Anti-Corruption Regulation

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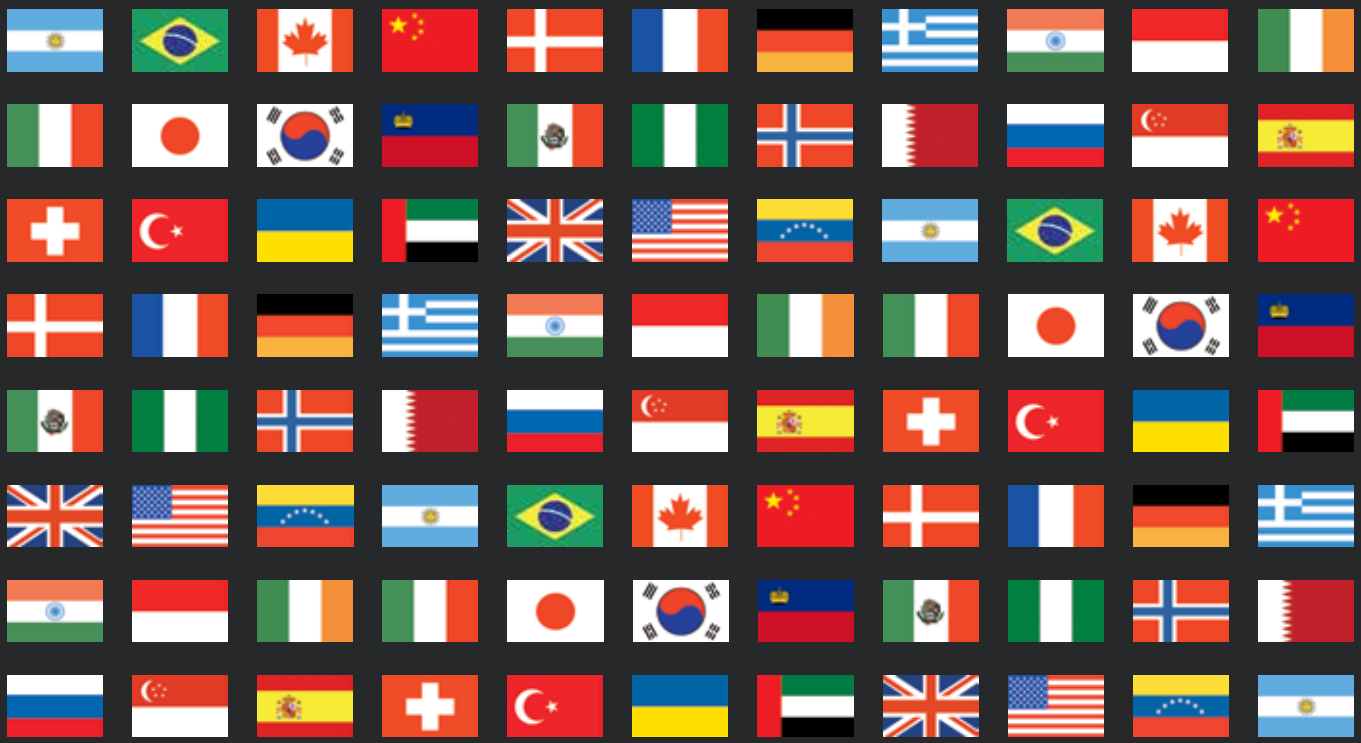

2017

GETTING THE DEAL THROUGH

GETTING THE DEAL THROUGH

Anti-Corruption Regulation 2017

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Preface

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Eleventh edition

Getting the Deal Through is delighted to publish the eleventh edition of *Anti-Corruption Regulation*, which is available in print, as an e-book, and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new article on Calculating Penalties.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Homer E Moyer Jr of Miller & Chevalier, for his continued assistance with this volume.

GETTING THE DEAL THROUGH

London
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Global overview

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Corruption, including corruption of public officials, dates from early in human history and countries have long had laws to punish their own corrupt officials and those who pay them bribes. But national laws prohibiting a country's own citizens and corporations from bribing public officials of other nations are a new phenomenon, less than a generation old. Over the course of perhaps the past 20 years, anti-corruption law has established itself as an important, transnational legal speciality, one that has produced multiple international conventions and scores of national laws, as well as an emerging jurisprudence that has become a prominent reality in international business and a well-publicised theme in the media.

This volume undertakes to capture the growing anti-corruption jurisprudence that is developing around the globe. It does so first by summarising national anti-corruption laws that have implemented and expanded the treaty obligations that more than 150 countries have now assumed. These conventions oblige their signatories to enact laws that prohibit paying bribes to foreign officials. Dozens of countries have already done so, as this volume confirms. These laws address both the paying and receiving of illicit payments – the supply and the demand sides of the official corruption equation – as well as mechanisms of international cooperation that have never before existed.

Second, this volume addresses national financial record-keeping requirements that are increasingly an aspect of foreign bribery laws because of their inclusion in anti-corruption conventions and treaties. These requirements are intended to prevent the use of accounting practices to generate funds for bribery or to disguise bribery on a company's books and records. Violations of record-keeping requirements can provide a separate basis of liability for companies involved in foreign as well as domestic bribery.

Finally, because the bribery of a foreign government official also implicates the domestic laws of the country of the corrupt official, this volume summarises the better-established national laws that prohibit domestic bribery of public officials. Generally not a creation of international obligations, these are the laws that apply to the demand side of the equation and may also be brought to bear on payers of bribes who, although foreign nationals, may be subject to personal jurisdiction, apprehension and prosecution under domestic bribery statutes.

The growth of anti-corruption law can be traced through a number of milestone events that have led to the current state of the law, which has most recently been expanded by the entry into force in December 2005 of the sweeping United Nations Convention against Corruption. Spurred on by a growing number of high-profile enforcement actions, investigative reporting and broad media coverage, ongoing scrutiny by non-governmental organisations and the appearance of an expanding cottage industry of anti-corruption compliance programmes in multinational corporations, anti-corruption law and practice is rapidly coming of age.

The US 'questionable payments' disclosures and the FCPA

The roots of today's legal structure prohibiting bribery of foreign government officials can fairly be traced to the serendipitous discovery in the early 1970s of a widespread pattern of corrupt payments to foreign government officials by US companies. First dubbed merely 'questionable' payments by regulators and corporations alike, these practices came to light in the wake of revelations that a large number of major US corporations had used off-book accounts to make large payments to foreign officials to secure business. Investigating these disclosures, the US Securities and Exchange Commission (the SEC) established a voluntary disclosure programme that allowed companies that admitted to having made illicit payments to escape prosecution on the condition that they implement compliance programmes to prevent the payment of future bribes. Ultimately, more than 400 companies, many among the largest in the United States, admitted to having made a total of more than US$300 million in illicit payments to foreign government officials and political parties. Citing the destabilising repercussions in foreign governments whose officials were implicated in bribery schemes – including Japan, Italy and the Netherlands – the US Congress, in 1977, enacted the Foreign Corrupt Practices Act (the FCPA), which prohibited US companies and individuals from bribing non-US government officials to obtain or retain business and provided for both criminal and civil penalties.

In the first 15 years of the FCPA, during which the US law was unique in prohibiting bribery of foreign officials, enforcement was steady but modest, averaging one or two cases a year. Although there were recurring objections to the perceived impact that this unilateral law was having on the competitiveness of US companies, attempts to repeal or dilute the FCPA were unsuccessful. Thereafter, beginning in the early to mid-1990s, enforcement of the FCPA sharply escalated, and, at the same time, a number of international and multinational developments focused greater public attention on the subject of official corruption and generated new and significant anti-corruption initiatives.

Transparency International

In hindsight, a different type of milestone occurred in Germany in 1993 with the founding of Transparency International, a non-governmental organisation created to combat global corruption. With national chapters and chapters-in-formation now in more than 100 countries, Transparency International promotes transparency in governmental activities and lobbies governments to enact anti-corruption reforms. Transparency International's annual Corruption Perceptions Index (the CPI), which it began publishing in 1995, has been uniquely effective in publicising and heightening public awareness of those countries in which official corruption is perceived to be most rampant. Using assessment and opinion surveys, the CPI currently ranks 168 countries and territories by their perceived levels of corruption and publishes the results annually. In 2015, Denmark and Finland, followed by Sweden and New Zealand, topped the index as the countries perceived to be the world's least corrupt, while Somalia and North Korea, followed by Afghanistan and Sudan, were seen as the most corrupt.

Transparency International has also developed and published the Bribe Payers Index (the BPI), a similar index designed to evaluate the supply side of corruption and rank the 28 leading exporting countries according to the propensity of their companies to bribe foreign officials. In the 2011 BPI, Dutch and Swiss firms were seen as the least likely to bribe, while Russian firms, followed closely by Chinese and Mexican firms, were seen as the worst offenders.

Through these and other initiatives, Transparency International has become recognised as a strong and effective voice dedicated solely to combating corruption worldwide.

The World Bank

Three years after the formation of Transparency International, the World Bank joined the battle to stem official corruption. In 1996, James D Wolfensohn, then president of the World Bank, announced at the annual meetings of the World Bank and the International Monetary Fund that the international community had to deal with 'the cancer of corruption'. Since then, the World Bank has launched more than 600 programmes designed to curb corruption globally and within its own projects. These programmes, which have proved controversial and have encountered opposition from various World Bank member states, include debarring consultants and contractors that engage in corruption in connection with World Bank-funded projects. Since 1999, the World Bank has debarred or otherwise sanctioned over 900 firms and individuals for fraud and corruption, and referrals from the Integrity Vice Presidency of findings of fraud or corruption to national authorities for prosecution have resulted in over 60 criminal convictions. In 2016, the World Bank announced that during the 2016 fiscal year (ending 30 June 2016) it debarred or otherwise sanctioned 58 firms and individuals for wrongdoing, including several high-profile negotiated resolution agreements in which companies acknowledged misconduct related to a number of World Bank-financed projects and cooperated with authorities from numerous countries to quickly address corruption identified during ongoing World Bank investigations. The World Bank maintains a listing of firms and individuals it has debarred for fraud and corruption on its website and, in an effort to increase the transparency and accountability of its sanctions process, the World Bank recently began publishing the full text of sanction decisions issued by its Sanctions Board. As part of the World Bank's effort to curb corruption, the Integrity Compliance Office (the ICO) also works to strengthen anti-corruption initiatives in companies of all sizes, including assisting debarred companies to develop suitable compliance programmes and fulfil other conditions of their sanctions.

In July 2004 and August 2006, the World Bank instituted a series of reforms that established a two-tier administrative sanctions process that involves a first level of review by a chief suspension and debarment officer (SDO) followed by a second level review by the World Bank Group's Sanctions Board in cases where the sanctions are contested. In August 2006, the World Bank also established a voluntary disclosure programme (VDP) which allows firms and individuals who have engaged in misconduct – such as fraud, corruption, collusion or coercion – to avoid public debarment by disclosing all past misconduct, adopting a compliance programme, retaining a compliance monitor and ceasing all corrupt practices. The VDP, which was two years in development under a pilot programme, is administered by the World Bank's Department of Institutional Integrity. In mid-2015, the World Bank's Office of Suspension and Debarment (the OSD) published a report with case processing and other performance metrics related to 368 sanctions imposed on firms and individuals in World Bank-financed projects from 2007 to 30 June 2015 (not including cross-debarments or sanctioned affiliates). Per the OSD report, most of these sanctions resulted in debarments.

In April 2010, the World Bank and four other multilateral development banks (MDBs) – the African Development Bank, the Asian Development Bank, the European Bank for Reconstruction and Development and the Inter-American Development Bank Group – each agreed to cross-debar any firm debarred by one of the other MDBs for engaging in corruption or fraud on an MDB-financed development project. Mutual enforcement is subject to several criteria, including that the initial debarment is made public and the debarment decision is made within 10 years of the misconduct. The agreement also provides for wider enforcement of cross-debarment procedures by welcoming other international financial institutions to join the agreement after its entry into force. According to recent annual updates issued by the World Bank Group Integrity Vice Presidency, the World Bank has crossed-debarred hundreds of entities over the past six years, including 38 in the fiscal year 2016 alone.

In October 2010, the World Bank announced the creation of the International Corruption Hunters Alliance to connect anti-corruption authorities from different countries and to aid in the tracking and resolving of complex corruption and fraud investigations that are cross-border in nature. According to the World Bank, the Alliance, which organises biennial meetings, has succeeded in bringing together over 350 enforcement and anti-corruption officials from more than 130 countries in an effort to inject momentum into global anti-corruption efforts.

Finally, the World Bank has significantly expanded its partnerships with national authorities and development organisations in recent years to increase the impact of World Bank investigations and increase the capacity of countries throughout the world to combat corruption. For example, since 2010, the World Bank has entered into more than a dozen cooperation agreements with authorities such as the UK Serious Fraud Office (the SFO), the European Anti-Fraud Office, the International Criminal Court, the United States Agency for International Development, the Australian Agency for International Development, the Nordic Development Fund, the Ministry of Security and Justice of the Netherlands, the Liberian Anti-Corruption Commission and the Ombudsman of the Philippines.

