

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



**A GUIDE TO ANTI-CORRUPTION
LEGISLATION IN ASIA PACIFIC
5TH 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 also 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

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

As this Guide makes clear, Asia Pacific countries vary in their anti-corruption legislation and in their enforcement practices. There are different standards for criminal enforcement and civil liability in each of the jurisdictions that should be taken into account when developing your anti-corruption compliance program. For example, countries define bribery differently and vary in how they view facilitation payments. Some countries provide exemptions for local customs and social or religious practices, whilst others implement a de minimis threshold for liability. If your anti-corruption compliance program 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.

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



INTRODUCTION

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

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

Corruption is a global phenomenon which presents an increasingly significant risk in Asia Pacific. Contracting with intermediaries and agents, providing corporate hospitality, giving charitable donations, hiring employees, dealing with state-owned enterprises, starting up operations abroad, or just carrying 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 obviously illegal everywhere in Asia Pacific and all the countries included in this handbook (except Taiwan) have signed the United Nations Convention against Corruption. As the

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

However, what constitutes corruption still varies from jurisdiction to jurisdiction. 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, 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 29 September 2017 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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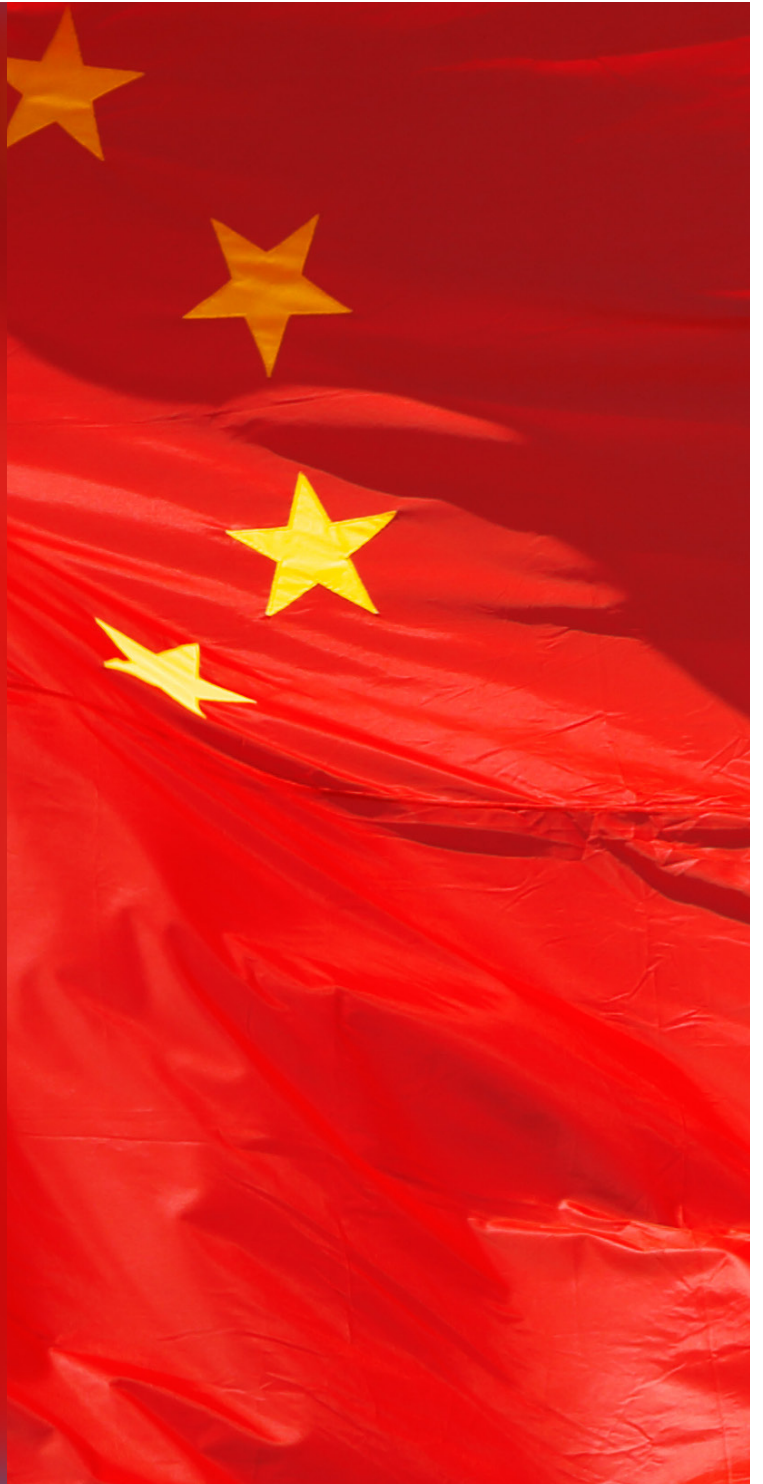
COMPARISON TABLE



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 (BEIJING AND HONG KONG OFFICES)

Key points:

<p>Key legislation</p>	<ul style="list-style-type: none"> • Criminal Law • 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 Opinions) • Anti-Unfair Competition Law (AUCL) (amended in 2017 and taking effect 1 January 2018, the 2017 AUCL) • Provisional Measures on Prohibition of Commercial Bribery • The Interpretation of Several Issues Concerning the Application of Law for Handling Criminal Cases of Bribery, promulgated jointly by the Supreme People's Court and the Supreme People's Procuratorate on 26 December 2012 (the 2012 Interpretation) • Rules on the Standard for Filing Cases that are Directly Filed for Investigation to the People's Procuratorate (Trial) (the 1999 Interpretation), which was promulgated on 9 September 1999 • The Interpretation of Several Issues Concerning the Application of Law in Handling Criminal Cases Related to Graft and Bribery, promulgated jointly by the Supreme People's Court and the Supreme People's Procuratorate on 18 April 2016 (the 2016 Interpretation)
<p>Private sector bribery</p>	<p>Yes</p>
<p>Extraterritorial effect</p>	<p>Yes</p>
<p>Exemption for facilitating payment</p>	<p>No</p>
<p>Defences</p>	<p>Criminal Law:</p> <ul style="list-style-type: none"> • Extortion payments with no quid pro quo <p>Anti-Unfair Competition Law:</p> <ul style="list-style-type: none"> • Small gifts for marketing and promotional purposes • Individual employees' conduct of bribery which is irrelevant to seeking transaction opportunities or competitive advantages for the employer

<p>Penalties for individuals</p>	<p>Criminal Law:</p> <ul style="list-style-type: none"> • Bribing public officials or public entities: criminal detention, up to life imprisonment, confiscation of property and criminal fine • Bribing non-public officials: criminal detention or imprisonment of up to 10 years and criminal fine • Receiving bribes as a non-public official: criminal detention or imprisonment of up to 20 years, and confiscation of property <p>Anti-Unfair Competition Law:</p> <ul style="list-style-type: none"> • A fine ranging from CNY100,000 (approx. US\$15,000) to CNY3,000,000 (approx. US\$453,000) and confiscation of illegal income
<p>Penalties for companies</p>	<p>Criminal Law:</p> <ul style="list-style-type: none"> • Unlimited criminal fine <p>Anti-Unfair Competition Law:</p> <ul style="list-style-type: none"> • A fine ranging from CNY100,000 (approx. US\$15,000) to CNY3,000,000 (approx. US\$453,000) and confiscation of illegal income, and revocation of business license in severe cases

