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

Domestic public official

Under the MACC Act, "officer of a public body" is defined as any person who is a member, an officer, an employee or a

servant of a public body. This includes a member of the administration, a member of parliament, a member of a state legislative assembly, a judge of the High Court, Court of Appeal or Federal Court, and any person receiving any remuneration from public funds, and where the public body is a sole corporation, includes the person who is incorporated as such.

The courts have adopted a broad approach in defining and determining who falls within the definition of "an officer of a public body". In the MACC Act, the term "public body" includes any company or subsidiary over which or in which any public body has a controlling power or interest. By this interpretation, a director or even an employee of a stateowned enterprise, more commonly known as a Governmentlinked Company (GLC) in Malaysia, falls under the scope of the MACC Act as they could be considered officers of a public body.

Foreign public official

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

Is private sector bribery covered by the law?

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

Does the law apply beyond national boundaries?

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

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

How are gifts and hospitality treated?

Gifts and hospitality would generally fall under the definition of "gratification" under the MACC Act. Additional guidance on giving and receiving gifts can be found in the Public Officers (Conduct and Discipline) Regulations as amended by the Public Officers (Conduct and Discipline) (Amendment) Regulations 2002 (the Regulations) and the Guidelines for

Giving and Receiving Gifts in the Public Service (the Guidelines). The Guidelines serve to support the Regulations and set out specific situations in which gifts from the private sector or any other persons may be prohibited or may require the approval of the Secretary General or the Security Office, depending on their value.

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

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

How is bribery through intermediaries treated?

The provision dealing with the offence of accepting gratification, which has general application, states that "any person who by himself, or by or in conjunction with any other person" receives or gives any gratification, commits an offence.

The MACC Act states that "any person who by himself, or by or in conjunction with any other person" bribes a foreign public official will be guilty of an offence, but there is no similar express reference in the section dealing with domestic public officials, suggesting that the use of intermediaries in paying bribes to domestic public officials is not prohibited in respect of that particular offence.

Additionally, it should be noted that the MACC Act makes it an offence for an intermediary (referred to as an "agent") who "corruptly accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gratification as an inducement or a reward for doing or forbearing to do". Thus, if a person acts as an intermediary (i.e. for or on behalf of any other person as an agent) it would amount to an offence. This would also appear to cover the use of intermediaries in the receipt of bribes by both foreign public officials and domestic ones.

Are companies liable for the actions of their subsidiaries?

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

Is there an exemption for facilitating payments?

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

Is there a defence for having adequate compliance procedures?

There is no defence at present. The MACC Act does not provide for the defence of having adequate compliance procedures. It is unclear whether a robust anti-corruption programme would be a mitigating factor in a breach as this would depend on individual cases.

Please note, however, that the Amendment Actcame into force on 1 October 2018, with the exception of Section 4, Section 4 of the Amendment Act amends the MACC Act by inserting a new section 17A. When it comes into force, section 17A will introduce far-reaching corporate liability provisions seeking to penalise commercial organisations for the corrupt practices of its associated persons. An "adequate procedures" defence in respect of such an offence will be available.

A commercial organisation will commit an offence if a person associated with it corruptly gives or offers to any person any gratification with intent to obtain or retain business or advantage for the commercial organisation (an Offence). A commercial organisation under the Amendment Act includes local companies, foreign companies and partnerships, carrying on business in Malavsia.

The liability imposed on a commercial organisation with regard to the Offence will extend to a director, officer, partner, or any person who is concerned in the management of the affairs of the commercial organisation at the time of the commission of the Offence, regardless of whether they had knowledge of the Offence. To avoid liability, they would have to prove that the Offence was committed without their consent and that they exercised due diligence to prevent the commission of the Offence. If a commercial organisation is charged with committing an Offence, it is a defence for the commercial organisation to prove that it had in place adequate procedures to prevent persons associated with the commercial organisation from undertaking the corrupt conduct.

The Offence will carry a substantial fine of not less than 10 times the sum or value of the gratification if it is capable of being valued, or MYR1 million (approx. US\$238,000), whichever is higher, or to imprisonment for a term not exceeding 20 years, or both.

The Malaysian Anti-Corruption Commission (MACC) has stated that the corporate liability provision under Section 17A will be brought into force in 2020.

What are the enforcement trends in the business area?

The MACC provides for two investigatory approaches in relation to its enforcement operations: proactive-based investigation and intelligence-based investigation.

Based on the statistics on the MACC website, the number of arrests made by the MACC in 2018 (as of the date of writing) numbered 821 people.

A recent case relates to the MACC's investigation into alleged wrongdoing and abuse of power involving the 1Malaysia Development Bhd (1MDB) fund, a state-owned fund, which has triggered widespread criticism around the globe due to the shocking number of irregular transactions involving the fund. In May 2018, Barisan Nasional (The National Front), a political coalition in Malaysia that had ruled the country for the past 61 years, was ousted from power in a general election as the scandal fuelled a voter backlash.

Full-scale investigations into the multibillion Ringgit scandal involving the 1MDB fund have commenced since the new government led by the political coalition Pakatan Harapan (The Alliance of Hope) took over the administration of the country. The former prime minister, Datuk Seri Najib Abdul Razak was charged on 19 September 2018 over allegations that US\$628 million linked to the 1MDB fund ended up in his personal bank accounts. The former prime minister is facing multiple charges including in relation to corruption, criminal breach of trust and money laundering.

In 2017, the MACC had also investigated the scandal-riddled Sabah Water Department (SWD). The scandal emerged in 2016 when the MACC arrested, amongst others, the SWD's former director, a deputy director, and, the deputy director's brother and his accountant, in relation to their involvement with the matter. The MACC later detained more than 20 people in relation to the case and recovered more than MYR190 million (approx. US\$45.3 million) in cash and assets. The investigation resulted in the largest ever cash seizure by the MACC, amounting to approximately MYR114 million (approx. US\$27.2 million). In December 2016, the former director of SWD and two others were charged with offences under anti-money laundering legislation relating to the proceeds of illegal activities stemming from offences under the MACC Act.