In the coming years, the World Bank's prestige and leverage promise to be significant forces in combating official corruption, although the World Bank continues to face resistance from countries in which corrupt practices are found to have occurred.

International anti-corruption conventions

Watershed developments in the creation of global anti-corruption law came with the adoption of a series of international anti-corruption conventions between 1996 and 2005. Although attention in the early 1990s was focused on the Organisation for Economic Co-operation and Development (the OECD), the Organisation of American States (the OAS) was the first to reach agreement, followed by the OECD, the Council of Europe and the African Union. Most recent, and most ambitious, is the United Nations Convention against Corruption, adopted in 2003. The events unfolded as follows.

On 29 March 1996, OAS members initialled the Inter-American Convention against Corruption (the IACAC) in Caracas. The IACAC entered into force on 6 March 1997. Thirty-three of the 34 signatories have now ratified the IACAC. The IACAC requires each signatory country to enact laws criminalising the bribery of government officials. It also provides for extradition and asset seizure of offending parties. In addition to emphasising heightened government ethics, improved financial disclosures and transparent bookkeeping, the IACAC facilitates international cooperation in evidence-gathering.

In 1997, 28 OECD member states and five non-member observers signed the Convention on Combating Bribery of Foreign Officials in International Business Transactions (OECD Anti-Bribery Convention), which was subsequently ratified by the requisite number of parties and entered into force on 15 February 1999. Forty-one countries in all, including six countries not currently members of the OECD, have now signed and ratified the OECD Anti-Bribery Convention, most recently Latvia, which ratified the country's accession to the convention on 31 March 2014. After amending its anti-corruption legislation to meet with OECD standards, Peru renewed its request to join the OECD Anti-Bribery Convention in June 2016 and is poised to become the next signatory to the Convention.

States that are parties to the OECD Anti-Bribery Convention are bound to provide mutual legal assistance to one another in the investigation and prosecution of offences within the scope of the OECD Anti-Bribery Convention. Moreover, such offences are made extraditable. Penalties for transnational bribery are to be commensurate with those for domestic bribery, and in the case of states that do not recognise corporate criminal liability (eg, Japan), the OECD Anti-Bribery Convention requires such states to enact 'proportionate and dissuasive non-criminal sanctions'.

In terms of monitoring implementation and enforcement, the OECD has set the pace. The OECD Working Group on Bribery (Working Group) monitors member countries' enforcement efforts through a regular reporting and comment process. After each phase, Working Group examiners will issue a report and recommendations, which are forwarded to the government of each participating country and are posted on the OECD's website. In phase I of the monitoring process, examiners assess whether a country's legislation adequately implements the OECD Anti-Bribery Convention. In phase II, examiners evaluate whether a country is enforcing and applying this legislation. In phase III, examiners evaluate the progress a country has made in addressing weaknesses identified during phase II, the status of the country's ongoing enforcement efforts, and any issues raised by changes in domestic legislation or institutional framework. Since nearly

all signatories to the OECD Anti-Bribery Convention had undergone these three phases of monitoring, in March 2016 the Working Group launched phase IV, which is focused on key group-wide cross-cutting issues; the progress made on addressing any weaknesses identified in previous evaluations; enforcement efforts and results; and any issues raised by changes in the domestic legislation or institutional framework of each participating country. According to the OECD, phase IV seeks to take a tailored approach, considering each country's unique situation and challenges, and reflecting positive achievements.

On 26 November 2009, the OECD Council issued its first resolution on bribery since the adoption of the OECD Anti-Bribery Convention. Entitled the 'Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions', the resolution urges member countries to continue to take meaningful steps to deter, prevent and combat the bribery of foreign public officials, not only on a national level, but on a multinational level, with rigorous and systemic follow-up. Among other things, the resolution recommends that member countries 'encourage companies to prohibit or discourage the use of small facilitation payments', and to always require accurate accounting of any such payments in the companies' books and records. The resolution was supplemented by two annexes setting forth 'Good Practice Guidance', one for member countries and one for companies.

On 4 November 1998, following a series of measures taken since 1996, the member states of the Council of Europe and eight observer states, including the United States, approved the text of a new multilateral convention – the Criminal Law Convention on Corruption. A year later, the parties adopted the Civil Law Convention on Corruption. Forty-five countries have ratified the Criminal Convention, which entered into force on 1 July 2002, while 35 countries have ratified the Civil Convention, which entered into force on 1 November 2003.

The Criminal Convention covers a broad range of offences including domestic and foreign bribery, trading in influence, money laundering and accounting offences. Notably, the Criminal Convention also addresses private bribery. The Criminal Convention sets forth cooperation measures and provisions regarding the recovery of assets. Similar to the OECD Anti-Bribery Convention, the Criminal Convention establishes a monitoring mechanism, the Group of States against Corruption, to conduct mutual evaluations.

The Civil Convention provides for compensation for damage that results from acts of public and private corruption. Other measures include civil law remedies for injured persons, invalidity of corrupt contracts and whistle-blower protection. Compliance with the Civil Convention is also subject to peer review.

The African Union Convention on Preventing and Combating Corruption was adopted on 11 July 2003. To date, 35 of the 48 signatories have ratified the African Union Convention. The convention covers a wide range of offences including bribery (domestic and foreign), diversion of property by public officials, trading in influence, illicit enrichment, money laundering and concealment of property. The convention also guarantees access to information and the participation of civil society and the media in monitoring it. Other articles seek to ban the use of funds acquired through illicit and corrupt practices to finance political parties and require state parties to adopt legislative measures to facilitate the repatriation of the proceeds of corruption.

Most aggressive, and potentially most important, of all of the international conventions is the United Nations Convention against Corruption. One hundred and forty countries have signed this convention, which was adopted by the United Nations General Assembly on 31 October 2003. The convention entered into force on 14 December 2005 and 181 countries are now party to it, though not all are signatories.

The United Nations Convention against Corruption addresses seven principal topics: mandatory and permissive preventive measures applicable to both the public and private sectors, including accounting standards for private companies; mandatory and permissive criminalisation obligations, including obligations with respect to public and private sector bribery, trading in influence and illicit enrichment; private rights of action for the victims of corrupt practices; anti-money laundering measures; cooperation in the investigation and prosecution of cases, including collection actions, through mutual legal assistance and extradition; and asset recovery.

Enforcement

Public dispositions of anti-corruption enforcement actions, media reports of official and internal investigations, disclosures in corporate filings with securities regulatory agencies and stock exchanges, private litigation between companies and former employees, monitoring reports by international organisations, voluntary corporate disclosures, occasional confessions or exposés of implicated individuals, public statements by enforcement officials, statistics compiled by NGOs and international organisations, findings of anti-corruption commissions, World Bank reports and academic studies all provide windows into the fast-changing landscape of enforcement of anti-corruption laws and conventions. Although public knowledge of official investigations and enforcement activity often lags behind, sometimes by years, the available indicators suggest ever-increasing enforcement activity. Without going beyond the public domain, a few recent examples indicate the breadth and diversity of anti-corruption enforcement, including international cooperation, extraterritorial and parallel enforcement, the use of liberalised bank secrecy laws and a growing array of penalties and sanctions.

Brazil

In the spring of 2014, the Federal Police of Brazil launched a money laundering investigation into, among other things, allegations of corruption at Petroleo Brasileiro SA (Petrobras), Brazil's state-controlled oil company. In less than two years, the investigation had gone global, with enforcement authorities from countries around the world, including the United States, joining Brazil in investigating alleged improper payments to Petrobras personnel, as well as to a range of other Brazilian officials, including several high-ranking politicians and officials from other Brazilian state-owned or controlled entities. The investigation, known in Portuguese as 'Operação Lava Jato', has already led to criminal indictments against 259 individuals, and has expanded to include many non-Brazilian companies. Since mid-2015, Brazilian authorities have succeeded in securing a large number of prominent convictions related to these indictments.

For example, on 20 July 2015, a Brazilian court handed down substantial sentences to three top executives from a Brazilian construction conglomerate for their involvement in a vast price-fixing scheme that resulted in the channelling of improper payments to Petrobras. The executives, including the former CEO, former vice president, and former chairman, were convicted and sentenced on charges of active corruption, money laundering and conspiracy related to the construction of a Petrobras refineries in the states of Pernambuco and Paraná. The former CEO and the vice president, both of whom entered into plea agreements, each received a sentence of 15 years' imprisonment and 10 months' house arrest. The former chairman, who apparently did not cooperate with the prosecution, was sentenced to nine years and six months' imprisonment. The executives were convicted alongside three other defendants – a former Petrobras executive, a black-market banker and a federal police officer who were also connected to the scheme.

On 17 August 2015, a Brazilian court sentenced the former director of Petrobras's international division to 12 years' imprisonment on charges of corruption and money laundering. The former director was convicted alongside two other defendants for helping to facilitate bribes from a Korean shipbuilding company in exchange for two drillship contracts awarded by Petrobras and its partners. Brazilian prosecutors also charged the president of the Chamber of Deputies of Brazil with accepting US$5 million in bribes related to these contracts.

On 8 March 2016, a Brazilian court sentenced the former CEO of another major Brazilian construction conglomerate (and one of Brazil's wealthiest businessmen) to 19 years and four months' imprisonment for various offences, including money laundering, corruption and criminal association, for his role in the payment of bribes to Petrobras officials to win favourable contracts. Several other executives of the conglomerate, along with several Petrobras officials, have also been convicted and sentenced for their participation in the scheme.

On 14 September 2016, Brazilian prosecutors charged Brazil's former president with several offences, including money laundering and passive corruption, for allegedly receiving personal benefits in exchange for facilitating lucrative contracts with Petrobras and for participating in a scheme that involved using bribes paid by Petrobras contractors for political gain. And in the months following this initial

indictment, prosecutors have added to the list of charges against the former president as Operação Lava Jato has continued to develop.

Finally, on 21 December 2016, Brazilian authorities, alongside their US and Swiss counterparts, announced a coordinated global settlement with one of the Brazilian construction conglomerates and its petrochemical unit in connection with the underlying misconduct outlined above. To resolve criminal and civil charges at the corporate level, the companies agreed to pay at least US$3.5 billion in fines and disgorgement to government authorities in Brazil, Switzerland, and the United States, making it the largest collective foreign bribery resolution in history.

According to Brazil's Federal Public Prosecutor's Office, as of 19 December 2016, Operação Lava Jato has led to 120 international cooperation requests and the convictions of 120 individuals.

Netherlands

In November 2014, a Dutch oilfield services provider entered into an out-of-court settlement with the Openbaar Ministerie, the Dutch Public Prosecutor's Service to resolve a variety of anti-corruption allegations. Under the terms of the settlement, the company agreed to pay a fine of US$40 million along with US$200 million in disgorgement, for a total monetary assessment of US$240 million. According to the Openbaar Ministerie, the company voluntarily disclosed tens of million dollars in potentially suspect commission payments that it had made to foreign sales agents for services in a range of countries, including Angola, Equatorial Guinea and Brazil, from 2007 to 2011. The company's internal investigation into the matter found that certain of the company's agents had provided local government officials with significant 'items of value', including rerouted commission payments, travel, education costs, cars, and a building. In the opinion of the Openbaar Ministerie, these payments were made with the knowledge of company employees. As part of the settlement, and in recognition of the company's voluntary disclosure, cooperation and remediation, the company will not face criminal prosecution in the Netherlands. The company also announced that the US Department of Justice (DOJ), which had been conducting its own investigation into the allegations, informed the company it had decided to close its inquiry without bringing an enforcement action. On 22 January 2016, the company's CEO and a member of its supervisory board entered into out-of-court settlements with Brazilian authorities related to the underlying allegations. As part of these settlements, the defendants each accepted a fine of 250,000 reais to be paid by the company, with no admission of guilt.

In February 2016, a Netherlands-based global telecommunications provider entered into a joint settlement with the Openbaar Ministerie and the US DOJ and the SEC to resolve corruption allegations relating to the company's activities in Uzbekistan. According to the Openbaar Ministerie, the company, operating through its Uzbek subsidiary, made more than US$114 million in improper payments to a foreign official in Uzbekistan in exchange for that official's understood influence over the telecommunications regulator in Uzbekistan. Under the terms of its settlement with Dutch authorities, the company agreed to pay a US$100 million criminal fine and disgorge US$167.5 million in profit. In its parallel settlement with US authorities, the company and its Uzbek subsidiary further agreed to a US$460.3 million criminal fine and a US$375 million disgorgement, approximately US$397.5 million of which was collectively offset in recognition of the company's payments to Dutch authorities.

France

On 8 November 2016, France adopted Sapin II, legislation that significantly strengthens the country's anti-corruption regime, which had been criticised by the OECD as being out of step with the country's treaty obligations. The new law does not significantly change existing prohibitions on corruption, but instead eliminates certain prerequisites that greatly curtailed the jurisdictional reach of the prior law, including provisions that permitted jurisdiction only when:

- a victim or wrongdoer was a French citizen;
- the conduct at issue was an offence in both France and in the place where the conduct occurred; and
- the complaint was filed by either a victim or a relevant foreign authority (the 'dual criminality' requirement).