<p>Collateral consequences</p>	<p>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.</p> <p>Blacklisted for public procurement in healthcare sector:</p> <p>In accordance with the Provisions on the Blacklisting of Commercial Bribery in Healthcare Procurement, which came into effect on 1 March 2014 and apply to the procurement of drugs, medical equipment and consumables, a company shall be blacklisted if its offence of paying bribes:</p> <ul style="list-style-type: none"> • 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 <p>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</p>
<p>Anti-corruption treaties</p>	<ul style="list-style-type: none"> • 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 in kind provided in return for “inappropriate interest”. It also refers to money or property in kind received or requested by the relevant individuals or entities for the purpose of securing/ providing an illegitimate benefit by taking advantage of their positions. 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 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. In accordance with the Provisional Measures on Prohibition of Commercial Bribery issued by the State Administration of Industry and Commerce (SAIC) to interpret the AUCL (AIC Measures, which is expected to be updated for the purpose of implementing the 2017 AUCL), a bribe refers to any money or property in kind provided to an entity or an individual, such as promotional fees, advertising fees, sponsorship, research fees, service fees, consultation fees or commissions etc., or other forms such as overseas trips.

The Criminal Law and relevant judicial interpretations, unlike the 2017 AUCL, set out a criminal threshold for investigation. A criminal investigation shall be commenced when the bribe

offered to a public official by an individual is at least CNY30,000 (approx. US\$4,520), 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, environment 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 in kind 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 in kind to any person from a private company (or any non-public official from a public entity) with the intention of seeking an inappropriate interest. The 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 AIC Measures provide a more detailed interpretation of Articles 163 and 164.

Does the law apply beyond national boundaries?

Yes, the Criminal Law has extraterritorial effect.

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

Also, 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 severe 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. In practice, however, investigations of overseas transactions are not common.

How are gifts and hospitality treated?

Under the Criminal Law, whether a gift is legitimate depends on the following factors: (i) the background of the gift (e.g. whether the parties are relatives or friends and the history of their personal relationship); (ii) the value of the gift; (iii) the timing, form and context of the gift; and (iv) whether the gift giver requested the receiver to act in a certain way in his 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 AIC Measures are silent on how to distinguish legitimate gifts or items of hospitality from bribes. The scope of bribes under the 2017 AUCL and the AIC Measures includes “other forms” of bribes which is sufficiently wide to cover any kind of gift and hospitality. However, advertising 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 regulation of bribery through intermediaries. Specifically, it is a violation 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 subsidiary, and not liable for any of its subsidiary's actions, unless the company itself is involved in such action. For instance, a parent company may be held liable if it authorised or instructed its subsidiary to commit the bribery or if it had knowledge that its subsidiary was involved in such criminal conduct.

The 2017 AUCL and the AIC 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 conduct is used as an agent by the parent company, the latter may be held liable, as described in the answer to the previous question.

Is there an exemption for facilitating payments?

No, there are no specific provisions or exemptions under the Criminal Law or the 2017 AUCL dealing with facilitation payments.

Is there a defence for having adequate compliance procedures?

No, such a defence is not available under the Criminal Law or the 2017 AUCL. However, please note that, if a payment is made under extortion and no illegitimate benefit is obtained in return, the payment should not be regarded as a bribe under the Criminal Law. 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 probably 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?

The anti-corruption crackdown in the PRC, which began in 2012, continues. According to a recent speech by Jianzhu Meng, head of the Central Political and Legal Affairs Commission of the Communist Party of China, almost 100,000 corruption-related cases have been prosecuted in the five years since 2012 (representing a 32% increase over the previous five-year period). Of these more than a hundred involved very senior government officials at or above provincial and ministerial level.

Beginning in 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 investigation in the GSK case has been the most high profile. 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 2017. Enforcement actions have since been expanded to other sectors, such as consumer goods, real estate, manufacturing, financial services and technology, media and telecommunications. For example, most recently, there has been a notable "industry sweep" by the Shanghai Administration for Industry and Commerce against tyre manufacturers for their sales incentive/rebate practices. Furthermore, given the uncertainties arising out of the 2017 AUCL, the PRC regulators are expected to issue more implementation rules, including but not limited to an update of the AIC 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. The Supreme People's Procuratorate has highlighted in its most recent annual report that, since launching the "fox hunt" campaign in late 2014 (which targets overseas suspects of corruption offences) more than 160 suspects have been extradited or persuaded to return to China.

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**



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

Key points:

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: (1) “lawful authority”, i.e., sourced in a positive rule of law that authorises an action; and (2) “reasonable excuse”, a deliberately vague term left for the courts to decide
Penalties for individuals	<p>Penalties for individuals on indictment, maximum penalties for:</p> <ul style="list-style-type: none"> • Possession of unexplained property: fine of HKD1,000,000 (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 <p>On summary conviction, maximum penalties for:</p> <ul style="list-style-type: none"> • 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	<p>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</p> <p>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)</p>
Anti-corruption treaties	<p>Hong Kong is party to a number of international and regional anti-corruption conventions and organisations, including:</p> <ul style="list-style-type: none"> • 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: (1) any prescribed officer; and (2) any employee of a public body. Prescribed officers include government officials, officials of the Hong Kong Monetary Authority, members of the ICAC, judicial 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, 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\$64,100) and imprisonment of up to seven years.

Does the law apply beyond national boundaries?

Section 4 of the POBO which criminalises bribery of Hong Kong public servants has extraterritorial effect, since there is express reference to the advantage being offered “whether in Hong Kong or elsewhere” in the section. For other corruption offences (i.e., under sections 5 (Bribery for giving assistance in regard to contracts), 6 (Bribery for procuring withdrawal of tenders), 7 (Bribery in relation to auctions), 8 (Bribery of public servants by persons having dealings with public bodies), and 9 (Corrupt transactions with agents) of the POBO), the position is less certain as there is no such inclusion of the words “whether in Hong Kong or elsewhere”. Such omission may well be construed as a legislative intention not to afford extraterritorial effect to these sections. Indeed, case law suggests that, with regard to section 9 of the POBO, the whole course of offer, solicitation or acceptance of illegal advantage should take place within the Hong Kong jurisdiction in order to be caught by the section. The same logic should therefore apply to sections 5 to 8 as well.

How are gifts and hospitality treated?