ANTI-CORRUPTION LEGISLATION IN TAIWAN CONTRIBUTED BY LCS & PARTNERS

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Key points:

Key legislation Private sector bribery	 Criminal Law Anti-corruption Statute Money-Laundering Control Act Not criminalised but may constitute other crimes punishable under the Criminal Law or other laws
Extraterritorial effect	Yes
Exemption for facilitating payment	No
Defences	None
Penalties for individuals	 For active bribery, the penalty depends on whether the requested activity violates the public official's duties, regardless of whether such public official takes any action to fulfil the requests of the bribe. If the bribe is paid to induce a violation of the public official's duties, the penalties are imprisonment of one to seven years and a fine of up to TWD3 million (approx. U\$\$99,800). If the bribe is paid to induce an act or an abstention that does not violate the public official's duties, then the penalties are imprisonment for up to three years or criminal detention and/or a fine of up to TWD500,000 (approx. U\$\$16,600) For passive bribery by a public official, the penalty depends on whether the requested activity violates the official's duties, regardless of whether the official actually takes any action to fulfil the request. If the bribe is paid to induce a violation of the public official's duties, the penalties for the official are imprisonment of no less than ten years to life and a fine of up to TWD100 million (approx. U\$\$3.326 million). If the bribe is paid to induce an act or an abstention that does not violate the public official's duties, the penalties are imprisonment for no less than seven years and a fine of up to TWD60 million (approx. U\$\$1.99 million). If the bribe is paid to a public official who is in charge of investigations, prosecutions or the trial of a case, the penalty shall be increased by 50%

	 Any person who is sentenced to a term of imprisonment under the Anti-Corruption Statute will be deprived of his or her civil rights for a certain period
	 If a legitimate source of property or valuables (acquired up to three years after the act of bribery was committed) held by the receiver of the bribe, his or her spouse, or their children under the age of 20, cannot be established, the property and valuables will be deemed the proceeds of bribery and confiscated
Penalties for companies	No penalties for companies are specified under the Criminal Law and the Anti-Corruption Statute but violations of other laws are possible, depending on the specific activity
Collateral consequences	A bribery offence can also result in a money laundering offence under the Money-Laundering Control Act. A person may be sentenced to imprisonment of up to seven years and fined up to TWD5 million (approx. US\$166,000) if he or she commits or attempts to commit money-laundering, defined as follows: • knowingly disguises or conceals the origin of the proceeds of bribery, or
	transfers or converts such proceeds to help others avoid criminal prosecution
	 disguises or conceals the nature, source, movement, ownership, right of disposition or other rights and interests of the bribe
	accepts, obtains, possesses or uses the proceeds of bribery committed by others
	The property or property interests transferred, converted, concealed, obscured, accepted, obtained, possessed or used in such money-laundering will be confiscated
Anti-corruption treaties	APEC Anti-Corruption and Transparency Working Group
	Complementary Anti-Corruption Principles for the Public and Private Sectors, 2007
	APEC Guidelines on Enhancing Governance and Anti-Corruption, 2009
	APEC Principles on the Prevention of Bribery and Enforcement of Anti-Bribery
	Laws and the General Elements of Effective Voluntary Corporate Compliance Programmes, 2014

What is the definition of a bribe?

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

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

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

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

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

Domestic public official

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

- serving an organisation of the state or a local self-governance body with statutory function and authority and others engaged in public affairs with statutory function and authority
- entrusted by an organisation of the state or a self-governing body in accordance with the law to handle the public affairs that fall within the authority of the organisation.

The personnel of a state-owned institution would not necessarily be considered a public official unless he or she is engaged in public affairs according to the law, with a statutory function and authority or he or she is engaged according to the law in the discharge of trusted public affairs. For example, if an employee of a state-owned enterprise conducts procurement under the Government Procurement Act or if a person is a member of a public university's committee which is the decision-making authority for academic promotions to professor, he or she is considered a public official.

Prior to becoming a public official, if a person demands, solicits, receives, accepts or agrees to receive or accept any bribe or other unjust enrichment in return for actions or abstentions that are in connection with his or her future official duties and thereafter fulfils the requests of the bribe, he or she will be punished as a public official.

A non-public official who joins, solicits or aids a public official in a bribery offence shall be considered a principal offender or solicitor or accessory, but the punishment imposed on such person may be reduced.

Foreign public official

Although the Anti-Corruption Statute punishes active bribery of a public official from a foreign country under certain

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

Is private sector bribery covered by the law?

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

Does the law apply beyond national boundaries?

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

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

How are gifts and hospitality treated?

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

The "Governmental Officials' Honest and Upright Guidelines" (Guidelines) set out the standards of gifts and hospitality that public officials can or cannot accept.

According to the Guidelines, it will be assumed that a gift was received by the public official if it was:

- · received in the name of the public official's spouse, lineal relative, or a residence and property-sharing family members
- given indirectly through a third party to the public official, his or her spouse, lineal relatives or residence and property sharing family members.

A public official should not demand, solicit or accept gifts from people with whom he or she has interests that are connected with his or her official duties, except in certain limited circumstances. As for gifts from people with whom he or she does not have interests and who are not his relatives or usual friends, the value of the gifts may not exceed TWD3,000 (approx. US\$100) and the gifts must be given in the ordinary course of social interaction. In addition, the value of the gifts given from the same source within the same year may not exceed TWD10,000 (approx. US\$333). Otherwise, the public official must report receiving such gifts to his or her supervisor.