The new law also requires companies and presidents, directors and managers of companies with over 500 employees and annual gross revenues exceeding €100 million to implement an anti-corruption compliance programme containing a variety of components, including a code of conduct, accounting controls, and training programs for high-risk employees.

Sapin II establishes the 'Agence Française Anti-Corruption' (AFA), a new anti-corruption agency with expanded enforcement powers beyond those of the Service Central de Prévention de la Corruption, the former agency responsible for enforcement. Among other things, the AFA will be in charge of:

- assisting in preventing and detecting corruption;
- verifying that companies required to adopt compliance programmes have such programmes in place;
- reporting possible violations of the law to prosecutors; and
- overseeing corporate monitorships.

Of note, article 22 of the new law enables French authorities to negotiate US-style deferred prosecution agreements (DPAs) in cases of domestic and foreign corruption, a new development within the French legal system. Although cooperating companies will have to agree to the facts enumerated in the DPA, they will not be required to admit guilt. Under these new DPAs, companies can be fined an amount equal to the benefit secured through the illicit activity up to 30 per cent of the company's average revenue for the past three years.

United Kingdom

In April 2013, the UK enacted the Crime and Courts Act 2013, which permits the SFO and the Crown Prosecution Service (the CPS) to enter into DPAs with cooperating corporate defendants to settle prosecutions for fraud, bribery and economic crimes. While UK law already permitted DPAs in the prosecution of individuals, the adoption of corporate DPAs mirrors a common approach by the US government for prosecuting corporate misconduct in the anti-corruption area. According to a draft Deferred Prosecution Agreement Code of Practice issued by the SFO and CPS, these agencies intend to use DPAs as 'an alternative to prosecution' and see the agreements as 'a discretionary tool … to provide a way of responding to alleged criminal conduct'. DPAs will not be offered in every prosecution. Instead, the draft code of practice outlines when the SFO and CPS will offer to negotiate a DPA and how such negotiations will proceed.

On 30 November 2015, the SFO announced that a prominent African bank had entered into the UK's first DPA over charges of failing to prevent bribery under section 7 of the Bribery Act. Specifically, the bank had failed to prevent its former sister company from making a US$6 million payment to a local partner in Tanzania, allegedly intended to induce members of the Tanzanian government to award a contract that later generated US$8.4 million for Standard and its sister company. As part of the DPA, the bank agreed to pay a fine of US$25.2 million to the UK government, US$7 million in restitution to the government of Tanzania, and £330,000 in 'reasonable costs' the SFO incurred in connection with the investigation. In a parallel settlement in the United States, the bank agreed to pay a US$4.2 million penalty to the SEC for making materially misleading statements to investors related to the transaction, although the SEC conceded that it did not have jurisdiction to charge the bank under the FCPA.

On 4 April 2016, a Glasgow-based logistics group entered into a civil settlement with the Civil Recovery Unit of the Scottish Crown Office and Procurator Fiscal Service (the COPFS), the entity responsible for enforcing the Bribery Act in Scotland. Under the terms of the settlement, the company agreed to pay a £2.2 million fine to resolve alleged violations of the Bribery Act. The company self-reported after an internal investigation uncovered unlawful payments related to two freight-forwarding contracts entered into by its local subsidiary:

- payments to a customer's employee that were funded by the dishonest inflation of the customer's invoices and provided via an account the employee used for personal expenses, including travel and gifts; and
- a secret profit-sharing agreement with the director of another customer, which rewarded the director for contracts placed with the company.

United States

In 2016, the DOJ and the SEC resolved 57 FCPA-related enforcement actions. These cases involved both US and non-US individuals and corporations and imposed a range of civil and criminal penalties. Corporate defendants resolved these cases by entering into DPAs, non-prosecution agreements and plea agreements. In some instances, a condition of settlement has been that the company retain and pay for an 'independent compliance monitor', who is given broad authority under these agreements. In other instances, the company has been required to 'self-report' at periodic intervals on the status of its remediation and compliance efforts. On several occasions, the US enforcement agencies have also imposed a hybrid of the two, requiring companies to retain and pay for an 'independent compliance monitor' during the first half of their probationary period and 'self-report' at periodic intervals during the second half.

The 57 FCPA-related dispositions in 2016 represent the second-highest annual total on record and comes just a year after enforcement had fallen to a 10-year low in 2015. This increase was largely driven by the SEC, which entered into substantially more corporate FCPA dispositions in 2016 than the DOJ, which has shifted its focus toward larger cases involving more serious misconduct. Over the past decade, the DOJ and SEC have averaged more than 35 enforcement actions a year compared with approximately four a year during the first 28 years following the statute's enactment. Accompanying this increase in overall enforcement, the sanctions pursued by the agencies have also increased in severity, particularly in recent years, with monetary penalties (including fines, disgorgement of profits, and payment of pre-judgment interest) significantly eclipsing those imposed by earlier FCPA settlements. For example, from 2005 to 2007, the DOJ and SEC imposed approximately US$272 million in FCPA-related corporate penalties, with the average combined penalty coming to nearly US$11 million. In the ensuing nine years, these figures have skyrocketed, with the agencies imposing approximately US$4.35 billion in FCPA-related corporate penalties from 2014 to 2016, bringing the average combined penalty to more than US$89 million.

Individuals have increasingly been targets of prosecution by US authorities and have been sentenced to prison terms, fined heavily, or both. Since 2011, over 90 individuals have been charged with or convicted of criminal or civil violations of the FCPA, and this emphasis by US enforcement authorities on the prosecution of individuals shows no signs of letting up. On 9 September 2015, Deputy Attorney General Sally Yates issued a memorandum entitled 'Individual Accountability for Corporate Wrongdoing' to federal prosecutors nationwide detailing new DOJ policies that require a corporation that wants to receive credit for cooperating with the government to provide 'all relevant facts' about employees at the company who were involved in the underlying corporate wrongdoing. The new FCPA enforcement 'pilot program', an initiative the DOJ launched in April 2016 to promote the self-disclosure of potential FCPA violations, furthers these aims, explicitly requiring that companies comply with the Yates Memo directives to receive full cooperation credit.

Among other notable developments this past year, several companies entered into substantial 'global' settlements to resolve FCPA-related charges in multiple jurisdictions simultaneously, including the aforementioned Brazil-based construction company and Netherlands-based global telecommunications provider, reflecting levels of coordination and international cooperation heretofore not seen between the United States and a variety of other countries.

This small sample of the diverse array of investigations and prosecutions under way or pending reflects a pronounced shift in anti-corruption law and a dramatic escalation of enforcement activity compared with only a decade ago.

As yet untested is the provision in article 35 of the United Nations Convention against Corruption, which creates a private right of action for entities or persons who have suffered damage as a result of bribery of public officials or other acts of corruption covered by the United Nations Convention against Corruption. The United States provides no private right of action consistent with article 35, as it maintained a reservation against this requirement when ratifying the UN Convention. However, a private right of action can be available within the United States through other means. For instance, US law allows those injured in certain circumstances to bring a cause of action and seek compensation under the Racketeer Influenced and Corrupt Organizations Act or as part of a civil securities suit; recent examples of such litigation include actions against Wal-Mart Stores Inc, Alcoa Inc, Avon Products Inc, and Bio-Rad Laboratories, Inc, all of which were filed in recent years, based in part on alleged FCPA violations.

Anti-corruption compliance programmes

The rapid changes in legal structures and enforcement have, in turn, contributed to a new corporate phenomenon and legal discipline – the widespread institution of anti-corruption compliance programmes within multinational corporations. Programmes that would have been innovative and exceptional in the early 1990s are becoming de rigueur. 'Best practices' have become a standard by which many companies seek to measure their own efforts and that standard continues to rise. Spurred by government pronouncements, regulatory requirements, voluntary corporate codes and the advice of experts as to what mechanisms best achieve their intended purposes, anti-corruption compliance programmes have become common, and often sophisticated, in companies doing business around the world. As a result, anti-corruption codes and guidelines, due diligence investigations of consultants and business partners or merger targets, contractual penalties, extensive training, internal investigations, compliance audits and discipline for transgressions have become familiar elements of corporate compliance programmes. The OECD's 'Good Practice Guidance on Internal Controls, Ethics and Compliance', issued on 18 February 2010, is directed squarely at companies, business organisations and professional associations, and identifies a number of recognised elements of effective compliance programmes:

- a strong commitment from senior management;
- a clearly articulated anti-bribery policy;
- accountability and oversight;
- specific measures applicable to subsidiaries that are directed at the areas of highest risk;
- internal controls;
- documented training;
- appropriate disciplinary procedures; and
- modes for providing guidance and reporting violations.

This guidance is noteworthy both because it is one of the first treaty-based articulations of effective anti-bribery compliance standards and because, on close reading, it emphasises some elements that have received less attention in traditional compliance programmes.

In September 2016, the International Organization for Standardization (ISO) published the final version of its new standard on anti-bribery management systems, ISO 37001, which was developed over the course of four years with the active participation of experts from 37 countries. The standard is designed to be used as a benchmark by independent, third-party auditors to certify compliance programmes. In terms of substance, the standard largely tracks the OECD's 'Good Practice Guidance' and guidance previously published by UK and US enforcement authorities. Thus, the key substantive aspects of ISO 37001 will be largely familiar to experienced compliance professionals. What is as yet unclear, however, is the level of deference that enforcement authorities around the world will provide to the new standard. Although seeking to obtain an ISO 37001 certification may help to demonstrate a company's commitment to compliance, such a certification is unlikely to shield a company facing an investigation by enforcement authorities. Furthermore, there are a host of questions surrounding the new standard, which lacks detail on certain areas of concern. For instance, how responsive will ISO 37001 be to the evolving compliance expectations of relevant enforcement authorities? At the very least, companies that have yet to establish mature compliance environments should find the ISO 37001 standard to be useful metric as should vendors aiming to work for multinational companies, which can use an ISO certification to help establish their anti-corruption credentials during corporate due diligence.

Against this backdrop, the expert summaries of countries' anti-corruption laws and enforcement policies that this volume comprises are becoming an essential resource. It is within this legal framework that the implementation of anti-corruption conventions and the investigations and enforcement actions against those suspected of violations will play out. Our thanks to those firms that have contributed to this volume for their timely summaries and for the valuable insights they provide.

Current progress in anti-corruption enforcement

Michael Bowes QC*

Transparency International UK

As we begin 2017, I want to look at signs that may point to the direction of travel in anti-corruption enforcement, following the Brexit result and Donald Trump's election as US president.

In May 2016, the prime minister, David Cameron, hosted the London Anti-Corruption Summit. This produced an ambitious list of 648 commitments from 43 countries. Anti-corruption NGOs were largely enthusiastic about the summit, subject to the promises being translated into actions. Within a few weeks, the UK had voted to leave the EU and David Cameron had resigned. The anti-corruption movement had lost a major champion and NGOs must now forge new links with the UK government. A year ago I wrote in this introduction that the US was the world's leading anti-corruption policeman and then its position seemed secure. In November 2016, Donald Trump was elected as the next US president, and the role of the US as world policeman in relation to corruption and global order has been thrown into question.

Both events have been shaped by a surge in populism, which clamours for change but seemingly has no structured or coherent solutions. It appears to move on a tide of emotion, rather than objective fact and is often described as an intrinsic part of the 'post truth era'. Robert Barrington, Executive Director of Transparency International UK(TI-UK) wrote as follows in December 2016 (www.transparency.org.uk/corruption-in-2017/):

> *One of TI's core values is democracy. But what happens when people in unrigged elections vote for candidates (usually described as demagogues) who appear, at best, indifferent to corruption? So-called populist politicians have been winning elections and referendum votes, and riding high in the polls, making good use of anti-corruption rhetoric. What we don't know is how their anti-corruption agenda will play out once they are in office. Will Trump drain the swamp or will he prove to be part of it? How will Duterte's extra-judicial killings affect his country's democratic institutions? Will Britain's High Court Judges continue to face intimidation from those who find they don't quite like Britain's law and constitution?*

US

As regards the US, the single biggest question on anti-corruption measures is whether the DOJ will continue its rigorous enforcement of the Foreign Corrupt Practices Act (the FCPA), which to date has set the tone for corruption enforcement around the world.

Donald Trump has previously described the FCPA as a 'horrible law'. It is reported that in 2012, Trump said (www.insidecounsel.com/2015/08/17/donald-trump-has-called-the-fcpa-a-horrible-law) laws such as the FCPA, 'should be changed' and said 'We're like the policeman for the world, it's ridiculous.' Whether this will remain Trump's position now he is president is hard to gauge at present.