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

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

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

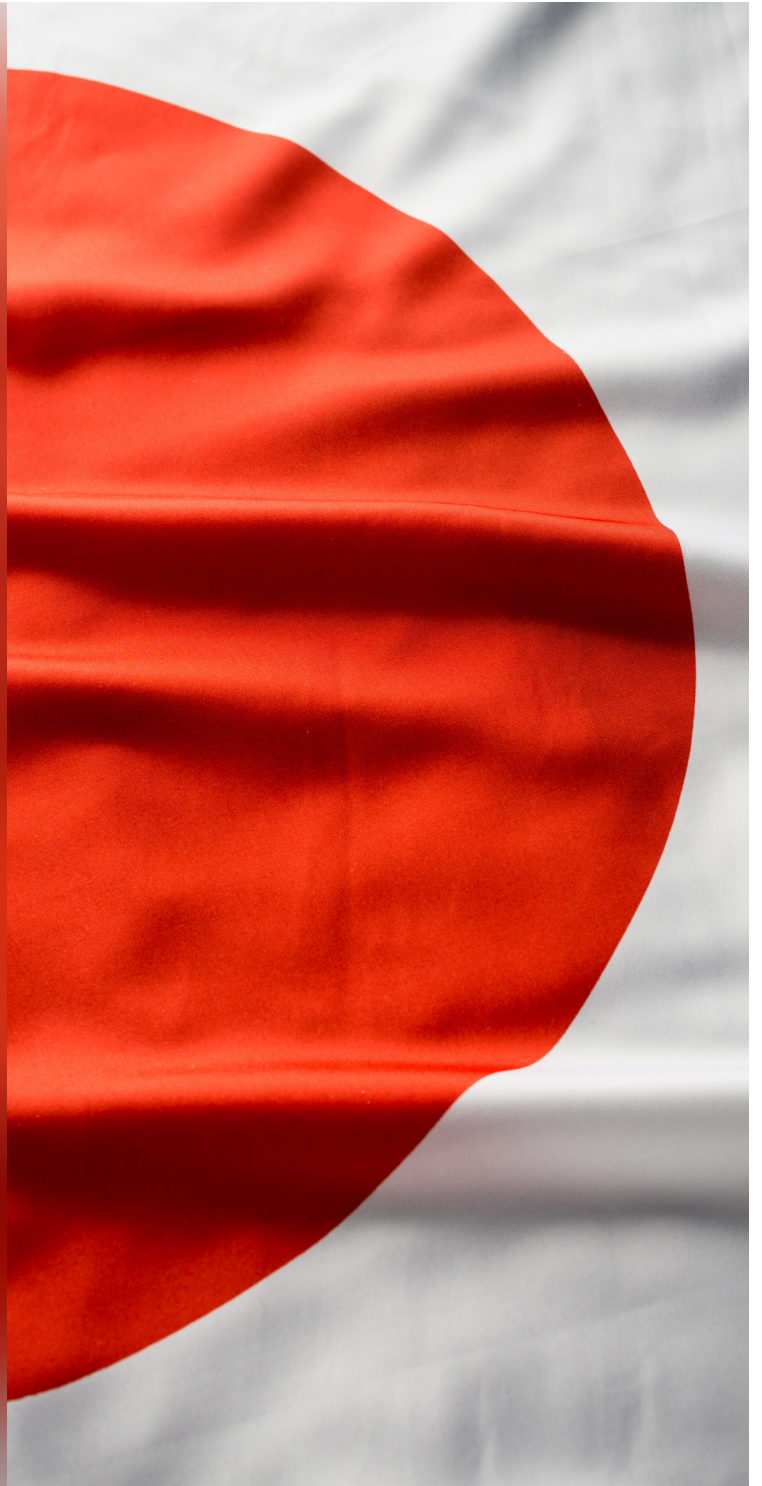
There is no similar defence in the POBO. It does not seem that having a robust compliance program could be admitted as a "reasonable excuse" defence under the POBO.

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 and an annual symposium attended by international anti-corruption agencies, non-governmental organisations and private sector businesses.

**ANTI-CORRUPTION
LEGISLATION
IN JAPAN**



ANTI-CORRUPTION LEGISLATION IN JAPAN

CONTRIBUTED BY CLIFFORD CHANCE (TOKYO OFFICE)

Key points:

Key legislation	<ul style="list-style-type: none"> • 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 private sector bribery
Extraterritorial effect	Yes
Exemption for facilitating payment	No
Defences	No
Penalties for individuals	<ul style="list-style-type: none"> • For bribing a domestic public official: imprisonment of up to three years or fine of up to JPY2.5 million (approx. US\$22,700) • For bribing a foreign public official: imprisonment of up to five years and/or fine of up to JPY5 million (approx. US\$45,400)
Penalties for companies	<ul style="list-style-type: none"> • For bribing a domestic public official: nil • For bribing a foreign public official: fine of up to JPY300 million (approx. US\$2.7 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	<ul style="list-style-type: none"> • 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 and the UCPA deals with the bribery of public officials belonging to foreign (non-Japanese) governmental/official bodies.

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

The Criminal Code prohibits a public official from accepting, soliciting or agreeing to receive a bribe in connection with his 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 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 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 “quasi-public 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 (directors, statutory auditor, liquidator and other persons engaged in management of the entity) of which are appointed, by foreign national and/or local government(s); and (b) which is granted specific rights and interests for the performance of its business by a national or local government, as well as a person who is considered similar to the aforementioned person as designated in a cabinet ordinance;
- an official of an international organisation (IO) consisting of governments or inter-governmental organisations; 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 forbids the bribery of NTT employees; and

- The Companies Act (Law No. 86 of 2005, as amended), specifically Articles 967 and 969, prohibits giving economic benefits to directors (or similar officers) of stock corporations with the request of unlawful actions 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 national to a Japanese official whilst outside of Japan.

Under the UCPA, Japanese nationals can be found guilty of the bribery of foreign public officials even if 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 shall not constitute a “bribe” if given within the bounds of social courtesy (*shakouteki girei*). The following elements shall be taken into account in order to determine whether a gift or hospitality is given within the bounds of social courtesy or not: the relationship of the giver and the receiver; the value of the gift; the social status of the giver and the receiver; and the social circumstances.

How is bribery through intermediaries treated?

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

Are companies liable for the action of their subsidiaries?

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

Corporate liability is nonetheless possible under the UCPA. Moreover, a parent company may be liable for the action of its subsidiary if it had some involvement in the subsidiary's bribery or if the bribe-giving employee of the subsidiary could be seen as virtually an employee of the parent. Parent companies are expected to ensure that subsidiaries establish and operate systems to prevent bribery as appropriate to the degree of risk, as indicated in the updated Guidelines for the Prevention of Bribery of Foreign Public Officials released by the Ministry of Economy, Trade and Industry in July 2015.

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.

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 actions to prevent the violation in the form of proactive and specific instruction. Also, the existence of a strong compliance program 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 report, Japan disclosed certain enhancements, increased resources and additional steps it was taking to investigate and prosecute foreign bribery more effectively. In particular, Japan reported taking several measures, including: raising the profile of its foreign bribery law, such as additional training for its prosecutors and police; strengthening the coordination with law enforcement authorities; enhancing the use of mutual legal assistance requests; including foreign bribery enforcement explicitly within the duties of economic and financial crimes prosecutors; focusing on suspicious transactions reports to detect foreign

bribery cases; increasing awareness of foreign bribery law among Japanese companies; and utilising 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.

The prosecution of domestic public bribery is pursued aggressively as is prosecution of private sector bribery.

The background of the slide is the flag of Singapore, which is red with two white stars and a white horizontal band at the bottom. The flag is shown with a slight wave and a gradient effect.

**ANTI-CORRUPTION
LEGISLATION
IN SINGAPORE**

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

Key points:

Key legislation	<ul style="list-style-type: none"> • Prevention of Corruption Act (Cap 241, 1993 Rev Ed) (the PCA) • Penal Code (Cap 224, 2008 Rev Ed) (the Penal Code)
Private sector bribery	Yes
Extraterritorial effect	Yes
Exemption for facilitating payment	No
Defences	None
Penalties	<p>For private sector bribery:</p> <ul style="list-style-type: none"> • Fine not exceeding SGD100,000 (approx. US\$73,700) • Imprisonment for a term not exceeding five years or both <p>For public sector bribery:</p> <ul style="list-style-type: none"> • Fine not exceeding SGD100,000 (approx. US\$73,700) • Imprisonment for a term not exceeding seven years or both
Collateral consequences	<p>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</p> <p>See also consequences under the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 65A, 2000 Rev Ed)</p>
Anti-Corruption treaties	<ul style="list-style-type: none"> • United Nations Convention against Corruption • Member of the Financial Action Task Force • Asia Pacific Economic Cooperation Anti-Corruption & Transparency Experts' Task Force • 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 the forbearance from the exercise of any right or any official power or duty; and
- (e) any offer, undertaking or promise of any gratification within the meaning of paragraphs (a), (b), (c) and (d) above.