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

- the attendance is required due to civil etiquette
- the event is held in relation to a traditional festival and is open to the public

- bonuses or recognition from his or her supervisor
- the event is held for an engagement, marriage, birth, moving to a new residence, inauguration, remote transfer, retirement or resignation and does not exceed the normal standards of social etiquette.

Public officials must refrain from attending social gatherings with people with whom they do not have an interest concerning their duties if their attendance is not appropriate considering their position and public duties.

How is bribery through intermediaries treated?

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

Are companies liable for the actions of their subsidiaries?

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

Is there an exemption for facilitating payments?

No, there is no exemption for facilitating payments.

Is there a defence for having adequate compliance procedures?

Taiwan legislation does not have any provisions similar to the UK Bribery Act's adequate compliance procedures defence.

What are the enforcement trends in the business area?

In 2015, the Act to Implement the United Nations Convention against Corruption (UNAC) was passed and took effect in Taiwan. In accordance with the UNAC, the government is obligated to take measures to prevent corruption involving the private sector. The National Congress on Judicial Reform held in March 2017 reiterated the same position, concluding that it is necessary to criminalise private sector bribery (a bribe paid by a private sector entity to another private sector entity). The authorities are considering whether to amend legislation to put this into effect. Separately, in 2013, legislators in Taiwan proposed the "Prevention of Bribery in the Private Sector Act" with the intention of criminalising private sector bribery. If it is enacted, private sector bribery will be criminalised in Taiwan.



ANTI-CORRUPTION LEGISLATION IN THE PHILIPPINES CONTRIBUTED BY CASTILLO LAMAN TAN PANTALEON & SAN JOSE

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Key points:

Key legislation	 The Revised Penal Code The Anti-Graft and Corrupt Practices Act The Code of Conduct and Ethical Standards for Public Officials and Employees The Anti-Plunder Act An Act Making It Punishable for Public Officials and Employees to Receive, and Private Persons to Give, Gifts on Any Occasion, Including Christmas The Anti-Red Tape Act
Private sector bribery	Yes, but only when it relates to an official act or function
Extraterritorial effect	Yes, but only for public officers abroad who accept bribes in the exercise of their public functions
Exemption for facilitating payment	No
Defences	Bribe given as a result of force or intimidation Under certain conditions, the bribe or gift giver may also apply for informant's immunity by voluntarily providing information on the offence and testifying against the public official
Penalties for individuals	 Direct Bribery under the Revised Penal Code: imprisonment of up to 12 years; a fine of not less than three times the value of the gift; and disqualification from office, practice of a profession/calling and/or the right to vote during the term of the sentence Indirect Bribery under the Revised Penal Code: imprisonment of up to six years and public censure

Penalties for individuals	 Qualified Bribery under the Revised Penal Code: imprisonment of 20 to 40 years or death (the imposition of the death penalty is currently suspended)
	 Violation of the Anti-Graft and Corrupt Practices Act: imprisonment of six years and one month to 15 years; perpetual disqualification from public office; disqualification from transacting business with the Philippine Government; and confiscation or forfeiture in favour of the Philippine Government of the gift or wealth acquired, subject to the right of the complaining party to recover the amount or thing given to the offender under the circumstances provided by law
	 Prohibited acts or transactions under the Code of Conduct and Ethical Standards for Public Officials and Employees: imprisonment of up to five years; a fine not exceeding PHP5 million (approx. US\$98); and/or disqualification from holding public office
	 Plunder under the Anti-Plunder Act: imprisonment of 20 to 40 years or death (the imposition of the death penalty is currently suspended) and forfeiture of ill-gotten assets in favour of the Philippine Government
	 Violation of An Act Making It Punishable for Public Officials and Employees to Receive, and Private Persons to Give, Gifts on Any Occasion, Including Christmas: imprisonment of one year to five years and perpetual disqualification from public office
Penalties for companies	The company's officers, directors or employees who participated in the crime or offence shall suffer the penalties described above
Collateral consequences	Rejection or revocation of registration of the company's securities if a company officer, director or controlling person, amongst others, is convicted of an offence involving moral turpitude or fraud. Bribery is an offence involving moral turpitude
Anti-corruption treaties	United Nations Convention against CorruptionUnited Nations Convention against Transnational Organized Crime

What is the definition of a bribe?

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

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

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

Domestic public officials

The term "public official" has several definitions under Philippine law.

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

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

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

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

Foreign public officials

Anti-bribery laws refer to Philippine public officials only. There is no indication that they apply to foreign public officials.

Is private sector bribery covered by the law?

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

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

Does the law apply beyond national boundaries?

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

How are gifts and hospitality treated?

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

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

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

As a result, a gift will not to be considered as a bribe where: (a) it is unsolicited; (b) its value is nominal or insignificant; (c) it is not given as or for a favour; (d) it is not given by reason of official position, or in connection with the performance of official duties; and (e) it is given in accordance with local customs or usage.

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

How is bribery through intermediaries treated?

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

Are companies liable for the actions of their subsidiaries?

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

Is there an exemption for facilitating payments?

There is no exemption for facilitating payments.

Is there a defence for having adequate compliance procedures?

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

What are the enforcement trends in the business area?

The current Philippine President Rodrigo Duterte is a staunch anti-corruption advocate. While campaigning for the presidency in 2016, he vowed to fight, and possibly end, corruption by the end of his term. Since assuming office, he has enforced numerous measures to combat corruption. Amongst others, he has issued Executive Order No. 06 on 14 October 2016, establishing the 8888 Citizens' Complaint Hotline, which is designed to serve as a "mechanism where citizens may report their complaints and grievances on acts of red tape ... and/or corruption..." Around 100 government employees from various agencies, such as the Bureau of Customs, the Bureau of Internal Revenue, the Land Transportation Franchising and Regulatory Board and the Land Transportation Office, have been dismissed or suspended for alleged corruption.