A seemingly different approach was taken by the attorney general-designate, Jeff Sessions in his written answers to the Senate Judiciary Committee. Senator Sheldon Whitehouse, D-RI, had sent follow-up questions to Sessions, asking whether the DOJ would enforce what President Trump once called a 'terrible law'. Sessions said (www.fcpablog.com/blog/2017/1/27/jeff-sessions-ill-enforce-the-fcpa.html):

> *Yes, if confirmed as attorney general, I will enforce all federal laws, including the Foreign Corrupt Practices Act and the International Anti-Bribery Act of 1998, as appropriate based on the facts and circumstances of each case.*

Several US commentators have pointed out that he is a prosecutor at heart and is in favour of prosecuting individuals where the evidence points to guilt. This may mean he is less inclined to offer deferred prosecution agreements (DPAs) and non-prosecution agreements to companies than his predecessors. Such an approach may attract the support of some anti-corruption NGOs, which have expressed concern that they are being overused and provide an easy option for companies to buy their way out of a prosecution. Overall, it seems unlikely that those within the DOJ will lose their appetite for FCPA enforcement without very substantial interference from above.

UK

In the UK, the government has introduced the Criminal Finances Bill, which contains provisions for unexplained wealth orders (UWOs). A UWO is an order made by the High Court that requires a person who is suspected of involvement in serious crime to explain the origin of assets that appear disproportionate to the respondent's income.

If a person fails to respond to a UWO, the property that is the subject of the UWO will be presumed to be recoverable for the purposes of any subsequent civil recovery proceedings under Part 5 of the Proceeds of Crime Act 2002. TI-UK and other anti-corruption NGOs strongly support the introduction of UWOs, which appears to have good cross-party support. There is an imperative to tackle the issue of corrupt capital flowing into the UK: a recent article in *The New York Times* entitled 'London rolls out the Blood Red Carpet for Kleptocrats' (www.nytimes.com/2016/12/29/opinion/london-rolls-out-the-blood-red-carpet-for-kleptocrats.html) commented:

> *It's a dictators' safe space, where billions of dollars are laundered through the London real estate market every year, contributing to what the National Crime Agency estimates to be an annual total of more $125 billion laundered in Britain.*

TI-UK has also highlighted this issue in its recent publication 'London Property: a top destination for money launders' (www.transparency.org.uk/publications/london-property-tr-ti-uk/). Beyond the introduction of UWOs, it is more difficult to gauge the government's enthusiasm for tackling corruption and following up on the summit pledges. The government was due to publish its anti-corruption strategy by the end of 2016, but this has not yet happened. It is appreciated that the government's most pressing task is dealing with Brexit, but the fear is that anti-corruption commitments may slip down the agenda. Some of the messages appear mixed: the prime minister has spoken of the need for greater corporate responsibility, and on 13 January 2017 the government launched its Call for Evidence on Corporate Liability for Economic Crime. As against that, on 15 January 2017 the chancellor of the exchequer said that if the EU behaved unreasonably towards the UK on Brexit, the UK might choose to become a corporate tax haven (www.theguardian.com/politics/2017/jan/15/philip-hammond-suggests-uk-outside-single-market-could-become-tax-haven).

Also of concern is a suggestion that the Department for International Development (DFID) may decide to align UK aid with trade policy. Many poor foreign states and many NGOs are

reliant on receiving funding from DFID in order to fight corruption and such a profit-based alignment may seriously damage this vital work (www.theguardian.com/global-development/2016/dec/01/uk-aid-reviews-trade-policy-sideline-poor-countries).

On 17 January 2017, the Serious Fraud Office (SFO) entered into a DPA with Rolls-Royce, which was approved by Sir Brian Leveson, president of the Queen's Bench Division. The indictment covers 12 counts of conspiracy to corrupt, false accounting and failure to prevent bribery. The conduct spans three decades and involves Rolls-Royce's Civil Aerospace and Defence Aerospace businesses and its former Energy business and relates to the sale of aero engines, energy systems and related services. The conduct covered by the UK DPA took place across seven jurisdictions: Indonesia, Thailand, India, Russia, Nigeria, China and Malaysia.

The court held that the total sum in the UK settlement (£497.25 million plus interest and the SFO's costs of £13 million) reflected the gravity of the conduct, the full cooperation of Rolls-Royce PLC in the investigation and the programme of corporate reform and compliance put in place by new leadership at the top of the company. The resolution is the highest ever enforcement action against company in the UK for criminal conduct. Rolls-Royce has also reached an agreement with the US DOJ and a leniency agreement with Brazil's Ministério Público Federal. In total, these agreements result in the payment of approximately £671 million (including US$170m to the US and $25 million to Brazil) by Rolls-Royce at the exchange rate at the time this book was published. The criminal investigation into the conduct of individuals continues and is not affected by the DPA.

Substantial concerns have been expressed by TI-UK that the settlement, large though it is, neglected the victims of this widespread and systemic corruption. In deciding that a DPA was 'just and proportionate' the court took into account what would have been the negative effects of debarment following a conviction for a bribery offence, which seems to run counter to the intended deterrent effect of debarment. Robert Barrington wrote (www.transparency.org.uk/what-can-we-learn-about-the-future-of-dpas-from-the-rolls-royce-case/):

> *The logical inference is that if a company is large enough and powerful enough, it will never be prosecuted due to the collateral damage; and that the possible impact on potential victims holds greater sway with the court than the actual impact on real victims. Sir Edward Garnier QC, representing the SFO in court, was at pains to make it clear that despite the systemic corruption, across all of its businesses in many countries and over twenty-five years, this did not mean that companies would not be prosecuted in future. Really? If not now, when?*

Also on 17 January 2017, the prime minister announced that Brexit meant leaving the single market. Where this puts the UK's approach to cooperation with the EU on anti-corruption and anti-money laundering measures remains to be seen.

The Panama Papers

2016 saw the release of a vast quantity of hacked data from the law firm Mossack Fonseca, and the data were quickly and irrevocably dubbed the 'Panama Papers'. The data focuses on the use of offshore tax havens, and to date the identity of the hacker, 'John Doe', has not been revealed. There are two particularly striking features about the leaking of these data. First, the reaction of the public and of regulatory authorities was that its emergence was for the public good: 'John Doe' is regarded as a whistle-blower and not a 'data thief' (in fact, data do not amount to 'property' under the Theft Act 1968 and so cannot be stolen (*Oxford v Moss* (1979) 68 Cr App R 183)). Second, it saw a remarkable level of cooperation between journalists: the data were shared through the International Consortium of Investigative Journalists (ICIJ), rather than by a single journalist seeking the limelight (https://panamapapers.icij.org/). As a result of the Panama Papers, in November 2016 there were 22 people in the UK facing tax evasion investigations and a further 43 individuals under review (www.theguardian.com/world/2016/nov/08/panama-papers-22-people-face-tax-evasion-investigations-in-uk).

France

In France, the Bill known as Sapin II passed into law. This has been widely praised as containing several effective measures against corruption. In summary, it expands extraterritorial reach for French prosecutors, establishes a strict positive obligation on French companies to 'prevent corruption', defines eight mandatory measures for a corruption prevention programme, creates a new national anti-corruption agency and introduces DPAs.

Brazil

In 2016, prosecutors in Brazil showed determination and courage in their investigation of the 'Carwash' Petrobras corruption scandal. (The investigation is called Lava Jato because the police first began tracking black market money dealers at a petrol station in Brasilia.) TI-UK has reported (www.transparency.org.uk/corruption-in-2017/) that:

> *With the collaboration of authorities in more than 30 jurisdictions, it has unveiled a bribing scheme of nearly USD 2 billion in Petrobras only (the probe is now reaching other Brazilian state owned enterprises). It is already considered a watershed in the country's history of impunity, with more than 240 criminal charges and 118 convictions – summing up 1,256 years of sentence time. Most of the defendants so far are executives and business tycoons, but in 2017 the operation will enter a new stage focusing on the political class. With the collaboration of several companies through leniency agreements, it is expected that more than 200 MPs will be targeted.*

Unsurprisingly, the 'Carwash' taskforce were the winners of Transparency International's Anticorruption Award 2016 and members of the taskforce gave an excellent presentation of their work at the International Anti-Corruption Conference (IACC) in Panama in December 2016.

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IACC 2016

I had the privilege of speaking at the IACC on the subject of combating judicial corruption. In many countries, the judiciary is put under political pressure to deliver a particular judgment. In the UK, we have perhaps always taken the attitude that 'it could never happen here'. This comfortable belief was severely shaken by the response of some parts of the media to the decision of the High Court that article 50 of the Lisbon Treaty (and thereby Brexit) could only be triggered by an Act of Parliament, as it amounted to the revocation of the European Communities Act 1972. The *Daily Mail* branded the judges (including the Lord Chief Justice) as 'enemies of the people', saying they were out of touch and putting Britain on course for a constitutional crisis. The Lord Chancellor, whose statutory function includes protecting the independence of the judiciary, said and did nothing to protect the judges. On 24 January 2017, the Supreme Court dismissed the government's appeal, ruling by a majority of 8–3 that the terms of the European Communities Act 1972, which gave effect to the UK's membership of the EU, are inconsistent with the exercise by ministers of any power to withdraw from the EU Treaties without authorisation by a prior Act of Parliament. On this occasion, the media response was far more muted.

In China, judges recently have been warned to avoid the 'ideology' of judicial independence (https://chinadigitaltimes.net/2017/01/top-chinese-judge-warns-judicial-independence/):

> *State media last weekend [14 January 2017] reported that Supreme People's Court Chief Justice Zhou Qiang warned the high court to resist ideologies that pose a threat to the Party, calling on it to: "resolutely oppose the influence of Western 'constitutional democracy,' 'separation of powers,' 'judicial independence' and other harmful ideas. Make your stance clear, dare to use your force.*

Such an instruction could not be more diametrically opposed to the democratic principle that the independence of the judiciary is fundamental to the rule of law.

The overall message I took away from the IACC was that now, more than ever, those fighting corruption must stand up and make themselves heard. This imperative is, perhaps, best summed up by the words attributed to Edmund Burke, the 18th century philosopher and statesman 'All it takes for evil to flourish is for good people to say nothing.'

A year from now, I look forward to reviewing who was prepared to stand up and lead the fight against corruption in 2017.

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Corporates and UK compliance – the way ahead

Monty Raphael QC

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Whatever the political upheavals of 2016 presage for the world in 2017, the existence of international economic crime and the efforts to combat it are unlikely to be very radically altered. If, as seems likely, efforts to change the behaviour that underlies public corruption continue to be frustratingly slow; public expectations of government response will remain very high. Some might say unrealistically so. Indeed, fed by decades of bellicose rhetoric, society expects its governments to be in a permanent state of war with serious international economic crime, including corruption. Having created this narrative the state has to be seen to deliver, if not outright victory, then at least a credible response.

After all, where economic delinquency is as global as legitimate trade, where crime control can rarely be anything but reactive, states are having to play catch up, and, in so doing are looking for new, speedier and cheaper solutions. Conventional investigation and prosecution of crime across borders is slow, expensive and frustrating, even with the help of whistle-blowers and incentivised self-reporting. Some prosecutions are clearly necessary to mark society's disapproval of corporate or individual criminality. They will never amount to zero tolerance but serve only a necessary and symbolic function. Prosecutions are a state-driven solution with, in the past two decades, the increasing assistance of civil society. The latter has an obvious role in preventing crime, but the debate has been over how those resources should be garnered in detecting crime, and if so utilised, how they may be reconciled with age-old conventions and safeguards like commercial confidentiality and professional secrecy. Bank secrecy is now seen as an outmoded obstacle to tax gathering and law enforcement, and states like Switzerland that promoted this feature have had to abandon it. But 2017, in the UK, will see new developments and challenges to doing business and providing professional services arising from compelled transparency.

Section 7 of the UK Bribery Act has already been employed to proceed against corporations who failed to establish adequate procedures to prevent bribery. This provision itself was a reaction to the difficulty in prosecuting corporations. The model of section 7 is perpetuated in the Criminal Finances Bill as a solution to the facilitation of UK tax evasion offences. As in section 7 of the Bribery Act, the defendant corporation or partnership is required to show that it had in place reasonable preventive procedures.

Thus once more, civil society is being asked to up its ethical game and to join in deterring harmful and delinquent behaviour. This is a new example of the professional adviser having a duty to the state greater than his or her duty to the client or prospective client. This tendency can be traced back more than two decades to the introduction of suspicious activity reports (SARs). These now amount to about 370,000 per annum and in themselves present a serious challenge. Most come from the financial sector and are often nothing more than very prompt responses to first suspicions, where the reporter has no intention of entering into any relationship with the subject. However, these reports are scant on information and detail, and the Criminal Finances Bill will grant the National Crime Agency (NCA), the UK's financial intelligence unit, extended time to investigate, and interrogate the reporters. The NCA wants to extract greater intelligence from SARs and have more time to gather its own evidence.

The Bill overall is designed to hand the UK authorities a bigger toolkit to combat economic crime. The director of the SFO is still pressing the government to extend the section 7 model to all serious economic crime. This would obviously place a bigger regulatory burden on the commercial sector and require enhanced law enforcement resources. The government says it is under consideration but this further initiative against corporations at a time of economic uncertainty is unlikely to find favour in the near future.

I have left to last what is in some ways the most radical provision of the Bill. Section 1 provides that the High Court sitting in a civil jurisdiction may make an Unexplained Wealth Order in respect of any property if:

- the respondent holds the property whether directly or otherwise and the value of the property exceeds £100,000;
- the court is satisfied that there are reasonable grounds for suspecting that the known sources of the respondent's lawfully obtained income would have been insufficient for the purposes of enabling the respondent to obtain the property; and
- the court is satisfied that the respondent is a politically exposed person or there are reasonable grounds for suspecting that the respondent is or has been involved in serious crime in the UK or elsewhere or a person connected with the respondent is, or has been, so involved.