The PCA prohibits any person (by himself or in conjunction with 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 not only covers “public servants” but also persons “expecting to be a public servant”.

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

Foreign public official

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

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

How are gifts and hospitality treated?

As the statutory definition of “gratification” under the PCA is very wide, gifts and hospitalities (including sexual favours) 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 are of a reasonable amount are unlikely to be prosecuted. There is no industry-specific anti-corruption legislation in Singapore.

How is bribery through intermediaries treated?

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

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

Are companies liable for the action of their subsidiaries?

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

Although the reference to “person” is sufficiently broad under the PCA and Penal Code to cover companies, based on a review of current reported case law, no company has been prosecuted yet 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, nor 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 program 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. The 2016 Corruption Perceptions Index (CPI) prepared by Transparency International (TI) ranked Singapore the 7th least corrupt country of the 176 countries surveyed. Singapore scored 84 on a scale where zero denoted a country with a very high risk of corruption and 100 denoted a very clean country. Singapore has also been ranked top in the 2016 Political and Economic Risk Consultancy (PERC) annual survey as the country where perceptions of corruption are most favourable among 16 major Asia-Pacific economies, a position it has maintained since 1995. In the Rule of Law 2016 Index compiled by the World Justice Project, Singapore was ranked ninth overall worldwide, maintaining its position from 2015. Singapore was ranked first under “regulatory enforcement”, second under “absence of corruption”, fourth under “criminal justice” and “civil justice”, and second in the Asia-Pacific region overall.

Corruption in Singapore remains low and under control. The number of complaints received by the Singapore Corrupt Practices Investigation Bureau (CPIB) decreased by 8% from

877 in 2015 to 808 in 2016. A total of 118 cases were subsequently pursuable, down from 132 cases in 2015. The majority of non-pursuable cases were because of insufficient, vague or unsubstantiated information. In 2016, there were 104 individuals prosecuted for corruption offences and 96% of them were private sector employees. Custodial sentences were meted out to the majority of them.

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\$73,700). Mok Kim Whang was the company's senior vice-president 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 weak-willed 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 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.

The background of the image is a composite of two national flags. On the left, the Australian flag is shown in a blurred, out-of-focus state, with its characteristic red, white, and blue colors. On the right, the European Union flag is shown in sharp focus, featuring a blue field with a white circle of twelve five-pointed stars. The text is overlaid on the left side of the image, positioned over the blurred Australian flag.

**ANTI-CORRUPTION
LEGISLATION
IN AUSTRALIA**

ANTI-CORRUPTION LEGISLATION IN AUSTRALIA

CONTRIBUTED BY CLIFFORD CHANCE (SYDNEY AND PERTH OFFICES)

Key points:

Key legislation	Division 70 of the Criminal Code (Commonwealth): bribery of foreign public officials
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: <ul style="list-style-type: none"> • 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	Proceeds of crime actions, Australian Taxation Office imposing tax adjustments and tax penalties
Anti-corruption treaties	<ul style="list-style-type: none"> • 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 as from 1 July 2017

What is the definition of a bribe?

The legislative definition of a “bribe” is broad and includes providing, offering to provide or causing a benefit to be provided, offered or promised to another person where that benefit is not legitimately due and was intended to influence the foreign public official in the exercise of the foreign public official’s duties in order to obtain or retain business or a business advantage. There is no necessity to prove as part of the offence an intention to influence a particular foreign official. It is unnecessary for the bribe to be successful. A “benefit” includes any advantage and is not limited to tangible property.

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

Domestic public official

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

- a Commonwealth public official;
- an officer or employee of the Commonwealth or of a state or territory;
- an individual who performs work for the Commonwealth, or for a state or territory, under a contract;
- an individual who holds or performs the duties of an office established by a law of the Commonwealth or of a state or territory;
- an individual who is otherwise in the service of the Commonwealth or of a state or territory (including service as a member of a military force or police force);
- 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; and
- an officer or employee of:
 - an authority of the Commonwealth; or
 - an authority of a state or territory.

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

Foreign public official

A foreign public official is broadly defined to include:

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

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

Is private sector bribery covered by the law?

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

Does the law apply beyond national boundaries?

The law has extraterritorial application if the offence occurs wholly or partly in Australia, on board an Australian aircraft or ship or if the offence occurs outside Australia but the person is 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 action of their subsidiaries?

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

Is there an exemption for facilitating payments?

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

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

Is there a defence for having adequate compliance procedures?

There is no specific defence at the time of this publication, although the existence of a robust anti-corruption program 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. As of April 2017, the Australian Federal Police reported there are 35 ongoing foreign bribery matters, including two active prosecutions and four matters being considered for prosecution.

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. There have been three recent cases of note. Civil proceedings were brought by the Australian Securities and Investments Commission 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\$40,000) and banned from managing a corporation for five years. His co-defendant had all claims dismissed against him, a decision which is currently the subject of an appeal.

Criminal charges have been brought against two former senior executives of Leighton Holdings Limited regarding falsification of company documents. 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. The trial was due to take place in November 2017, but has been adjourned until October 2018.

Three individuals have recently been 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\$785,000) to an associate in Iraq for the purposes 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. Of interest, the investigation into the conspiracy was happened upon 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.

A trend towards greater regulation in areas associated with foreign bribery is imminent given developments in the law and a swathe of consultation processes under way. 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 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.

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 yet, there have been no charges brought under

this new offence. A Senate enquiry is also under way regarding foreign bribery, covering topics such as the resourcing of agencies, guidance as to what constitutes a good anti-bribery compliance program, self-reporting and whistleblower protection, with the report due in February 2018. The federal government plans to introduce the *Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017* 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 Bill will require public companies to have whistleblower policies.

The image features a close-up, slightly blurred view of the Thai national flag. The flag's horizontal stripes of red, white, and blue are visible, with the blue stripe being the most prominent in the center. A semi-transparent blue overlay covers the left side of the image, where the title text is placed. The overall composition is clean and professional, suitable for a report or presentation.

**ANTI-CORRUPTION
LEGISLATION
IN THAILAND**

ANTI-CORRUPTION LEGISLATION IN THAILAND

CONTRIBUTED BY CLIFFORD CHANCE (BANGKOK OFFICE)

Key points:

Key legislation	<ul style="list-style-type: none"> • 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 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 word “public official” means a person who is appointed by the Thai government to perform official functions and also includes any official appointed by special law.

Members of 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 lifetime 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) must 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; or
- 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 action of their subsidiaries?

Under Thai law, a subsidiary is treated as a separate legal entity from the parent company and is generally not liable for an offence committed by its parent company. However, the parent company can be held liable for an offence committed by its subsidiary 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 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, advisors and agents;
- companies should adopt adequate internal controls and good accounting standards;
- companies should adopt measures and controls to detect and report violations; and
- companies should carry out periodic reviews and evaluations of their anti-corruption program.