On 4 October 2017, President Duterte issued Executive Order (EO) No. 43, creating the Presidential Anti-Corruption Commission. The commission is mandated "to directly assist the President in investigating and/or hearing administrative cases primarily involving graft and or corruption against all

presidential appointees". EO No. 43 also provides that, "upon the instructions of the President or motu proprio, the commission may conduct lifestyle checks and fact-finding inquiries on acts or omissions of all presidential appointees, including those outside the executive branch of government".



ANTI-CORRUPTION LEGISLATION IN INDIA CONTRIBUTED BY AZB & PARTNERS

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Key points:

Key legislation	 Prevention of Corruption Act, 1988 (PCA) Central Civil Services (Conduct) Rules, 1964 All India Services (Conduct) Rules, 1968 Indian Foreign Service (Conduct and Discipline) Rules, 1961 Central Vigilance Commission Act, 2003 (CVC Act) Right to Information Act, 2005
Private sector bribery	No laws specifically prohibit bribery in the private sector in India. While not defined as a bribery offence, the Companies Act penalises Fraud in relation to the affairs of a company. The definition of Fraud under the Companies Act is wide and could be invoked to penalise private sector bribery The bribery related offences under the PCA are restricted to bribery of 'public servants'
Extraterritorial effect	 PCA – Yes (to Indian citizens only) Lokpal Act – Yes (to Indian public servants outside India)
Exemption for facilitating payment	No

Defences	 The PCA was amended in 2018, and now provides for an "adequate procedures" defence for firms and companies accused of corruption offences. However, guidelines in this regard are yet to be notified by the Indian government A bribe giver who is compelled to pay a bribe and reports the matter to a law enforcement agency within seven days may raise that as a defence to his or her prosecution Directors and officers of companies and firms accused of bribery may argue that
	the offence took place without their consent and connivance
PCA	The PCA as amended in 2018 criminalises: (i) the taking of bribes by a public servant, (ii) influence-peddling by any person, (iii) offering and payments of bribes to a public servant, (iv) bribery by commercial organisations, (v) obtaining of undue advantage by public servants in transactions, and (vi) other misconduct by public servants
	The expression "public servant" is very widely defined
	 Punishments under the PCA include imprisonment for a period between three to seven years as well as a fine. Abetment of offences is also criminalised by the PCA
	 Public servants who are habitual offenders may be subjected to imprisonment for a period between five and ten years as well as a fine.
Lokpal Act	The Lokpal Act provides for the establishment of an anti-corruption ombudsmen at the federal level. This ombudsman has not yet been established. States have separately established state-level ombudsmen via separate legislation
Companies Act	• The Companies Act criminalises Fraud by a company or perpetrated on a company. The Companies Act provides for imprisonment for a term between six months and five years as well as a fine ten years and a fine ranging between half the amount involved in the fraud and up to three times that amount

Penalties for companies	Under the PCA, the penalties for companies include fines. In certain cases, directors and other officers in charge of a company may be held personally responsible for an offence and may be liable to imprisonment
Collateral consequences	Investigations for tax evasion, money-laundering, blacklisting etc
Anti-corruption treaties	United Nations Convention against Corruption
	Member of the Financial Action Task Force
	United Nations Convention against Transnational Organized Crime
	Member of the trilateral India-Brazil-South Africa Cooperation Agreement (IBSA)

What is the definition of a bribe?

The PCA uses the wide expression "undue advantage" to cover both pecuniary and non-pecuniary illegitimate benefits received by a public servant. The term "undue advantage" has been defined as any gratification whatever, other than legal remuneration that a public servant receives from the employer entity or is permitted by the employer entity to receive.

The PCA criminalises the receipt or solicitation of illegal gratification by "public servants" and the payment of such gratification by other persons.

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

Domestic public official

The expression "public servant" has a wide import under the PCA and includes (i) persons in the service or pay of the government, or (ii) persons remunerated by the government for the performance of any public duty, or (iii) persons in the service or pay of a local authority or of a corporation established by or under legislation (iv) persons in the service of a body owned, controlled or aided by the government (v) persons in the service of a government company; (vi) judges, (vii) court-appointed arbitrators or (viii) office bearers of certain registered cooperative societies that have received financial aid from any government agency. The Supreme Court has held that employees of banks (whether public or private) are 'public servants' under the PCA (CBI v. Ramesh Gelli & Ors., 2016 (3) SCC 788).

Foreign public official

There are no Indian laws that apply specifically to the bribery of foreign public officials.

Is private sector bribery covered by the law?

No laws specifically prohibit bribery in the private sector in India. While not defined as a bribery offence, the Companies Act penalises Fraud in relation to the affairs of a company.

The definition of Fraud under the Companies Act is wide. Fraud includes any act, omission, concealment of any fact or abuse of position committed by any person or any other person with the connivance in any manner, with intent to deceive, to gain undue advantage from or to injure the interests of, the company or its shareholders or its creditors or any other person, whether or not there is any wrongful gain or wrongful loss.

This definition is invoked to penalise private sector bribery.

The punishment for Fraud under the Companies Act includes imprisonment for a term which may extend to ten years and fine which may extend to three times the amount involved in the fraud.

Does the law apply beyond national boundaries?

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

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

How are gifts and hospitality treated?