It is significant that an application for such an order can be made by any of the following authorities, the NCA, HMRC, the FCA, the SFO and the DPP. If the respondent fails to satisfactorily respond, the court has the power to make an interim freezing order, which, in time, would lead to a full-blown civil recovery order, that is, civil forfeiture.

This provision, which mirrors legislation in Australia and in the Republic of Ireland, will, it is hoped, deter the laundering of some of the £22 billion washing through the UK economy each year.

The other inevitable effect is that those professionals who hitherto have been characterised as only gatekeepers or preventers of economic crime will increasingly be targeted as enablers or actual accomplices. Overall the design is that the UK should become a much less attractive destination for the proceeds of crime, and that while it struggles to preserve its dominant position post-Brexit as a pre-eminent financial centre it should as well preserve its reputation as a clean destination for doing business.

The reader is referred to the chapter headed 'United Kingdom' co-authored with my colleague Neil Swift for a round-up of other developments in the UK in the past 12 months.

Risk and compliance management systems

Daniel Lucien Bühr
Lalive

Can standard-based and independently certified anti-bribery management reduce corruption?

A well-known deflection of Murphy's Law ('If anything can go wrong, it will.') is the law 'If anything can go wrong, it's a system.' No matter where they are introduced, management systems are typically met with scepticism and, when they fail, become a standing joke.

In many organisations, it is extremely important to systematically manage product and service quality, information security and occupational health and safety, to quote but a few examples. And yet, when it comes to managing risk and compliance, and especially combating the likelihood of bribery, most organisations do not yet appear to follow a standard-based approach, preferring mix-and-match instead. Governmental and enforcement agency compliance guidelines are mixed with topical guidelines issued by trade organisations, then matched to the organisation's own management concepts. The final product is then often spiced up using 'home-made' ingredients. The result is that most organisations that manage risks and compliance use management programmes or systems that are couched in undefined terms and are based on discretionary principles and approaches, priorities and instruments. These home-made programmes and systems are therefore often not transparent, not comparable to anything and, consequently, not certifiable, that is to say they cannot be benchmarked. Any independent auditors, tasked with evaluating a particular organisation's impromptu risk and compliance management will take an above-average amount of time and resources understanding how the organisation is actually managed before coming up with a reliable assessment. In practice, however, resources for highly personalised audits are not readily available and the upshot is that assessing non-standardised programmes and systems is a 'naturally flawed' method and therefore generally unreliable.

Despite Murphy's Law of systems, my guess would be that the true law of systems is: 'If anything can go wrong, it is piecemeal (governance, risk and compliance) management.'

Management is systematic and transparent when it follows documented, defined rules and involves planned, structured action, can be easily understood by outsiders who are familiar with the rules and its results can be, and are, independently audited. Since the beginning of the financial crisis in 2007, we have seen countless cases of long-standing organisational governance, risk and compliance failures, such as banks' turning a blind eye to competition law, conflicts of interest and laundering of corrupt money, and manufacturers' willingness to do without honest and reliable product information. In many cases, the organisational and management breakdowns continued for several years under the averted gaze of governing bodies and top management. The costs of such breakdowns are astronomical and the effects on reputation disastrous. After 40 years of modern compliance management (since the Lockheed scandal in 1976 and the adoption of the Foreign Corrupt Practices Act in 1977), it makes sense to try a new, and hopefully more effective, approach to risk and compliance management.

Over the past few years, one of the most noteworthy steps aimed at making risk and compliance management more effective has been the development of standardised risk and compliance management systems.

Management systems based on generally accepted international standards are an integrated process. They consist of a documented strategy, clear organisation, adequate planning, disciplined implementation, meaningful monitoring, accurate measuring of effectiveness and continual improvement. These systems follow the plan-do-check-act procedure, an iterative four-step management method used in businesses around the world to control and constantly improve processes and products.

A well-known example of this procedure is the ISO (International Organization for Standardization) Standard 9001 – Quality Management Systems, which has been successfully used by more than a million businesses worldwide. The key reason for applying standard-based management systems is that standardisation itself reduces complexity and cost while harmonising technical specifications for processes, products and services, and this in turn increases transparency, comparability and efficiency. For the self same reasons, businesses worldwide apply generally accepted accounting standards.

Effective risk management is a prerequisite for effective compliance management. Without a reliable procedure for identifying, analysing and evaluating risks in order to deal with them in good time, any business is likely to hit the iceberg that no one on the command bridge ever saw coming. According to a report by the OECD (2014, Risk Management and Corporate Governance), ISO Standard 31000 has become the de facto world standard in risk management. It was published in 2009 and is the only independent global risk management standard. Another key document, while not an international standard, is the COSO (Committee of Sponsoring Organizations of the Treadway Commission, a private sector initiative) 2004 Enterprise Risk Management Framework.

ISO 31000 firstly establishes clear terms and definitions. For instance, 'risk' is the effect of uncertainty on objectives; 'risk attitude' is the organisation's approach to assess and eventually pursue, retain, take or turn away from risk; 'risk assessment' is the overall process of risk identification, risk analysis and risk evaluation; and 'risk treatment' is the process to modify risk.

Based on its clear set of terms and definitions, ISO 31000 recommends that (senior) management commit to effective risk management and provide a documented mandate for designing and implementing a framework for managing risk. Once introduced, the framework needs to be monitored, reviewed and continually improved. The ISO Standard provides detailed guidance on the risk-management framework, risk-assessment and risk-treatment techniques and provides a multilingual risk-management vocabulary.

Some of the key risk management mistakes made by organisations are the absence of a clear top management position on the organisation's risk tolerance; the reliance on mere risk governance concepts (which do not explain anything about risk management on substance) instead of genuine risk management standards and frameworks; the (mal)practice of multiplying likelihood with consequences of an event or development, whereby worst-case scenarios are ignored; or the massive underestimation of gradual developments (such as climate change, shifts in public attitudes to modern slavery, etc) compared to one-off events.

The standard-based management system approach also applies to best practice compliance management. Examples of compliance management system standards are Australian Standard AS 3806-2006 – Compliance Programmes, German Audit Standard IDW AS 980 – Principles for properly auditing compliance management systems and, since 2014, ISO Standard 19600 – Compliance Management Systems.

These aim to provide guidelines or minimum requirements for all private and public organisations wanting to design, implement, maintain and improve effective compliance management systems.

The fundamental difference between compliance management based on a stand-alone corporate compliance programme and compliance management built on a recognised management system standard is transparency, confirmability and comparability.

Whereas classic stand-alone programmes, despite the frequent high-gloss codes of conduct, are often opaque, rather poorly documented, bottom-up (ie, single-risk rather than values-oriented) fragmentary compliance efforts, compliance management systems based on public standards are transparent, top-down, driven by leadership, values and principles, and are comprehensive and well-documented systematic compliance management efforts.

In practice, it makes a huge difference whether a business or a public organisation reinvents the wheel of compliance management on its own or whether it follows a structured, public, transparent, auditable and externally certifiable process.

ISO 19600 introduces defined terms (for instance 'compliance', which means meeting all the organisation's compliance obligations, compliance culture, compliance function, etc) so that everyone speaks the same language, sets out the key role of leadership, tone at the top and ethical values and explains what good governance in compliance management requires.

Furthermore, the ISO standard sets out in detail the responsibilities at all levels of an organisation, the planning, implementation and monitoring, measuring and continual improvement of the best practice compliance management processes and tools (from – again – best practice and standard-based risk management to training and finally to the mechanism for the reporting of concerns by staff or third parties).

Good compliance governance explicitly or implicitly always includes the compliance function's direct access to the board, its independence from operational management, adequate organisational authority and availability of appropriate resources. The standards all equally underline board and top management responsibility for compliance and the essential role of the right tone and good example they set. They also address the key role of the compliance function in day-to-day management, and the need for a written compliance policy, effective risk management and specific organisational (clear and easy to understand regulations, credible and effective reporting mechanisms, etc) and procedural measures (targeted training, timely and meaningful support, effective audits, etc).

The single most important legal risk to many organisations is corruption, either that their employees might pay bribes to win business or that their officers demand undue advantages in exchange for steering business to the briber.

Bribery is one of the world's most destructive phenomena because it undermines good governance, hinders development and distorts competition. According to the World Bank, around US$1 trillion is paid each year in bribes, helping to perpetuate poverty worldwide.

ISO Standard 37001

Addressing the challenges of corruption faced by organisations, on 15 October 2016 the ISO published the International Standard ISO 37001 – Anti-bribery management systems. This is a tool to help organisations fight bribery and promote an ethical business culture by setting out requirements and guidance for establishing, implementing, maintaining, reviewing and improving an effective anti-bribery management system. The standard was drafted by experts from 60 countries and international organisations, including the OECD and Transparency International.

ISO 37001 holds that organisations can contribute to combating bribery by means of an anti-bribery management system and with leadership commitment to establishing a culture of integrity, transparency, openness and compliance. It then states that the nature of an organisation's culture is critical to the success or failure of an anti-bribery management system. The standard is logically based on the insight that the actual drivers of compliance are leadership, values and culture. Without this foundation, compliance efforts can never be any more than window-dressing.

ISO 37001 only applies to bribery. It sets out requirements and guidance for a management system designed to help an organisation prevent, detect and respond to bribery, comply with anti-bribery laws, and make voluntary commitments applicable to its activities. In addition to what ISO 19600 recommends for effective compliance management, ISO 37001 defines the terms bribery, business associate and public official, and specifically requires organisations to:

- establish an anti-bribery function in addition to an anti-bribery policy;
- conduct due diligence on specific transactions, projects, activities, business associates and staff to obtain sufficient information to assess the bribery risk;
- implement anti-bribery controls by business associates; and
- introduce procedures on gifts, hospitality, donations and other similar benefits.

ISO 37001 provides detailed guidance on its use (Annex A), and the ISO Technical Standard 17021-9:2016 specifies the competence required for auditing and certifying anti-bribery management systems.

Independent auditing and certification of an organisation's anti-bribery management system does not of course provide any guarantee that employees will never become involved in bribery. However, by implementing a planned, structured and documented anti-bribery process and by independently benchmarking it against ISO 37001, organisations will be able to enhance their anti-bribery management. Even though any audit is only as good (or bad) as the audit terms (including the audit budget), the audit process and the auditors' qualifications, the fact that independent audits are actually carried out will have a direct, material effect on the effectiveness of anti-bribery management.

To conclude, it is time to rethink and redevelop risk and compliance management and take them to the next level. An educated and reasonable approach is to implement standards-based risk and compliance management systems, including anti-bribery management systems. By doing this, management adopts the same approach to risk and compliance management that it has most certainly adopted in one way or another in its operative management of product and service quality.

Applying a transparent and generally accepted management process is – usually and in the long run – more effective and certainly less costly (including compared to the cost of non-compliance) than stand-alone spur-of-the-moment risk and compliance management. All organisations, multinational as well as risk-exposed small or medium-sized businesses and public organisations, will appreciate the low cost of information about the principles of best practice risk and compliance management and how much easier it is to do things in the same way as many others. And finally, independent certification of best practice risk and compliance management will boost an organisation's learning curve and effectiveness in reaching its goals.

Effective risk and compliance management will therefore in future be easier and overall less costly for all organisations, both private and public. This is certainly a considerable gain when it comes to the sustainable diligent management of businesses and good public management.

Calculating penalties

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As discussed elsewhere in this book, a lot of detailed information has been published on the steps required for companies to achieve compliance. For board directors, the dangers of failing to comply with international bribery laws have been explained at length, reinforced by warnings to audit committees. But if things do go wrong, the board – assisted by legal and forensic accounting advisers – will face some hard choices. If we settle, what is the likely penalty range? If we go to trial, what is the worst case scenario? We are being asked for details about the profitability of contracts; what exactly does this mean?

To most outside (and many inside) the rarefied environment of white-collar defence practices, the process by which fines and penalties for bribery are determined is a mystery. This article attempts to shed some light on the current state of play regarding fines and penalties for bribery offences, based on our practice as forensic accountants and bribery specialists, assisting companies with penalty negotiations. This article will focus on the UK and US, where the majority of enforcement interest currently lies. Some principles and practices are now emerging, thanks to a body of resolved deferred prosecution agreements (DPAs) in the US, and five cases (including three DPAs) resolved for bribery offences in the UK since late 2015.

We begin by reviewing the current position for bribery sentencing in the UK, before comparing this with the current US approach.

Penalties in the UK

The task of drawing conclusions about penalties for bribery in the UK has not been helped by the lack of jurisprudence on corporate penalties. Until very recently, there had been very few prosecutions for corruption in the UK, and the majority of those were generally under the 'previous' civil recovery orders regime for offences under the Prevention of Corruption Act 1906. The lack of transparency has made getting reliable data very challenging. But with new Sentencing Guidelines in place, the courts are now under an obligation to provide reasons for the sentence and an explanation of its effect.