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 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; and
- 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, while the remaining two are due to be opened on 1 October 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 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; and
- individuals are charged with deliberately refusing to declare assets, falsely declaring assets or covering up assets that should have been declared.

The background of the image is a close-up, slightly blurred view of the South Korean national flag, known as the Taegeukgi. The flag features a white field with a large Taegeuk symbol in the center, composed of a red upper half and a blue lower half. In the upper right corner, the four trigrams of the flag are visible. The overall image has a soft, ethereal quality with a light grey gradient on the left side.

**ANTI-CORRUPTION
LEGISLATION
IN SOUTH KOREA**

ANTI-CORRUPTION LEGISLATION IN SOUTH KOREA CONTRIBUTED BY CLIFFORD CHANCE (SEOUL OFFICE)

Key points:

Key legislation	<ul style="list-style-type: none">• 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 Corruption• 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	<p>The CoC, Graft Act and Foreign Bribery Act each set out exemptions to what is considered a bribe. Under the CoC, to constitute a bribe, benefits provided to a public official must be in connection with their official duties. Any benefit that is not in connection with their official duties is not considered a bribe. The Graft Act allows 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 demanded or permitted under written law in the foreign official's country.</p>

Penalties for individuals

For public sector bribery:

Bribes in connection with domestic public officials:

- Under the Graft Act, a domestic public official who receives KRW1 million (approx. US\$900) at one time or, over a year, KRW3 million (approx. US\$2,700) in aggregate, is subject to: (i) imprisonment of up to three years; or (ii) a fine of up to KRW30 million (approx. US\$27,900).
- Under the Graft Act, a domestic public official who receives, or a bribe giver who gives, a bribe is subject to: (i) imprisonment of up to two years; or (ii) a fine of up to KRW20 million (approx. US\$18,600).
- 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 between two to five times the amount of the accepted bribe and imprisonment, as follows:
 - if the bribe is more than KRW100 million (approx. US\$94,000), not less than 10 years;
 - if the bribe is more than KRW50 million (approx. US\$47,000) but less than KRW 100 million (approx. US\$94,000), not less than 7 years; and
 - if the bribe is more than KRW30 million (approx. US\$27,900) but less than KRW50 million (approx. US\$47,000), not less than 5 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\$18,600).
- If the pecuniary benefit derived from the unlawful activity exceeds KRW10 million (approx. US\$9,300), 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.

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\$27,600).

<p>Penalties for companies</p>	<ul style="list-style-type: none"> • 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 KRW30million (approx. US\$27,600), unless the company has shown "due attention and supervision" to prevent the violation in question. • For bribing a foreign public official: a fine of up to KRW1 billion (approx. US\$930,000). If the pecuniary advantage derived from the bribe exceeds KRW500 million (approx. US\$465,000) the fine is twice the pecuniary advantage received. <p>Under the Foreign Bribery Act, a company is not liable for the foreign bribery offences committed by its employers, officers or agents if it proves it has taken significant measures to prevent the bribery.</p>
<p>Collateral consequences</p>	<ul style="list-style-type: none"> • 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 one year.
<p>Anti-corruption treaties</p>	<ul style="list-style-type: none"> • 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 does not refer to bribery, instead it 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. Importantly, it also makes it a criminal offence for a domestic public official to: (i) receive KRW1 million (approx. US\$900) or its equivalent at one time; or (ii) KRW3 million (approx. US\$2,700) 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. In addition, the Graft Act provides for a blanket prohibition against any domestic public official receiving the following benefits, irrespective of how or why the money or goods are received, for example, the money can be entirely unconnected with a public official’s duties. Benefits that exceed the following values: (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\$94); and (iv) for funerals and festive occasions such as weddings, KRW50,000 (approx. US\$45), except in case of condolence flowers, up to KRW100,000 (approx. US\$94).⁴ If these thresholds are exceeded, both the recipient domestic public official and the bribe giver are punishable under the Graft Act, via disciplinary action, a fine or a criminal sentence.

Under the CoC, a domestic public official is prohibited from receiving any cash, gifts or entertainment from anyone who may directly or indirectly benefit from the performance of public duties. A bribe is not limited to benefits received for the exercise of legitimate and formal duties of a domestic public official, but covers a wider range of influences over government functions. A domestic public official who: (i) handles, or is related to, other affairs concerning his office; (ii) assists with ancillary duties; and (iii) may influence a person in an official or public decision-making capacity, cannot receive bribe to exercise these functions. The CoC also sets out a threshold for the value of goods which can legally be received by a domestic public official: (i) KRW30,000 (approx. US\$27) for “food or items of value provided within the extent of normal practices”; and (ii) KRW50,000 (approx. US\$45) for cash or gifts for commemorative events such as weddings and funerals. Under the CoC, only domestic public officials (and not the bribe giver) are punishable via disciplinary action.

⁴ The permissible values are based on the proposed amendment which passed the Anti-Corruption and Civil Rights Commission in December 2017; the amendment is currently scheduled to become effective in mid-February 2018.

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 entity such as a government agency or ministry. In addition, specific statutes provide that certain individuals are deemed to be public officials (Deemed Public Officials) under the anti-corruption law. For example, the maximum criminal sentence imposed by the Criminal Code on arbitrators who receive bribes is the same as that imposed on domestic public officials. The Specific Crimes Act considers managers of government-controlled organisations or companies to be Deemed Public Officials and provides a list of specific entities falling under the category of government-controlled organisations or companies. An organisation or company is “government-controlled” if the amount of the paid-in capital invested by the government exceeds 50%, 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 (as it is not defined) 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 servant 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 was delegated; (iii) a person who works for a public statutory institution/organisation; (iv) a person who works for a corporation in which the investment made by a foreign government accounts for more than 50% 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. Unlike the analogous crime of bribing a domestic public official, it is necessary to prove the specific intent/purpose of the bribe giver behind the act of bribing in order to establish criminal liability.

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 the 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; and
- otherwise such gifts/hospitality that is within socially acceptable boundaries.

Under the Graft Act, meals, gifts and other hospitality up to the following values are explicitly permissible: (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\$94); and (iv) for funerals and festive occasions such as weddings, KRW50,000 (approx. US\$45), except in case of condolence flowers, up to KRW100,000 (approx. US\$94).⁵ Similarly, the CoC sets out a threshold of up to: (i) KRW30,000 (approx. US\$27) for “food or items of value provided within the extent of normal practices”; and (ii) KRW50,000 (approx. US\$45) for cash or gifts for commemorative events such as weddings and funerals.

⁵ The permissible values are based on the proposed amendment which passed the Anti-Corruption and Civil Rights Commission in December 2017; the amendment is currently scheduled to become effective in mid-February 2018.

In addition to these general rules, there are some specific business sector regulations allowing for exceptions to the prohibition of giving or accepting benefits under certain conditions. The regulated business sectors include the 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 makes influences a public official through a third party is subject to a fine not exceeding KRW10 million (approx. US\$9,600).

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 the 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 action of their subsidiaries?

Companies will not be held liable for the action 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 demanded 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 27 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\$900) (or KRW3 million (approx. US\$2,700) 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 September 2017, approximately 4,052 violations of the Graft Act were reported. The number of self-reported violations of the Graft Act by domestic public officials was double that of third parties, indicating strong compliance within the public sector. To date, most violations of the Graft Act have resulted in minor fines. Only one individual has been prosecuted and receiving a penalty of KRW5 million (approx. US\$4,800). The individual received a bribe of approximately KRW2 million (approx. US\$1,860) from an employee at a subcontractor company and received a penalty. A corporate entity has not yet been accused or indicted for violation of the Graft Act.