Various rules govern different government employees with regard to the acceptance of gifts and hospitality. They set out restrictions on public officials accepting offerings and gifts or any other pecuniary or non-pecuniary benefits including free transport, boarding and hospitality from any person unless such acceptance is sanctioned by the government. During weddings or funerals where it is a religious and social practice to accept gifts, the public official may accept gifts from near relatives or personal friends who have no official dealing with him or her. If such offering is accepted by the public official, acceptance of gifts exceeding a certain threshold, depending on his or her post, is required to be disclosed as per the applicable rule governing his or her conduct. The motive and intent of all such offerings is key in determining whether an offence has been committed. The term gratification can cover an insignificant amount paid to influence the public servant, if it is not within the legal remuneration of the public servant. The Supreme Court of India has set out that the amount paid as gratification is immaterial and that conviction will depend on the conduct of the public official and the proof established by the prosecution regarding the demand and acceptance of gratification (AB Bhaskara Rao v Inspector of Police, CBI, Visakhapatnam 2011 (4) KLT(SN) 35).

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

There is no de minimis threshold regarding the receipt of offerings by public officials. However, conduct rules applicable to some kinds of public officials permit them to accept gifts and hospitality within certain prescribed limits and accordingly gifts and hospitality that meet such criteria are permitted. Such limits vary depending on the rules applicable to the public official in each case. For example, the All India Services (Conduct) Rules 1968 have been amended by the All India Services (Conduct) Amendment Rules 2015 (Amendment Rules 2015) to increase the threshold of the value of gifts permitted to be accepted by the member of the service. The Amendment Rules 2015 applicable to some officials provide an exception for the receipt of "casual meals" or "casual lifts" or gifts worth up to a de minimis amount of INR5,000 rupees (approx. US\$77) as against the earlier amount of INR1,000 rupees (approx. US\$16).

How is bribery through intermediaries treated?

The payment of bribes to a public servant is an offence under the PCA regardless of whether the bribe is paid directly or through an intermediary.

The intermediary is also covered by the bribery offence. In addition, the intermediary may separately be charged with the distinct offence of receiving an undue advantage to influence a public servant.

Are companies liable for the actions of their subsidiaries?

Indian law does not ordinarily hold a company liable for the acts of its subsidiaries.

However, there may be some circumstances where a court may ascribe liability to a parent company for acts of its subsidiaries. These circumstances include situations where the two companies in reality constitute a single economic entity, or the parent company uses its subsidiary as a device to perpetrate

fraud, or illegally evade taxes, or if the parent company exercises shadow directorship over the subsidiary.

Indian courts have the power to lift the corporate veil and look into the internal workings of a company in cases where they are of the view that doing so is essential in order to prevent fraud or improper conduct and to attribute liability.

Is there an exemption for facilitating payments?

Facilitating payments are expressly considered bribes under the PCA and there is no exemption for such payments. Payments made to get even lawful things done promptly are prohibited and the PCA has been enforced with respect to facilitation payments. The Supreme Court of India has held, that it has "little hesitation in taking the view that 'speed money' is the key to getting lawful things done in good time and 'operation signature' be it on a gate pass or a pro forma, can delay the movement of goods, the economics whereof induces investment in bribery", and that, if speed payments are allowed, "delay will deliberately be caused in order to invite payment of a bribe to accelerate it again" (Som Prakash v State of Delhi, AIR 1974 Supreme Court 989).

Is there a defence for having adequate compliance procedures?

A 2018 amendment to the PCA has introduced an adequate procedures defence that is available to bodies corporate. The statute provides for guidelines from the Indian government on those procedures. However, such guidelines have not yet to be issued.

What are the enforcement trends in the business area?

Recent cases have demonstrated strong and substantive enforcement activity.

2018 saw significant amendments that are likely to strengthen the enforcement of the PCA.

2018 also saw the introduction of the Fugitive Economic Offenders Act, 2018 which provides for the confiscation of propertyof individuals who evade summons or warrants issued by court in connection with certain economic offences (including bribery) by leaving the country. The confiscation under this statute ceases to take effect the moment the alleged offender returns to the country and participates in the proceedings against him.

The scope of the money laundering offence under the Prevention of Money Laundering Act has also been broadened by the inclusion of Fraud under the Companies Act as a predicate offence. That is to say, any funds connected to the alleged fraud are now treated as proceeds of crime..

In addition, the Companies Act 2013 and rules thereunder contain a provision making it mandatory for listed companies to establish a "vigil mechanism" for reporting of "genuine concerns". Rules issued by the Ministry of Corporate Affairs extend this to companies which accept deposits from the public and companies which have taken money from banks and public financial institutions, of more than INR500 million (approx. US\$7.79 million). The Companies Act 2013 also imposes an obligation on the directors of companies to devise proper systems to ensure compliance with the provisions of all

applicable laws and ensure that such systems are adequate and operating effectively. Fines and imprisonment are mandated for violating the provisions.

The Companies Act provides statutory backing to the Serious Fraud Investigation Office (SFIO) for the purpose of investigating the affairs or frauds relating to a company. The statute contemplates that once a case is assigned to the SFIO, it shall be the sole authority to investigate the case and all the papers, documents and the information shall be transferred to the SFIO, which has power to arrest people for violations of the Companies Act 2013.



ANNEXURE 1 – THE US FOREIGN CORRUPT PRACTICES ACT

What is the definition of a bribe?

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

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

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

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

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

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

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

Is private sector bribery covered by the law?

Private sector bribery is not covered by the FCPA.

Does the law apply beyond national boundaries?

Yes. The FCPA's anti-bribery prohibitions and internal control requirements have broad extraterritorial reach. The provisions apply to violative acts by US issuers, domestic concerns, and their agents and employees that occur entirely outside US territory and acts by any US citizen or resident, wherever they occur. In addition, any person (including foreign companies or persons) may be liable under the FCPA if an act in furtherance of a prohibited bribe, including, for example, a single telephone call, occurs within the United States, Jurisdiction has also been found where the act occurring in the United States was the processing of US dollar-denominated bribe payments through the US banking system, where there was no other nexus to the United States and US payment processing was not contemplated by the parties.

How are gifts and hospitality treated?