DPAs

UK enforcement agencies have historically struggled to bring successful prosecutions against companies. In February 2014, DPAs first became available to corporates, and they are now an important tool. The Serious Fraud Office (the SFO) now has the option of using DPAs as an alternative to a full prosecution, and has done so on three occasions – with the promise of more large ones to come.

A DPA involves the company agreeing to a public statement of facts, including a description of the wrongdoing. In return, and provided the conditions of the DPA are met, the company will not face prosecution. DPAs are public, and must be applied for and approved by the court before coming into effect. The court will approve a DPA that it considers to be in the interests of justice, and that has fair, reasonable and proportionate terms. In the US, DPAs do not have to be approved by the court and are used more frequently.

The UK Sentencing Guidelines

Financial penalties received a welcome measure of clarity and consistency in 2014, when the Ministry of Justice's Sentencing Council published the Fraud, Bribery and Money Laundering Offences: Definitive Guideline (the Guidelines). This became effective for sentences from 1 October 2014, regardless of the date of the offence. The Guidelines establish a matrix of factors that every court has to follow to determine the level of any fine to be imposed when sentencing individuals and corporates, unless it is satisfied that it would be contrary to the interests of justice to do so.

Accordingly, there is now a multistage process in determining the financial penalty, which can be summarised as follows:

- compensation: Priority must first be given by the court to the payment of compensation for any injury, loss or damage resulting from the offence;
- confiscation: The court must then consider a confiscation order if either the prosecution asks for it or the court thinks it appropriate;
- fine: In order for the court to be able to assess the level of the fine, it must consider 'harm' to which is applied a multiplier depending on 'culpability':
  - harm: The harm suffered is a financial sum, dependent on the offence, and generally calculated based on the amount gained by the offender; and
  - the multiplier is based on the culpability of the offending corporation. Culpability is bracketed into low, medium and high categories of seriousness, which have multipliers ranging from 20 per cent to 400 per cent, and a starting point within each bracket. Culpability depends on the facts of the case and depends on the offending company's role and motivation. Factors that could lead to an increased level of culpability include organised activity, bribery of government officials, targeting vulnerable victims, a sustained period of offending or an abuse of a dominant market position.

    Having determined culpability, the court applies the corresponding multiplier to the harm figure. In general, the court will determine a fine that reflects the seriousness of the offence and takes into account the financial circumstances of the offender;
- having calculated the level of the fine, the court must then further consider what other aggravating or mitigating factors may exist that merit an adjustment on the level of the fine. The court's objective should be to achieve:
  - removal of all gain by the organisation;
  - appropriate additional punishment; and
  - deterrence; and
- finally, the court should consider any factors that would indicate a reduction in the level of fine, such as assistance to the prosecution or early guilty pleas. Generally, there is a one-third reduction in the fine for a guilty plea at the earliest opportunity following a formal prosecution.

DPAs inevitably include a financial penalty, and the Guidelines are the reference point when negotiating the terms of any DPA.

UK lessons to date

Harm

In the case of offences under the Bribery Act 2010 (the Act), the Guidelines provide that the starting point for 'harm' is normally the gross profit made from the contract obtained or sought through the offence. This is the approach taken in the five UK cases since 2015.

Where there is insufficient evidence of the amount that was likely to be obtained, harm could be calculated as 10 to 20 per cent of the

relevant revenue (for instance, by reference to the worldwide revenue derived from the product or business area to which the offence relates for the period of the offending). Alternatively, in the case of an offence of failure to prevent bribery under section 7 of the Act, harm may be the likely cost avoided by failing to establish effective anti-bribery procedures.

There is still, however, a question of how to calculate 'gross profit' because different companies assess their own gross profit in different ways. When approaching this calculation, it is vital to understand the cost base of the company and how its costs are related to the revenues generated from the alleged bribes. This usually requires the input of forensic accountants with experience in this area. Lord Justice Leveson pointed out in the Rolls-Royce DPA that: 'care must be used in relation to this term [gross profit] which is based on calculations reached by accountants instructed by the SFO and Rolls-Royce and agreed by the parties and does not necessarily reflect the way in which the accounting profession would approach gross profit for reporting standards'.

Multiplier

We now have some clarity about how the courts are likely to consider the multiplier, as all cases have been in the medium/high culpability categories with multipliers between 250 per cent and 400 per cent (for three counts in the Rolls-Royce DPA).

It might be arguable that an offence justifying a very much lower multiplier might push the behaviour into a category where it is not taken on for investigation by the SFO and not in the public interest to prosecute.

Confiscation

In all recent bribery cases, the court has required the confiscation of the benefit from the illicitly obtained contract. In most cases, this will represent the gross profit made. In *Smith & Ouzman*, it was the gross profit plus the value of the bribes paid.

Discretion and financial hardship

Furthermore, inability to pay and proportionality can lead to the court exercising its wide discretion available and can lead to a substantial reduction in the base fine calculated using the Guidelines. Although confiscation payments are due almost immediately following the sentencing hearing, in cases of financial hardship, the court has allowed the fine to be paid over five years.

DPAs

Lord Justice Leveson, the most senior judge of the Queen's Bench Division, has to date approved three DPAs between companies and the SFO for corporate bribery offences: Standard Bank in November 2015, XYZ in July 2016 and Rolls-Royce in January 2017. (Related criminal proceedings are still ongoing, and so to preserve anonymity the judgment refers to the company as 'XYZ'.)

We are now being able to see more clearly some of the factors that make a potential prosecution a DPA candidate or not, the predominant one being whether it is in 'the interests of justice' to do so. These include:

- self-reporting;
- previous and ongoing cooperation with the SFO;
- prior and ongoing compliance efforts;
- remediation, including termination of problematic contracts and termination of implicated staff and associates; and
- the impact of prosecution, including debarment.

Although Rolls-Royce involved 'the most serious breaches of criminal law in the areas of bribery and corruption, some of which implicated senior management', it was offered a DPA without having self-reported (instead the SFO heard about the allegations through an internet post). The company did, however, cooperate fully in the subsequent investigation, and with an entirely new board and executive since the period of the corruption, none of the current senior management were implicated.

Despite its guilty plea, a DPA was not offered to Sweett Group, which was charged under section 7 of the Act in December 2015. Here, the SFO did not deem the company sufficiently cooperative, particularly with regard to its willingness to provide evidence gathered.

Obtaining a DPA

It is clear that DPAs are not lenient panaceas for defendants. They involve penalties at a broadly comparable level to those that would be imposed as part of a prosecution: ongoing compliance costs and heavy disclosure and cooperation requirements. They are hardly attractive, despite them being sometimes portrayed as companies 'getting off lightly'.

This is leading companies to question whether they should not self-disclose early, but take their chances that they will be found out and investigated and prosecuted: possibly ending up in broadly the same place. This is not helped by rising levels of fines and uncertain cooperation credits. However, there are situations where DPAs are attractive, and they are important for companies keen to avoid any issues regarding debarment. For example, in the UK, an organisation will be debarred from tendering for public contracts if found guilty of bribing another person (section 1 of the Act) or bribery of foreign public officials (section 6). This was a particular factor in the court allowing Rolls-Royce a DPA. 'I have no difficulty in accepting that a criminal conviction against Rolls would have a very substantial impact on the company, which, in turn, would have wider effects for the UK defence industry and persons who had not conducted in criminal conduct,' Lord Justice Leveson said.

Companies wanting to get a DPA by self-reporting with clear evidence of criminality to the SFO and asking for a DPA are unlikely to get one. Why would that be in the SFO's interest, when its statutory and stated duty is to prosecute crime? Instead, companies wanting to obtain a DPA need to ensure that the SFO knows that there is also something in it for them. This might be assistance with the practical difficulties and resource needs of obtaining evidence in overseas countries that is going to be necessary to prove the predicate offence to a section 7 prosecution , or assistance with criminal cases against guilty executives.

Penalties in the US

It is rare in the US to see a company go to trial in a bribery case. In part, this is because it is much easier to establish corporate liability in the US than it is in the UK: once a prosecutor has identified a company employee or agent who has individual liability, it is usually possible through the doctrine of respondeat superior to pin that liability on the company. Thus, there is little case law as guidance to point to regarding how penalties are calculated. Instead, most corporate cases are resolved through negotiated settlements, which have historically not always been fully transparent, although with regard to the form and financial component of a settlement, the Department of Justice (the DOJ) and the Securities and Exchange Commission (the SEC) have recently become more specific in their DPA documents.

The US Federal Sentencing Guidelines – DOJ approach to penalties

The US Federal Sentencing Guidelines are the starting point for the fine a company will pay in a criminal matter. The method for calculating an eventual fine in the Sentencing Guidelines is a complex and multistep process, similar to that set out in the UK Guidelines.

The first step is to establish the 'base fine' level, which in most Foreign Corrupt Practices Act (the FCPA) cases is the profit earned as a result of the corrupt conduct. A multiplier is then applied to the base fine, which is calculated after arriving at a 'culpability score'. The culpability score is based on a number of mitigating and aggravating factors that can be subjective and dependent on the discretion and judgment of the DOJ prosecutor:

Aggravating factors include:

- managerial involvement;
- prior criminal history; and
- obstruction of justice.

Mitigating factors include:

- maintenance of an effective programme to prevent and detect violations of law;
- self-reporting of the offence;
- full cooperation in the investigation; and
- clearly demonstrating recognition of, and affirmative acceptance for, its criminal conduct.

As illustrated in recently resolved cases, and as detailed in the Pilot Program, companies will be treated differently by the DOJ depending on the level of cooperation and remediation and whether there was

self-reporting. For companies that self-report, fully cooperate, and appropriately remediate, a 50 per cent reduction to the low end of the sentencing guideline range can be achieved. Companies that do not self-report, but fully cooperate and remediate, can still achieve a potential 25 per cent reduction.

SEC penalties

The Pilot Program and US Sentencing Guidelines do not apply to the SEC. The SEC has its own rules and regulations and follows guidance from what has come to be known as the Seaboard Report. In that, the SEC sets out certain criteria that it considers in levying penalties against issuers:

- What is the nature of the misconduct?
- Where in the organisation did the misconduct occur?
- How long did the misconduct last?
- How much harm has the misconduct inflicted upon investors?
- How was misconduct detected and who uncovered it?
- How long after discovery of the misconduct did it take to implement an effective response?
- Did the company promptly, completely and effectively disclose the existence of the misconduct to the public, to regulators and to self-regulators?
- Did the company cooperate completely with appropriate regulatory and law enforcement bodies?
- Did the company promptly make results of its review and provide sufficient documentation reflecting its response to the situation to the SEC staff?
- What assurances are there that the conduct is unlikely to reoccur?

SEC settlements can be in the form of federal court injunctions, administrative cease-and-desist proceedings, non-prosecution agreements (NPAs) and DPAs. But in addition to civil penalties, the SEC's main weapon is an order for disgorgement of all ill-gotten gains from any bribery scheme plus prejudgment interest, in a similar way that the UK courts will order confiscation. This is often larger than the civil penalty itself.

In many corporate bribery matters, the SEC will be able to bring an action when the DOJ is unable to. That is because the SEC can charge violation of the books and records and internal control provisions of the federal securities laws, which do not require intent or scienter to be established. For example, in situations where it may be very difficult or impossible to establish jurisdiction against a foreign subsidiary, the SEC can hold the US corporate parent liable if the subsidiary's financial statements are consolidated within the financial statements of the parent.

US lessons to date

The DOJ and SEC continue to aggressively pursue violations of the FCPA. With the recent cases resolved under the DOJ's FCPA Pilot Program, there is now a greater degree of certainty with respect to the benefits that companies can achieve through self-reporting, fully cooperating with the government and appropriately remediating their compliance programs. The Pilot Program also highlights the gap between the US (where NPAs and DPAs are now seen as the norm) and the UK (where they are not).

Although the regulators have always focused on individuals, the Yates Memo (a policy memo promulgated by Deputy Attorney General Sally Yates in September 2015 that set forth six 'key steps' designed to better hold individuals accountable for corporate wrongdoing) makes providing all relevant information with respect to individuals a threshold matter to achieving any cooperation credit. Over time, it is likely that there will be an increase in self-reporting as the benefits of doing so spelled out in the Pilot Program become clearer and, with significant financial incentives for whistle-blowers, the risks of the regulators learning of a bribery issue are increasing. Thus, we can expect to see more NPAs and DPAs in cases where there is self-reporting and exemplary cooperation and remediation.

Large penalties and disgorgements are also expected to continue and we can surely expect more global settlements like *VimpelCom* and *Rolls-Royce* as international cooperation increases. Although unlikely, perhaps at some point a company will contest the regulators in court and a judge can weigh in on penalty calculations and other FCPA-related interpretations.

Adequate procedures

In the UK, if a prosecution is made under section 7 of the Bribery Act for the corporate offence of failing to prevent active bribery, it is a complete defence to show that the company has adequate procedures in place to prevent bribery being committed by those associated with it. This defence has not yet been tested, and there is currently much speculation in the UK to see what an 'adequate procedures defence' will look like.