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. Another recent high profile corruption case 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.

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	<ul style="list-style-type: none"> • 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	<p>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.)</p> <p>If a gratification recipient (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</p>

<p>Penalties for individuals</p>	<p>Depending on the seriousness of the offence, penalties include:</p> <ul style="list-style-type: none"> • 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 conditions, the death penalty
<p>Penalties for companies</p>	<p>Penalties imposed on companies include:</p> <ul style="list-style-type: none"> • 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 business and/or • the payment of compensation <p>In addition to the company, its management, i.e. Board of Directors, Board of Commissioners and any relevant officers may be penalised</p>
<p>Collateral consequences</p>	<p>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</p>
<p>Anti-Corruption treaties</p>	<p>United Nations Convention against Corruption</p>

What is the definition of a bribe?

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

- giving or promising something to a public official or 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 case; or
- 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 IDR15,000,000 (approx. US\$1,120). The recipient may also be sentenced to imprisonment for up to three years and fines of up to IDR15,000,000 (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) allows the crime to be committed; and (iii) does 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 action 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 subsidiary's 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 2015, Indonesia's ranking improved to 88 out of 167 countries compared with 107 out of 175 countries in 2014; however, its position dropped slightly in 2016 to 90 out of 176).

As reported in the media and other publicly available sources, the primary enforcement efforts to date have focused on areas of financial loss to the state, such as government procurement, payments to 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); and (iii) in 2017, the KPK also caught Patrialis Akbar (the former minister of law and human rights and a Constitutional Court judge), and 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.

The background of the image is the national flag of Vietnam, featuring a solid red field with a large, five-pointed yellow star in the center. The flag is shown waving, with visible folds and creases, set against a light blue sky. The text is overlaid on the left side of the red field.

**ANTI-CORRUPTION
LEGISLATION
IN VIETNAM**

ANTI-CORRUPTION LEGISLATION IN VIETNAM CONTRIBUTED BY VILAF

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Key points:

Key legislation	<ul style="list-style-type: none">• Penal Code (effective from 1 January 2018)• Law on Anti-Corruption• Law on Cadres and Public Officials• Law on Public Employees• Decision 64 of the Prime Minister dated 10 May 2007 on giving, receiving and 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 (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	<ul style="list-style-type: none"> • Criminal penalties (including imprisonment of up to 20 years for giving a bribe and the death penalty for receiving a bribe)
Penalties for companies	<ul style="list-style-type: none"> • Criminal penalties are not applicable to companies under the Penal Code (effective from 1 January 2018)
Collateral consequences	<ul style="list-style-type: none"> • 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 VND2,000,000 (approx. US\$90) or more (or less than VND2,000,000 (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 non-material 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 the Law on Anti-Corruption 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; and
- Persons assigned to exercise a duty or an official task and having such power.

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

Foreign public official

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.

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 bribe) outside the territory of Vietnam; or
- 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 receiving and giving of gifts by organisations, units, and "staff, public officials and officials". A gift includes, among other things, cash, "valuable papers" (such as shares, bonds, certificate of deposits, promissory notes etc.), goods, properties, tourism benefits, medical services, education and training.

Decision 64 prohibits "staff, public officials and officials" from directly or indirectly receiving gifts in the following circumstances:

(i) where the public official (or person 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 action 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 anti-corruption is an express defence or a mitigating factor. That said, if the anti-corruption program 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 court has increased in recent years and we expect this trend to continue.



**ANTI-CORRUPTION
LEGISLATION
IN MALAYSIA**

ANTI-CORRUPTION LEGISLATION IN MALAYSIA

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Key points:

Key legislation	Malaysian Anti-corruption Commission Act (MACC Act)
Private sector bribery	Yes
Extraterritorial effect	Yes
Exemption for facilitating payment	No
Defences	There is no statutory defence under the MACC Act. However, the Guidelines for Giving and Receiving Gifts in the Public Service permit those in public service to accept gifts up to a certain value if they are reported
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	No additional penalty specific to companies
Collateral consequences	No
Anti-corruption treaties	United Nations Convention against Corruption

What is the definition of a bribe?

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

Instead of the word “bribe”, the MACC Act uses the word “gratification”, which includes both pecuniary and non-pecuniary bribes. 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 controlling power or interest. By this interpretation, a director or even an employee of a state-owned enterprise, more commonly known as a Government-linked Company (GLC) in Malaysia, falls under the scope of the MACC Act as they could be considered 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 officer 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 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 action 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?

The MACC Act does not provide for the defence of having adequate compliance procedures. It is unclear whether a robust anti-corruption program would be a mitigating factor in a breach as this would depend on individual cases.

What are the enforcement trends in the business area?

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

Based on the statistics on the MACC website, the number of arrests made by the MACC in 2017 (as of the date of writing) numbered 785 people.

A recent case relates to the MACC’s investigation into alleged wrongdoing and abuse of power involving the Sabah Water Department (SWD). The scandal emerged in 2016 when the MACC arrested, among others, the SWD’s former director,

deputy director, 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**

ANTI-CORRUPTION LEGISLATION IN TAIWAN CONTRIBUTED BY LCS & PARTNERS

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Key points:

Key legislation	<ul style="list-style-type: none"> • Criminal Law • Anti-corruption Statute • Money-Laundering Control Act
Private sector bribery	Not criminalised but punishable under other laws
Extraterritorial effect	Yes
Exemption for facilitating payment	No
Defences	None
Penalties for individuals	<ul style="list-style-type: none"> • 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. US\$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. US\$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. US\$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. US\$1.99 million). If the bribe is paid to a public official who is in charge of investigations and prosecutions, the penalty shall be increased by 50%

	<ul style="list-style-type: none"> • 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	<p>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:</p> <ul style="list-style-type: none"> • 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 <p>The property or property interests transferred, converted, concealed, obscured, accepted, obtained, possessed or used in such money-laundering will be confiscated</p>
Anti-corruption treaties	<ul style="list-style-type: none"> • 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 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, which 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; or
- entrusted by an organisation of the state or a self-governance body in accordance with the law to handle the public affairs that fall within the authority of the organisation.

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 has the decision-making authority for promotion 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.

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 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 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 relatives or residence and property sharing family members; or
- 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 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 friends of usual contact, 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 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; and
- the event is held for an engagement, marriage, birth, moving to a new residence, inauguration, remote transfer, retirement or resignation and does not exceed the normal standard of social etiquette.

Public officials must refrain from attending social gatherings with people with whom they do not have interest concerning their duties or 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 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, etc.

Are companies liable for the actions of their subsidiaries?

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

Is there an exemption for facilitating payments?

No, there is no exemption for facilitating payments.

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, back 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**

ANTI-CORRUPTION LEGISLATION IN THE PHILIPPINES

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Key points:

Key legislation	<ul style="list-style-type: none"> • 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	<p>Bribe given as a result of force or intimidation</p> <p>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</p>
Penalties for individuals	<ul style="list-style-type: none"> • 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

<p>Penalties for individuals</p>	<ul style="list-style-type: none"> • 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 PHP5,000.00 (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
<p>Penalties for companies</p>	<p>The company's officers, directors or employees who participated in the crime or offence shall suffer the penalties described above</p>
<p>Collateral consequences</p>	<p>Rejection or revocation of registration of the company's securities if a company officer, director or controlling person, among others, is convicted of an offence involving moral turpitude or fraud. Bribery is an offence involving moral turpitude</p>
<p>Anti-corruption treaties</p>	<ul style="list-style-type: none"> • United Nations Convention against Corruption • United Nations Convention against Transnational Organized Crime

What is the definition of a bribe?