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

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

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

the organisation and recorded, would be examined by the regulators in order to determine if a corrupt intent could be inferred from such circumstances.

The DOJ has provided some guidance as to what should qualify for 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. A gift of nominal value branded with the company's logo is also likely to qualify as a promotional gift covered by the affirmative defence.

How is bribery through intermediaries treated?

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

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

Are companies liable for the actions of their subsidiaries?

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

Is there an exemption for facilitating payments?

The FCPA has an express exception for facilitation or expediting payments - relatively insignificant payments made to facilitate or expedite performance of a "routine governmental action". Such actions do not include "any decision by a foreign official whether, or on what terms, to award new business to or to continue business with a particular party, or any action taken by a foreign official involved in the decision-making process to encourage a decision to award new business to or continue business with a particular party".

Is there a defence for having adequate compliance procedures?

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

What are the enforcement trends in the business area?

The pace of FCPA-related enforcement remained steady during the Trump administration's second year. In 2018, the APAC region was host to several notable cases, including a US\$77 million settlement with Credit Suisse in July 2018 concerning the bank's "princeling" hiring probe and the wide-ranging 1MDB investigation that is ongoing.

In May 2018, the DOJ introduced the "Policy on Coordination of Corporate Resolution Penalties". The policy aims to avoid disproportionate penalties from multiple enforcement agencies "piling on" a corporate defendant in response to the same violations. Société Générale's settlement of FCPA violations in June 2018 reflected this policy.

In September 2018, the DOJ clarified that the FCPA Corporate Enforcement Policy will apply to successor liability in the context of mergers and acquisitions. A company that voluntarily discloses a suspected breach and offers cooperation in an investigation may receive a reduction in penalties. The approach aims at providing companies with more clarity regarding FCPA enforcement in corporate transactions.

In November 2018, Deputy Attorney General Rod Rosenstein announced a softening of the DOJ's approach toward individuals in the context of corporate settlements, a policy which was first articulated in the September 2015 "Yates Memo." The Yates Memo premised cooperation credit on companies' providing "all relevant facts about individuals involved in corporate misconduct." Moving forward, the DOJ will take a flexible view of the amount of information offered in order to receive cooperation credit. The objective is to increase efficiency, provide more discretion to DOJ staff, and award partial cooperation to companies that make reasonable efforts.



ANNEXURE 2 – THE UK BRIBERY ACT

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

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

The Bribery Act contains six general bribery offences, two of which relate to the offering/promising and giving of a bribe (commonly referred to as "active bribery" offences) and four of which relate to requesting, agreeing to receive or accepting a bribe (commonly referred to as "passive bribery" offences).

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

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

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

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

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

Domestic public official

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

Foreign public official

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

- holds a legislative, administrative or judicial position of any kind, whether appointed or elected, of a country or territory outside the United Kingdom (or any subdivision of such a country or territory)
- exercises a public function (i) for or on behalf of a country or territory outside the United Kinadom (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)
- is an official or agent of a public international organisation".

"Public international organisation" means an organisation whose members are any of the following:

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

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

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

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

There is one defence to the Corporate Offence – if the organisation is able to prove that it had "adequate procedures"

in place designed to prevent persons who are associated with it from bribing. Statutory guidance for companies has been issued by the UK Ministry of Justice on adequate procedures (the MoJ Guidance), but this is not intended to provide any form of safe harbour for companies and is not binding on the courts.

Under the Crime and Courts Act 2013 (section 45 and Schedule 17), an organisation (but not an individual) can avoid prosecution for bribery (and certain other offences) by entering into a deferred prosecution agreement (DPA). The substance of the DPA is that the prosecutor agrees to suspend an indictment against the organisation, and, subject to compliance with the terms of the DPA, to discontinue the proceedings after a given length of time. The agreement is subject to scrutiny and approval by the court. One of the considerations when determining whether a DPA will be offered and/or approved is the extent to which the organisation has cooperated with the prosecutor, including proactive self-reporting. The first DPA was approved on 30 November 2015 and there have been several more since.

DPAs are not available in Scotland, where the Crown Office and Procurator Fiscal Service operates a self-reporting scheme whereby businesses that self-report bribery offences that have taken place within, or predominantly within, the relevant jurisdiction may in certain circumstances (including where the business has conducted a thorough investigation and offers full disclosure of its findings) be referred for civil settlement rather than criminal prosecution. Every case is considered on its own merits and with a view to the public interest; the first such civil settlement for the Corporate Offence by the Crown Office and Procurator Fiscal Service in Scotland was announced in September 2015.

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

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

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

Is private sector bribery covered by the law?

Yes. The Bribery Act's six general offences of bribing and being bribed as well as the "Corporate Offence" apply equally to bribery in the public and the private sectors.

Does the law apply beyond national boundaries?

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

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

In addition, under the Corporate Offence, a commercial organisation may be prosecuted in the UK for failing to prevent bribery even where no part of the underlying bribery offence took place in the UK, the associated person who did the bribing is not closely connected to the UK and the commercial organisation is formed outside the UK (so long as it carries on part of its business in the UK).

How are gifts and hospitality treated?

Gifts and hospitality to private sector individuals and to UK public officials will only be an offence where there is some element of impropriety, e.g. an intention that the recipient

perform his or her job improperly (but note that such intention may be inferred by lavishness of the gift/hospitality).

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

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

How is bribery through intermediaries treated?

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

Are companies liable for the actions of their subsidiaries?

The Corporate Offence of the Bribery Act makes it an offence for a commercial organisation to fail to prevent bribery by its associated persons.

Consequently, where a subsidiary bribes, its parent company will be liable for this bribery if the subsidiary was performing services for or on behalf of the company (this is the test for whether a person is "associated"), and where the bribery was intended to obtain business or an advantage in the conduct of business for the parent company. The parent company has a defence if it can prove that it had adequate procedures in place to prevent bribery by its associated persons.