The efforts that a company has undertaken to prevent and detect bribery is something viewed in the US as mitigation, which would reduce the level of a penalty, but is not a complete defence.

International double jeopardy

The UK Bribery Act 2010 came into force in July 2011 and changed the UK test for bribery offences. With the UK Sentencing Guidelines and a DPA regime now in place, and although there are still significant differences, in essence the UK bribery regime is aligned with that in the US. With the Rolls-Royce DPA, the UK now has for the first time the very high fines and penalties obtained by the DOJ and SEC. As part of the *Standard Bank* decision, for example, the UK court was keen for the DOJ to confirm that the level of the penalty proposed would be comparable to that imposed as part of a DPA in the US, and that confirmation was received.

We have already seen a number of joint US/UK and multi-jurisdictional settlements and plea agreements, and this trend is only going to increase. There are strong links between US and European prosecuting agencies and cooperation on almost all major cases. This leads to complex issues that a defendant must then face, such as: how the responsibility for prosecution is going to be divided up between jurisdictions; will I face prosecution in both; and if I am going to self-report, where do I do it? The fundamental principle of the OECD Anti-Bribery Convention is that there will not be penalties in different jurisdictions for the same offence. This means there will, therefore, often be some sort of 'carving up' of responsibilities. Although the DOJ will normally lead the prosecution of US companies, and the UK will lead for UK companies, often there will be cases where each regulator will view themselves as having equal interests in a case and they will work in parallel. Often cases are divided up geographically, or one agency takes the company, and one takes the individuals. While this creates complications, there are sometimes situations where a defendant has paid two (smaller) penalties, but that together adds up to a 'full' penalty if it was restricted to just one jurisdiction.

At the recent ACI FCPA conference in Washington, DC, Andrew Weissman, head of the DOJ Fraud Section, stressed that the DOJ is aware of the potential for 'piling on' and the obligation of government to have 'one pie to divide up with those that have an interest in the resolution'. He cited the *VimpelCom* case as an example where the DOJ, SEC, and Dutch regulators equitably divided up the 'pie'. Weissman also said that if there is an acquittal in a case overseas, the DOJ will not go forward and prosecute the same conduct. He stated that mutual legal assistance treaties typically have this policy embedded in them.

In *Standard Bank*, the SEC imposed its own US$4.2m civil fine, which was related to the UK's case, but was a different aspect of the same matter, so there was no double jeopardy. But when we move away from simply the DOJ and the SFO the position becomes even more difficult as countries outside the OECD might also wish to prosecute in parallel or after the UK or US.

Seminal UK bribery resolutions

There have been five key cases for bribery offences since late 2015. These are DPAs for Standard Bank, XYZ and Rolls-Royce, and prosecutions for Smith & Ouzman and Sweett Group. These set out well the parameters of how modern bribery offences are being resolved in the UK at the present time. (In addition to the penalties below, each of the defendant companies had to contribute to the SFO's investigation and prosecution costs, which amounted to almost £13 million in the case of Rolls-Royce.)

Standard Bank: the UK's first DPA

On 30 November 2015, Lord Justice Leveson approved the UK's first DPA. The conduct concerned the failure by a UK-regulated bank, Standard Bank plc, to prevent bribery in breach of section 7 of the Bribery Act. The case concerned a transaction to raise US$600 million

for the government of Tanzania in 2013. As part of this transaction, a local Tanzanian company was paid a bribe of US$6 million (1 per cent of the transaction) by Standard Bank's sister company, Stanbic Bank, which was subsequently withdrawn in cash.

The penalty against the company was US$32.5 million, and the terms of the DPA were as follows:

- DPA: A three-year term;
- compensation: Standard Bank paid $6m plus interest to the government of Tanzania as compensation for the increased cost it suffered in the transaction, being the 1 per cent fee paid by Stanbic as a 'bribe';
- confiscation: Standard Bank was made to disgorge $8.4 million, which represented the 1.4 per cent fee received by Standard Bank and Stanbic;
- fine: Standard Bank paid a financial penalty of $16.8 million. This was calculated as:
  - harm: the US$8.4 million gross profit which represented the fee received by Standard Bank and Stanbic; and
  - multiplier: 300 per cent, which is the upper end of medium culpability and the starting point of higher culpability;
- reduction of one-third for admitting guilt at the first available opportunity; and
- monitorship: At its own expense, Standard Bank had to commission an independent report on its anti-bribery and corruption policies and their implementation.

Smith & Ouzman – the first SFO successful prosecution for bribery of foreign public officials

Smith & Ouzman Limited is an English security printing company that was sentenced in January 2016 – along with two of its directors – of paying bribes totalling £395,074 to secure contracts in Kenya and Mauritania. The conduct took place prior to the introduction of the Bribery Act, and, therefore, the convictions were under the old Prevention of Corruption Act 1906.

The penalty against the company of £2.2m was assessed as follows:

- compensation: There was no compensation order made;
- confiscation: A confiscation order of £881,158 was made against the company. The gross profit made on the contracts by Smith & Ouzman was £438,933; however, this is after bribes paid of £395,074. These were written into the contract itself and had been effectively paid away by the company, so the court added the value of these bribes to the gross profit figure. The total was indexed at printing sector rates to account for inflation;
- fine: The company was also fined £1,316,799 comprising:
  - harm: The harm was the gross profit from the contracts obtained of £438,933;
  - multiplier: A 300 per cent multiplier was applied, reflecting the seriousness of a company in a dominant market position, bribing public officials, over a sustained period of time; and
  - no reduction for a plea of guilty as the case was fought by the company.

The court was flexible in allowing the company time to pay the fines on account of questions over its solvency. Although (as is usual) confiscation was to be paid by the company within 28 days of the date of the hearing, the judge allowed the fine to be paid over 60 months.

Sweett Group plc: the UK's first conviction under section 7 of the Bribery Act

Sweett Group was an AIM-listed UK construction consultancy. The conduct concerned the failure to prevent bribery in breach of section 7 of the Bribery Act when its subsidiary paid bribes to secure a contract to advise on the construction of a hotel in Abu Dhabi.

The company pleaded guilty, and was sentenced at a hearing in February 2016, when it was ordered to pay penalties of £2.25 million as follows:

- compensation: A compensation order was not sought;
- confiscation: The prosecution and defence agreed a confiscation order for the amount of £851,000, which the judge approved. This amount reflected the company's gross profit obtained from the hotel project;
- fine: The fine was £1.4 million. It was calculated as:
  - harm: The gross profit of £851,000; and
  - multiplier: 250 per cent. The judge classified this as a high culpability offence. Although the starting point for the high culpability bracket is 300 per cent, the judge reduced the multiplier to 250 per cent, which was at its lowest end, and actually lower than the multiplier applied by the court in the DPA with Standard Bank to reflect mitigating factors; and
- there was the usual reduction of one-third for a guilty plea.

XYZ Ltd: the UK's second DPA

On 8 July 2016, Lord Justice Leveson approved the UK's second DPA between the SFO and an unnamed party (owing to ongoing action against individuals). We do know that it was a UK-based manufacturing company with a US parent company – in which certain of XYZ's employees and agents were involved in the systematic offer and payment of bribes to secure contracts in foreign jurisdictions between 2004 and 2012. Like Sweett and Smith & Ouzman, XYZ was a company of modest means, but the SFO appears to have better acknowledged its financial difficulties, and ultimately reduced the penalty to avoid bankrupting the company.

The penalty of £6.5 million and terms of the DPA were as follows:

- DPA: A period of at least three years and up to five years;
- compensation: There was no compensation order made, it not being possible to positively identify any entities as victims who may be compensated;
- disgorgement and fine of £6.5 million. XYZ made a gross profit on the illicitly obtained contracts of £6,553,085. Owing to XYZ's limited means, this was determined to be the entirety of the penalty. The court held that all the financial circumstances must be taken into account, including profitability, and so the fine was limited to the cash available within XYZ. The DPA provided for the penalty to be paid in instalments over five years.

The penalty of £6.5 million was split between fine and confiscation (perhaps slightly arbitrarily) as:

- fine: The fine was £352,000, which was a reasonable estimate of the unencumbered balance of cash available following a review by the SFO of XYZ's cash flow projections over three years;
- confiscation: There was ordered to be £6,201,085 disgorgement of gross profits. This required the support of XYZ's US parent company, and indeed roughly £6m had been received by XYZ's parent company since its acquisition in 2000;
- had XYZ not been short of money, the court would have likely ordinarily fined XYZ at £8.2 million. This would have comprised:
  - harm: The gross profits made of £6.5 million;
  - multiplier: The multiplier was 250 per cent. This was a high culpability offence, involving the company playing a leading role in a bribery scheme over a sustained period of time, with a lack of effective systems; and
  - discount: Given the self-report and admission far in advance of the first reasonable opportunity, a discount of 50 per cent could have been appropriate, not least to encourage others how to conduct themselves when confronting criminality; and
- monitorship: There was no monitor ordered; however, the DPA provides that XYZ would cooperate fully with the SFO, including reporting by XYZ's chief compliance officer on all third-party intermediary transactions and the adequacy of its anti-bribery policies and procedures over the next 12 months (and annually until at least 2018).

Rolls-Royce: the UK's largest bribery resolution and DPA

On 17 January 2017, Lord Justice Leveson approved the UK's third, largest, and most complex DPA, involving 'truly vast, endemic' bribery and corruption in one of the world's most established engineering firms, Rolls-Royce Plc and its US subsidiary Rolls-Royce Energy Systems Inc.

The conduct spanned three decades in seven jurisdictions and involved three business sectors. It was brought through six counts of conspiracy to corrupt in Indonesia, Thailand, India and Russia; one of false accounting in India; and five counts of failure to prevent bribery under section 7 of the Act in Indonesia, Nigeria, China and Malaysia. The majority of the issues arose through Rolls-Royce's use of intermediaries and agents. The investigation into the conduct of individuals continues.

The penalty in the UK against the company was £497 million, and the terms of the DPA were as follows:

- DPA: A five-year term, which can be shortened to four years with satisfactory compliance;
- compensation: There was no compensation order made, as it was not possible to identify a quantifiable loss arising to victims from any of the criminal conduct;
- confiscation: Rolls-Royce was made to disgorge £258.17 million, which represented the gross profits made under the 12 counts;
- fine: £239,082,645 after a discount of one half for admitting guilt and for extraordinary cooperation;
- the disgorgement of profits and the fine were payable over four instalments, carrying interest at 0.8 per cent above LIBOR; and
- monitorship: At its own expense, Rolls-Royce had to complete a compliance programme following previous recommendations.

Again, both the disgorgement and fines were based on gross profits. Some points worthy of note in relation to these calculations:

- the offence of conspiracy to corrupt was treated for penalty purposes as a substantive bribery offence;
- where the counts (for example, 2, 3 and 4) represented multiple offending of a similar nature in one jurisdiction, using one intermediary in respect of one airline involving the same senior Rolls-Royce employees, the harm figure was based on the total gross profit disgorged, divided by the number of engines sold;
- where a bribe was paid to obtain a document, without specific profits resulting from it, harm was based on the amount of the bribe paid;
- multipliers for these most serious substantive bribery offences were either 325 or 400 per cent;
- in relation to the offence of false accounting, harm was based on the amount likely to be obtained, calculated as 10 per cent of the relevant revenue less allowable costs;
- in respect of the offences under section 7 of the Act:
  - gross profit earned prior to implementation of the Act on 1 July 2011 did not form part of the disgorgement, since the offending was not causative of that profit being earned;
  - similarly, gross profit earned subsequent to the final payment to an intermediary was not disgorged;
  - the gross profit made on the contracts was allocated on a pro rata basis if necessary, to estimate the amounts arising between these dates; and
  - the multiplier varied between 200 and 300 per cent, and in practice was averaged across business units.

In addition, a simultaneous deferred prosecution agreement reached with the DOJ required a financial payment of US$169,917,710 and a leniency agreement with the Brazilian authorities a payment of US$25,579,645.

Recent US Cases

VimpelCom Ltd – global settlement

In a February 2016 global settlement with the DOJ, SEC and Dutch regulators, VimpelCom resolved FCPA violations. The settlement papers detail how Unitel, an Uzbek subsidiary of Vimpelcom, between 2006 and 2012, paid $114 million in bribes to an Uzbek government official to enable it to enter and continue operating in the Uzbek telecommunications market. In the DOJ settlement, Unitel pleaded guilty to violating the anti-bribery provisions of the FCPA, while VimpelCom itself entered into a DPA.

The penalty was $795 million, and half of this amount will be paid to the Netherlands and the other half to the US as follows:

- DPA: This will last a period of three years. If the DOJ determines that VimpelCom has violated the DPA, the DOJ may at its sole discretion commence prosecution or extend the term of the DPA for up to one year;
- monitor: VimpelCom agreed to appoint an independent compliance monitor for three years, which may be terminated early or extended depending on certain circumstances;
- disgorgement of US$375 million:
  - the DOJ: US$40 million;
  - the SEC: US$167.5 million; and
  - the Dutch Public Prosecution Service: $167.5 million;
- criminal penalty to the US DOJ: US$230.1 million including the US$40 million forfeiture above as follows:
  - the base fine, being the profit made on the contracts, was $523 million;
  - the bribe range given under the US Guidelines was US$836 million to $1.67 billion, and so the total penalty represents a 45 per cent reduction from the bottom of the range. This was explained as being:
    - 25 per cent for full cooperation as permitted by foreign data protection laws; and
    - 20 per cent for prompt acknowledgement of wrongdoing and willingness to resolve its criminality on an expedited basis;
  - US$230m of the fine was offset against the fine levied by the Dutch authorities on the subsidiary Unitel; and
- criminal penalty paid to the Dutch Public Prosecution Service: US$230 million.