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

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

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

Domestic public officials

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

Under the Revised Penal Code, a public official is “any person who, by direct provision of the law, popular election or appointment by competent authority, shall take part in the performance of public functions in the Government of 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 concerned public official or employee in the discharge of his official functions. This prohibition includes parties or other entertainment organised in honour of the official or employee or 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-by-case basis.

How is bribery through intermediaries treated?

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

Are companies liable for the action of their subsidiaries?

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 program 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. Among others, he 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.

**ANTI-CORRUPTION
LEGISLATION
IN INDIA**



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Key points:

Key legislation	<ul style="list-style-type: none">• Indian Penal Code 1860 (IPC)• 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• Right to Information Act 2005• Whistle Blowers Protection Act 2011• Lokpal and Lokayuktas Act 2013• Companies Act 2013• Foreign Contribution (Regulation) Act 2010
Private sector bribery	<p>No specific laws prohibit bribery in the private sector in India. While not defined as a bribery offence, the Companies Act contemplates penalising fraud by any person in relation to the affairs of a company or corporate body. Fraud has been defined to include any act, omission, concealment of any fact or abuse of position, committed by any person or any other person with the connivance in any manner, with intent to deceive, to gain undue advantage from, or to injure the interests of, the company or its shareholders or its creditors or any other person, whether or not there is any wrongful gain or wrongful loss. Laws like the PCA are restricted to bribery by 'public servants'</p>

Extraterritorial effect	<ul style="list-style-type: none"> • Indian Penal Code 1860 – Yes • PCA – Yes (to Indian citizens only) • PCA Amendment Bill 2013 – Yes (to Indian citizens only) • Lokpal Act 2013 – Yes (to Indian public servants outside India) • Central Vigilance Commission Act 2003 – Yes (to Indian citizens only)
Exemption for facilitating payment	No
Defences	<ul style="list-style-type: none"> • It may be possible for the accused to argue that the gratification received had no connection with any official act • The PCA Amendment Bill which was recently approved by the Union Cabinet and is to be tabled in Parliament, provides that companies may make the defence of showing that they had in place adequate procedures to prevent misconduct on the part of their employees. Further, it is a defence if the person in charge of the commercial organisation can prove that the offence was committed without his or her knowledge or if he or she has exercised due diligence to prevent the commission of the offence • The Whistle Blowers Protection Act provides that the head of the department in certain cases and the company may not be punished if they can prove that the offence was committed without their knowledge or if they have exercised due diligence to prevent the commission of the offence
PCA	<p>The PCA provides for a penalty of imprisonment for a period between three to seven years as well as a fine for the following offences:</p> <ul style="list-style-type: none"> • a public servant who takes gratification other than legal remuneration with regard to an official act • taking gratification, in order, by corrupt or illegal means, to influence a public servant • taking gratification, for the exercise of personal influence with a public servant

A public servant obtaining a valuable thing, without consideration from the person concerned in the proceeding or business transacted by such public servant is punishable with imprisonment for a period between six months and five years as well as a fine

Abetting the aforementioned offences relating to taking gratification, in order, by corrupt or illegal means, to influence a public servant and taking gratification, for the exercise of personal influence with a public servant is punishable with imprisonment for a period between three years and seven years as well as a fine

Criminal misconduct by a public servant leads to imprisonment for a period between four and ten years as well as a fine

Public servants who habitually commit offences under the PCA are exposed to the risk of imprisonment for a period between five and ten years as well as a fine. The punishment for an attempt to commit an offence will be imprisonment, which may extend up to five years as well as a fine. Under section 24 of the PCA, immunity against prosecution will be granted if the person has made a statement in the course of any proceeding initiated against a public servant, stating that he or she has offered or agreed to offer any gratification or other valuable thing to any public servant

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

<p>PCA Amendment Bill</p>	<p>The PCA Amendment Bill proposes to make certain changes to the penalty and has also made additions to the offences which will be subject to penalty. The PCA Amendment Bill proposes the enhancement of the penalty to imprisonment of not less than three years which may extend to seven years, as well as a fine for certain offences</p>
<p>The Whistle Blowers Protection Act:</p>	<p>The Whistle Blowers Protection Act, which was approved by both houses of Parliament and received Presidential assent on 9 May 2014, has not been brought into force as yet. The Act provides for the following penalties:</p> <ul style="list-style-type: none"> • if an organisation or concerned official furnishes incomplete or incorrect or misleading comments/explanations/reports to the competent authority, such official or organisation will be liable for a penalty which may extend to INR250 (approx. US\$4) each day until the report is furnished but will not exceed an amount of INR50,000 (approx. US\$780) • the penalty for revealing the identity of the complainant is imprisonment for a term which may extend to three years as well as a fine which may extend to INR50,000 (approx. US\$780) • any person who makes false or frivolous disclosures will be punished with imprisonment for a term which may extend to two years as well as a fine which may extend to INR30,000 (approx. US\$470)
<p>Lokpal Act</p>	<ul style="list-style-type: none"> • The Lokpal Act provides that a body called the Lokpal (ombudsman) is to be established to inquire into allegations of corruption against public functionaries • Under the Lokpal Act, making a false and frivolous or vexatious complaint will be punishable with imprisonment for a term which may extend to one year and with a fine which may extend to INR100,000 (approx. US\$1,555)
<p>Companies Act</p>	<ul style="list-style-type: none"> • The Companies Act provides that the penalty in a case of fraud by any person against a company is imprisonment for a term of six months up to ten years and a fine that will be at least the amount involved in the fraud but may extend to three times that amount

<p>Penalties for companies</p>	<ul style="list-style-type: none"> • Under the PCA, the penalties for companies include fines. In certain cases, officers in charge of a company may be held personally responsible for an offence and may be liable to imprisonment • The PCA Amendment Bill provides that investigating agencies have the authority to confiscate the bribe or the assets purchased with the bribe and such asset/property can be forfeited to the government on conviction • The Whistle Blowers Protection Act provides that every person who was in charge of the company at the time when the offence was committed could be punished based on the proceedings against such person
<p>Collateral consequences</p>	<p>Tax, money-laundering, ban from public tender, class-action</p>
<p>Anti-corruption treaties</p>	<ul style="list-style-type: none"> • 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 term “bribery” has not been defined under the PCA. However, it has been defined specifically in the context of offences relating to elections under the IPC as an act of giving gratification to any person with the object of inducing him or her or any other personnel to exercise any electoral right or of rewarding any person for having exercised any such right.

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

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

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

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

Domestic public official

The expression “public servant” has a wide import under the PCA and includes not only persons in the service or pay of the government or remunerated by the government for the performance of any public duty but also persons in the service or pay of a local authority or of a corporation established by or

under central, provincial or state legislation or an authority or a body owned, controlled or aided by the government or a government company; judges, court appointed arbitrators, senior office bearers of certain registered cooperative societies that receive or have in the past received, any financial aid from any government of India or from any corporation owned, controlled or aided by the government. The Supreme Court has held that employees of banks (whether public or private) are considered ‘public servants’ under the PCA (CBI v. Ramesh Gelli & Ors., 2016 (3) SCC 788)

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

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

Foreign public official

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

Is private sector bribery covered by the law?