Is there an exemption for facilitating payments?

There is no exemption in the Bribery Act for facilitation payments⁶ (nor was there under the UK's former anti-bribery laws). The MoJ Guidance describes facilitation payments as "small bribes" and says that "exemptions in this context create artificial distinctions that are difficult to enforce ...".

However, the Serious Fraud Office (the SFO) has stated⁷ that "[i]t would be wrong to say there is no flexibility" [with respect to prosecution for facilitation payments] and that "[w]hether or not the SFO prosecutes in relation to facilitation payments will always depend on (i) whether it is a serious or complex case which falls within the SFO's remit and, if so, (ii) whether the SFO concludes, applying the Full Code Test in the Code for Crown Prosecutors, that there is an offender that should be

⁶ It should be noted however that a person may be able to avail themselves of the common law defence of duress in situations where, but for the making of a facilitation payment, there would be risk to life, limb or liberty.

⁷ http://www.sfo.gov.uk/bribery--corruption/the-bribery-act/questions-and-answers.aspx

prosecuted". By way of example, cases will usually satisfy these criteria where they involve significant international elements and/ or where complex legal or accountancy analysis is likely to be required. Companies may wish to consider in particular the Joint Prosecution Guidance of the Director of the SFO and the Director of Public Prosecutions on the Bribery Act 2010, which indicates that prosecution will be less likely where a single, isolated payment is made and where the organisation had a clear and appropriate policy in place, with procedures which were correctly followed.8

On the other hand, a prosecution is more likely where there are large or repeated payments, where facilitation payments are "planned for or accepted as part of a standard way of conducting business" and where "a commercial organisation has a clear and appropriate policy setting out procedures an individual should follow if facilitation payments are requested and these have not been correctly followed".

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

Is there a defence for having adequate compliance procedures?

Yes, for the Corporate Offence. A commercial organisation charged with the Corporate Offence has a defence if it can show that it had "adequate procedures" in place designed to prevent persons who are associated with it from bribing.

The MoJ Guidance sets out six principles (described as "not prescriptive") that should inform an organisation's corporate anti-corruption programme:

Principle 1: Proportionate procedures

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

Principle 2: Top-level commitment

The top level management of a commercial organisation (be it a board of directors, the owners or any other equivalent body or person) are committed to preventing bribery by persons associated with it. They foster a culture within the organisation in which bribery is never acceptable.

Principle 3: Risk assessment

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

⁸ See page 9 of the Joint Prosecution Guidance of The Director of the SFO and The Director of Public Prosecutions, published on 30 March 2011.

Principle 4: Due diligence

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

Principle 5: Communication (including training)

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

Principle 6: Monitoring and review

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

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

What are the enforcement trends in the business area?

While the significant increase in foreign bribery enforcement in recent years is certainly due in part to the Bribery Act, it also reflects an increased appetite on the part of enforcement authorities to pursue foreign bribery charges, even in the case of conduct which occurred before 1 July 2011 (when the Bribery Act came into force), which continues to be prosecuted under the legislation which predated the Bribery Act.

For example, as part of the SFO's investigation into Unaoil, launched in March 2016, a number of individuals were charged

in November 2017 with conspiracy to make corrupt payments (under pre-Bribery Act legislation) to secure the award of contracts in Iraq to Unaoil's client SBM Offshore, between June 2005 and August 2011. Further charges of conspiracy to give corrupt payments were announced by the SFO in the Unaoil investigation on 22 May 2018 in connection with the award of a contract worth US\$733 million to Leighton Contractors Singapore PTE Ltd for a project to build two oil pipelines in southern Iraq.

In a recent example of this, F.H. Bertling Limited, a UK subsidiary of the German-headquartered Bertling Group, pleaded guilty on 1 August 2017 to conspiracy to make corrupt payments, contrary to the Prevention of Corruption Act 1906. A number of senior employees also pleaded guilty in a case involving corrupt payments to an agent of the Angolan state oil company, Sonangol, in relation to F.H. Bertling's freight forwarding business in Angola, while in a separate case, other senior employees have been charged with conspiracy to make or accept corrupt payments in relation to contracts for the supply of freight forwarding services to a North Sea oil exploration project.

A clear trend has developed in the use of DPAs by the SFO to settle bribery charges against corporates. The first DPA, between the SFO and Standard Bank plc (now known as ICBC Standard Bank plc), related to charges of failing to prevent bribery (i.e. the Corporate Offence) by a sister company based in Tanzania, and several senior employees, in order to obtain a mandate from the Government of Tanzania to raise funds. Standard Bank agreed to pay financial orders of US\$25.2 million, and a further payment of US\$7 million to the Government of Tanzania, as well as costs of GBP330,000 to the SFO. In addition, Standard Bank agreed to

cooperate with the SFO and to implement the recommendations of an independent reviewer. This DPA was successfully concluded on 30 November 2018.

A second DPA, approved on 8 July between the SFO and an unnamed UK company, known as XYZ Limited, related to charges of conspiracy to corrupt and conspiracy to bribe, as well as the Corporate Offence, in connection with contracts to supply its products to customers in a number of foreign jurisdictions. The name of the company has not yet been released because of ongoing, related legal proceedings. XYZ agreed to pay approximately GBP6.5 million, to carry out an internal compliance review and to report annually to the SFO. In both this and the Standard Bank cases, the company involved had itself directly referred the matter to the SFO.

In a third case, a DPA was offered to Rolls-Royce, even though the matter came to the attention of the SFO through online postings by a whistleblower rather than being raised by Rolls-Royce. However, the court approved the offer of the DPA on the basis that Rolls-Royce had provided an "extraordinary" level of cooperation, and that what it had reported on was "far more extensive (and of a different order)" than what was likely to be uncovered without their cooperation. The charges against Rolls-Royce were on 12 counts of conspiracy to corrupt, false accounting and failure to prevent bribery over a period of three decades in Nigeria, Indonesia, Russia, Thailand, India, China and Malaysia. Rolls-Royce agreed to pay GBP497,252,645 in disgorgement of profits plus a financial penalty, as well as around GBP13 million in reimbursement of the SFO's costs. The DPA is effective for five years, and Rolls-Royce must implement the recommendations of a compliance programme review.

Ben Morgan, Joint Head of Bribery and Corruption at the SFO said in a speech on 7 March 2017, "the disposal of corporate criminal risk through resolutions like those in Standard Bank, XYZ and Rolls-Royce will become increasingly common".

In a warning, however, that DPAs would not be available in every case, Sweett Group plc was convicted after pleading quilty in December 2015 to a charge of failing to prevent bribery intended to secure and retain a contract with Al Ain Ahlia Insurance Company in Dubai. The SFO said that it did not consider that the company had cooperated with it and therefore saw no reason to offer it a DPA.

In the first instance of a company pleading not guilty to the corporate offence of failing to prevent bribery (under section 7 of the Bribery Act 2010), a small UK interior refurbishment company was convicted on 21 February 2018 of failing to prevent its former managing director from bribing a project manager in a property company in connection with office refurbishment contracts worth GBP6 million. Skansen Interior Limited (with a staff of only 30 employees) conducted its own internal investigation, proactively brought matters to the attention of the City of London Police and cooperated with their investigation, but was not offered a DPA. Skansen sought to rely on the defence that it had adequate procedures in place to prevent bribery which were proportionate to its (small) size. However the jury did not accept that the company's general policies and procedures on ethics, which required everybody to act honestly and ethically, or its financial controls on the payment of invoices, amounted to adequate procedures. There was no specific anti-bribery policy in place at the time of the conduct, no proper training and no individual with specific responsibility for ABC compliance. 1 No penalties could be

¹ See https://www.cliffordchance.com/briefings/2018/03/first_contested_prosecutionforfailuret.html for more information about the case.

imposed on the company, which has been dormant since 2014. Two senior executives at the company pleaded guilty to bribery and corruption offences.

In a speech on 18 March 2018 Camilla de Silva, Joint Head of Bribery and Corruption at the SFO, said that "since the passing of [the Bribery Act], we, the SFO, have yet to encounter a corporate with sufficient confidence in its compliance programme to persuade us of its adequacy or run a section 7 defence argument in court. (...) We saw last week the argument run for the first time and a jury rejecting a section 7 defence in a CPS prosecution. (...) The case [Skansen, see above] is perhaps a salient reminder to corporates to ensure their compliance procedures are sufficiently robust and the high bar that will need to be reached for a section 7 defence to succeed. The starting point is about having bespoke compliance procedures in place, but it is more about the substance of the procedures and about them actually working in the first place".

Ms de Silva highlighted a number of compliance-related issues which could be gleaned from the Rolls-Royce and Standard Bank DPAs – "for example the interaction between and impact of the compliance team on the business unit, a top-level commitment from the Board for proper governance and organisation of compliance and this effort being properly resourced, and crucially, a bedding in of a compliance culture".

New Director at the SFO

Mr David Green, Director of the SFO, stepped down on 20 April 2018 when his term of office came to an end. After an interim period, Lisa Osofsky, began her five-year tenure on 28 August 2018. The personality and priorities of the Director can be influential in terms of prosecution strategy and the new

Director's focus will be a matter of considerable interest. Ms Osofsky is a former US federal prosecutor, pursuing a range of white-collar crimes, and joins the SFO from Exiger, a risk and compliance consultancy. In the short to medium term, it is expected that the SFO will continue to work to existing priorities, as outlined above by Ms de Silva.



CLIFFORD CHANCE ASIA PACIFIC - RECENT ANTI-CORRUPTION CLIENT BRIEFINGS

Title	Date
The Asia Pacific Top Ten FCPA Enforcement Actions of 2018	2019 January
The 2018 Bribery Risk Rankings for Asia Pacific	2019 January
DOJ Revises Corporate Cooperation Policy But Leaves Individual Employees in the Crosshairs	2018 December
Very Pleased to Meet You: Market Rates for Introducers in Asia Pacific	2018 September
DOJ Announces Policy to Discourage Law Enforcement Agencies and Regulators from "Piling On" Duplicative and Parallel Penalties	2018 May
Little movement in latest APAC transparency international rankings	2018 March
Anti-Bribery amd Corruption Review	2018 June
The Asia Pacific Top Ten FCPA Enforcement Actions of 2017	2018 January
China's new anti-bribery law - has commercial bribery been redefined?	2018 January
Asia Anti-Bribery and Corruption update 2017	2017 September
Anti-Bribery and Corruption Review	2017 June
First prosecution in Singapore of a director for company money laundering	2017 June
Companies need to get ready as more mandatory reporting requirements on non-financial issues take effect	2017 March
Asia Pacific Runs the Gamut in 2016 Anti-Corruption Rankings	2017 February
The Asia Pacific Top Ten FCPA Cases of 2016	2017 January
Lost in translation: Japan urged to do more to combat foreign official bribery	2016 December
Top Hong Kong court rejects "thought crime" defence in money laundering appeal	2016 August
Reading the Tea Leaves: Expansion and Interpretations of PRC Anti-Corruption Legislation	2016 May
Self-Reporting of Corporate Wrongdoing: the Yates Memo seven months on	2016 May
Asia Pacific Anti-Corruption Rankings 2015	2016 February
The Asia Pacific Top Ten FCPA Activities of 2015	2016 January

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