While there is no specific law covering “private sector bribery”, the Companies Act 2013 contemplates punishments for “fraud”.

It 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.

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

Does the law apply beyond national boundaries?

The PCA extends to Indian citizens outside India. A reading of the provisions of the PCA along with the statement of its extent makes it clear that this statute 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?

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

The payer of the illegal gratification as an “abettor” will also be punishable. The offence of abetment is an independent, distinct and substantive offence. The mens rea or mental state of the bribe giver is important and it is irrelevant that the public servant had no authority to commit the particular offence or refused to accept the bribe. The mere offering of illegal gratification with the objective of offering gratification is considered sufficient to aggravate the offence, even if no money or other compensation is produced.

Are companies liable for the action of their subsidiaries?

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

However, the Supreme Court of India has held that, with regard to a company, the “corporate veil may be lifted where a statute itself contemplates lifting the veil, or fraud or improper conduct

is intended to be prevented, or a taxing statute or a beneficent statute is sought to be evaded or where associated companies are inextricably connected as to be, in reality, part of one concern” (Life Insurance Corporation of India v. Escorts Limited, AIR 1986 Supreme Court 1370). Hence, 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 affix liability.

Is there an exemption for facilitating payments?

Payments made to get even lawful things done promptly are prohibited and the PCA has been enforced with respect to facilitation payments. The Supreme Court of India has held, that it has “little hesitation in taking the view that ‘speed money’ is the key to getting lawful things done in good time and ‘operation signature’ be it on a gate pass or a pro forma, can delay the movement of goods, the economics whereof induces investment in bribery”, and that, if speed payments are allowed, “delay will deliberately be caused in order to invite payment of a bribe to accelerate it again” (Som Prakash v State of Delhi, AIR 1974 Supreme Court 989).

Is there a defence for having adequate compliance procedures?

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

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

What are the enforcement trends in the business area?

Recent cases have demonstrated strong and substantive enforcement activity.

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

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 were 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 SFIO, it shall be the sole authority to investigate the case and all the papers, documents and the information shall be transferred to SFIO, which has power to arrest people for violations of the Companies Act 2013.

The background of the slide is a close-up, slightly blurred image of the United States flag, showing the stars and stripes. The flag is positioned on the right side of the slide, with the stars in the upper left and the stripes extending towards the bottom right. The colors are vibrant, with a deep blue, bright red, and clean white.

**ANNEXURE 1 –
THE US FOREIGN
CORRUPT
PRACTICES ACT**

ANNEXURE 1 – THE US FOREIGN CORRUPT PRACTICES ACT

What is the definition of a bribe?

The Foreign Corrupt Practices Act (FCPA) prohibits the provision of anything of value, 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 action of their subsidiaries?

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

Is there an exemption for facilitating payments?

The FCPA has an express exception for facilitation or expediting payments – relatively insignificant payments made to facilitate or expedite performance of a “routine governmental action”. 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 program defence. However, the existence of a strong compliance program may be taken into account by the enforcement authorities when making a determination whether to prosecute certain companies or may support mitigation of the ultimate penalty.

What are the enforcement trends in the business area?

In April 2016, the DOJ's Criminal Division launched a one-year FCPA Pilot Program to encourage corporations to make self disclosures of FCPA violations while providing for reduced penalties in cases of cooperation. The Pilot Program was extended in March 2017. On 29 November 2017, the DOJ announced a revised FCPA Corporate Enforcement Policy, incorporating elements of the Pilot Program guidance. The revised Policy creates a presumption of declination in cases where companies provide the DOJ a self-disclosure, full cooperation and timely and appropriate remediation of FCPA compliance deficiencies.

The announcement followed the release of the DOJ's guidance on Evaluation of Corporate Compliance Programs, in February 2017.

During the first year of the Trump administration, the SEC announced two settlements with companies for violations of the FCPA's books and records provisions, a significant decrease from 2016. DOJ enforcement has remained active, with a greater emphasis on voluntary self-disclosures and cooperation. Since 20 January 2017, the DOJ has announced two declinations against corporate defendants, with disgorgement of profits, and eight criminal actions against corporate and individual defendants.



**ANNEXURE 2 –
THE UK
BRIBERY ACT**

ANNEXURE 2 – THE UK BRIBERY ACT

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

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

The Bribery Act contains 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 Kingdom (or any subdivision of such a country or territory), or (ii) for any public agency or public enterprise of that country or territory (or subdivision) or
- is an official or agent of a public international organisation.”

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

- countries or territories;
- governments of countries or territories;
- other public international organisations; or
- 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 provide services for or on behalf of the organisation). The definition of a person “associated with” a commercial organisation is set out in further detail below. The offence can be triggered by acts of bribery anywhere in the world.

A commercial organisation will be guilty of an offence if a person associated with the organisation bribes another person with the intention of obtaining or retaining business or an advantage in the conduct of business for that organisation. The commercial organisation does not need to be an entity incorporated in 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 only one defence to the Corporate Offence: the organisation must prove that it had “adequate procedures” in

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

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

How is bribery through intermediaries treated?

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

Are companies liable for the action of their subsidiaries?

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

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

Is there an exemption for facilitating payments?

There is no exemption in the Bribery Act for facilitation 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 ...”.

The SFO has stated⁷ though that “[i]t would be wrong to say there is no flexibility” [with respect to prosecution for facilitation payments] and that “[w]hether or not the SFO prosecutes in relation to facilitation payments will always depend on (a) whether it is a serious or complex case which falls within the SFO’s remit and, if so, (b) whether the SFO concludes, applying the Full Code Test in the Code for Crown Prosecutors, that there is an offender that should be prosecuted”. By way of

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>

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

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

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

use of UK diplomatic channels or participating in “locally active non-governmental organisations” to apply pressure on the relevant governmental authorities.

Is there a defence for having adequate compliance procedures?

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

The MoJ Guidance sets out six principles (described as “not prescriptive”) that should inform an organisation’s corporate anti-corruption program:

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.

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 3: Risk assessment

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

Principle 4: Due diligence

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

Principle 5: Communication (including training)

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

Principle 6: Monitoring and review

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

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

What are the enforcement trends in the business area?

In March 2017, the Organisation for Economic Co-operation and Development Working Group on Bribery completed its Phase 4 evaluation of the UK's implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International

Business Transactions. The report concluded that foreign bribery enforcement had increased significantly in the UK since 2012.

While this 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 pre-dated the Bribery Act.

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 Serious Fraud Office (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 £330,000 to the SFO. In addition, Standard Bank agreed to cooperate with the SFO and to implement the recommendations of an independent reviewer.

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 £497,252,645 in disgorgement of profits plus a financial penalty, as well as around £13 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 review program 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 guilty 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 SFO’s Annual Report for the reporting year 2016-17, the Director said that the SFO had opened 12 new criminal investigations in that year, including investigations into “allegations of bribery and corruption concerning companies such as Airbus Group, Unaoil and ABB Ltd”. He reported significant progress in investigations “with charges brought against 25 companies and individuals in eight cases”. During the year, 13 defendants were convicted in seven cases, giving a conviction rate of 86.7 % by defendant, and of 100% by case.

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Asia Anti-Bribery and Corruption update 2017	September 2017
Anti-Bribery and Corruption Review	June 2017
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