The companies did not receive more significant mitigation credits because the companies did not voluntarily self-disclose their misconduct after an internal investigation uncovered wrongdoing.

The DOJ is still seeking forfeiture of a further $850 million – $300 million in property located in Belgium, Ireland, and Luxembourg, and $550 million held in Swiss bank accounts, which the DOJ claims as being derived from criminal acts under US law. If successful, this would make the *Vimpelcom* case the largest ever.

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PTC Inc

In February 2016, Massachusetts software company PTC resolved investigations conducted by the DOJ and SEC related to improper travel, gifts and entertainment. It was alleged that PTC subsidiaries spent more than US$1 million to arrange and pay for Chinese public officials to travel to the US for recreational travel, and during that same timeframe, entered into more than US$13 million in contracts with Chinese state-owned entities.

In total, the US$28 million in combined penalty and disgorgement paid by PTC far exceeded the $13 million earned in the contracts associated with the improper payments. The enforcement action involved:

- an NPA for three years with the DOJ. The NPA cited 'extensive remedial measures' as a factor in the decision to allow an NPA;
- criminal penalties against two subsidiaries (but not the parent company) in which the subsidiaries paid fine of US$14.54 million. There was a partial cooperation credit of 15 per cent off the bottom of the US Sentencing Guidelines fine range for cooperation with the DOJ's investigation, but not a full cooperation credit owing to incomplete self-disclosure;
- an SEC administrative order against PTC Inc itself, involving a disgorgement of profits of US$13.7 million (including US$1.8 million in prejudgment interest); and
- an SEC DPA against a Chinese citizen and a former employee, in what the SEC called 'its first DPA with an individual in an FCPA case' as a reward for the significant cooperation he provided the SEC during its investigation.

Akamai and Nortek receive DOJ declination letters and SEC NPAs

In June 2016, both the diversified industrial company Nortek Inc and the internet services company Akamai Technologies Inc became the first companies under the FCPA Pilot Program to receive declination letters. The declination letters were issued after the companies self-reported their involvement in making illicit payments to Chinese officials, fully cooperated with the US government and took remedial actions to address the conduct.

Both companies also agreed to NPAs with the SEC in which Akamai Technologies agreed to pay US$652,000 in disgorgement and US$19,400 in prejudgment interest, while Nortek agreed to pay US$291,000 in disgorgement and US$30,000 in pre-judgment interest.

It is noted that both companies self-reported prior to the April 2016 announcement of the FCPA Pilot Program, but the DOJ stated in both letters that the declination decisions were consistent with the Pilot Program.

Among the factors that led to the declination, the DOJ specifically noted that both companies would be 'disgorging to the SEC the full amount of disgorgement as determined by the SEC'.

HMT LLC and NCH Corporation – DOJ declinations with disgorgement

On 29 September 2016, the DOJ released declination letters for two private Texas companies, HMT LLC and NCH Corporation, under its FCPA Pilot Program.

HMT LLC is a manufacturer and supplier of oil and gas storage tanks that paid bribes to foreign government officials in Venezuela and China. HMT LLC agreed to disgorge approximately US$2.7 million.

NCH Corporation is a manufacturer of cleaning products that paid bribes, including cash and other things of value, to foreign government officials in China. NCH Corporation agreed to disgorge US$335,342.

These declination letters are the first declinations under the DOJ FCPA Pilot Program to include a disgorgement payment and are also the first declinations to be issued to private companies. There was no associated SEC resolution because HMT and NCH, as private companies, are not registered with the SEC.

Combating corruption in the banking industry – the Indian experience

Aditya Vikram Bhat and Shwetank Ginodia

AZB & Partners

'If you owe the bank a hundred thousand dollars, the bank owns you. If you owe the bank a hundred million dollars, you own the bank.' This American proverb alludes to the dangers of corruption, nepotism and cronyism in the banking sector. Often ignored, corruption in the financial services sector can have deep and far-reaching consequences for an economy, and in an increasingly interconnected world, the entire globe. This has been brought into sharp focus post the 2008 crisis and its aftermath, which included interest rate rigging, money laundering and tax evasion. In India as well, corruption in the financial services sector has been in the media spotlight in recent years, with Indian banks labouring under the burden of growing columns of non-performing assets and bad loans. While the issues of debt recovery have been sought to be addressed by way of undertaking an overhaul of existing laws, enforcement actions are bringing to light the corruption in the system and how bank officials have been sanctioning loans to undeserving borrowers.

Why is tackling corruption in the banking industry important?

Combating corruption in the finance sector is a central concern of both law enforcement agencies as well as central banks and financial regulators. Probity in the conduct of business by banks is crucial given that they deal with public money; since they are financed through deposits of small savers and their equity is owned by retail investors either directly on the stock market or aggregated through institutional investors like insurance companies, mutual funds and pension funds.

In India, some of the bigger banks are state-owned and therefore their capital is directly from taxpayers. State-owned banks dominate the banking landscape in India – statistics issued by the Reserve Bank of India (RBI), India's central bank and regulator of banks, show such banks have 73.3 per cent of the market share in credit and 73.9 per cent of the share in deposits. This is why they should have standards of integrity, but unfortunately, banks and state-run banks in particular have very low standards of governance. Governance in banks is also crucial to achieve the ends of banking supervision – whether prudential regulation or consumer protection. Corruption by banks in the manner they extend loans and subsequently recover (or restructure) them has systemic implications on the asset quality of banks – giving loans for extraneous considerations and possibly evergreening or restructuring bad loans could lead to the build up of non-performing assets in banks, tie up capital and prevent fresh credit offtake. While reliable data linking bank integrity issues to asset quality is difficult to get, the anecdotal evidence is worrying.

One of the most high-profile instances was of state-run banks running up exposure of up to 70 billion rupees in respect of an airline company without appropriate credit assessments and against inadequate capital. There were serious accounting, legal and governance violations with respect to the cash flows of the borrower that the banks should have detected and tackled – and ideally they should not have lent to the borrower unless such transactions were reversed or if such transactions were discovered post facto, they should have been treated as acceleration events under their lending documents. Instead, banks did not address the deterioration in asset quality by taking legal measures against it, but rather refinanced their loans. Eventually these loans became junk as the airline company shut its operations and several loans had to be written off almost completely – with bank capital remaining interminably stuck and not being free for more productive deployment. Because of the interconnectedness of the financial sector, such issues threaten to destabilise the economy. Corruption and related offences (such as collusion and fraud) significantly impact the consumer protection goal of banking regulators when it takes the form of offences such as interest rate rigging as well as predatory pricing, which is subsequently accelerated.

Banks also often act as gatekeepers to identify other kinds of offences – for instance, money laundering and tax evasion offences are tracked through banks' processes relating to know your customer (KYC) checks and suspicious transactions reporting, among others. Banks and their personnel are therefore especially vulnerable to fraud and corruption on a potential anti-money laundering (AML) offence. An international example of this is the U-turn transactions undertaken by Standard Chartered Bank for routing funds into Iran, a country that otherwise was on the sanctions list. In other instances, banks have been used to fund criminal organisations. In another instance, a list of Indian account holders of a Swiss branch of an international bank was leaked to authorities, leading to an investigation by the tax and law enforcement authorities in India.

In a major recent development, the Indian government on 8 November 2016 demonetised Indian currency notes of 500 and 1,000 rupee denominations (ie, the two highest available denominations) with immediate effect, ostensibly to tackle hoarding of black money and as a measure to reduce corruption. The government has introduced new currency notes of denominations 500 and 2,000 rupees and placed limits on the exchange of the demonetised notes and withdrawal of new notes from banks. While the impact of this still remains to be seen, the systemic issues are coming to light with the police apprehending persons in possession large amounts of currency, and arresting bank officials for permitting conversion of demonetised notes into new currency in excess of prescribed limits.

The recent India experience

The recent Indian experience on integrity issues in banks is especially instructive for the width and depth of its prevalence. A year ago, the chairman and managing director of a large state-run bank was arrested for taking a bribe to extend a loan to a steel manufacturing company. Charges have been framed under the Prevention of Corruption Act, 1988 and the Indian Penal Code. The loan was discharged without adequate credit checks on account of alleged bribing of the lender's management and collusion with the borrower – and later classified as non-performing on account of defaults, requiring the lender to disclose and provision capital. Regardless, it was refinanced and restructured for a period of as long as 25 years, when other recovery, collateral enforcement or liquidation options could have been explored instead. Similarly, a former chair and managing director of another large public sector bank was recently arrested by the Central Bureau of Investigation for having obtained large amounts of money for herself or a private firm owned by her husband and son, from private companies to whom various credit facilities were granted by the bank.

In the context of state-run banks, there are restrictions on recruitment as well as remuneration of managerial staff in state-run banks, which impacts the quality of top management. Boards also tend to have ex officio nominees to the government rather than independent experts that can provide 'tone from the top'. There are limitations on the tenure of bank chiefs that, coupled with collusive and corrupt practices, means that they are incentivised to 'extend and pretend' when a loan goes bad,

rather than recognise and address it. This is demonstrated by the fact that the quarterly results following the appointment of the chairman and managing director of India's largest state-run bank almost always report lower profits on account of higher provisioning for bad loans extended during the tenure of the previous chairperson. For instance, the quarterly results following the appointment of the current chairperson showed the sharpest decline in profitability when compared with those during the two years that preceded it (incidentally, the tenure of the previous chairperson), which was attributable almost entirely to the provisioning against bad assets undertaken after her taking over. All of these have lead to a build-up of non-performing assets in India's banks to the extent of 4.45 per cent of total advances in March 2015. Loans are extended based on egregious practices rather than rigorous credit checks to borrowers or sectors that need credit.

Part of the reason for the concentration of such practices in the banking sector was the lack of a governance framework for banks that addresses these issues in a concerted manner. The Reserve Bank of India has now put in place various reporting mechanisms that obligate banks and financials institutions to report 'fraud', including unauthorised credit facilities extended for reward or illegal gratification. Moreover, in an important recent development, the Supreme Court of India in a recent decision in the case of *Central Bureau of Investigation v Ramesh Gelli & Others*, has held that the term 'public servant' under the Prevention of Corruption Act, 1988 includes employees of private banks, thereby extending the ambit of India's primary anti-corruption law (which primarily targets corruption in the public sector).

The Prevention of Corruption Act, 1988 does apply to state-run banks and the comptroller and auditor general and the Central Vigilance Commission do have oversight over them. However, the managerial staff of such banks do not have the tighter conduct rules applicable to other civil servants restricting them from taking gifts, meals and hospitality and lack severe restrictions on interface with private parties. It remains to be seen how the decision of the Supreme Court in the *Ramesh Gelli* case impacts private banks and their bank officials, and whether it will result in tighter checks and vigilance mechanisms. In addition, due diligence and customer service is often disregarded in the race to meet numerical targets. An RBI-appointed Committee on Customer Service in banks noted that banks are 'focusing excessively on achievement of quantitative targets rather than rendering quality service to select customers after having carried out the process of due diligence'. This highlights the potential for mis-sale or unsuitable sale of products because of remuneration structures that place excessive importance on the achievement of sales targets.

There have been some recent reform initiatives in this regard, including the requirement to have independent directors and permitting competitive remuneration of directors. For state-run banks, the RBI formed a committee that made a host of recommendations to improve governance, including competitive recruitment and remuneration, fixed tenures for bank chiefs, clawback of bonuses when dubious evergreening is detected, etc. The implementation of these recommendations is currently on hold since it is being resisted by bank unions. These recommendations are fundamental and could help transform the banking landscape into a more professional and better-governed one. In addition to the aforesaid recommendations, others could include embedding within performance metrics the performance of loans disbursed under the management's watch, and making their remuneration contingent on this by penalising management for non performance of loans, holding up promotions for deterioration in quality of loans and linking promotions to recoveries. This will bring accountability and disincentivise collusive behaviour. Further, despite fixed tenures, management should be made responsible for loans disbursed in their time if they become non-performing even after they are transferred (if such deterioration can be linked back to acts or omissions of the management). In addition, there must be tighter rules governing the conduct of bank personnel in both private and public sector banks.

Inculcating integrity

The India experience holds some lessons more generally. While other countries do penalise private sector corruption, because of the risks unique to banking, it is appropriate for there to be a special framework on integrity specifically for the banking sector, which could be stipulated and monitored by banking regulators and supervisors. This should include having independent boards to set the tone and monitor on an ongoing basis the compliance with an anti-corruption framework and its impact on related parts of the bank's performance. The remuneration of bank management has been especially criticised in the wake of the global financial crisis and must be overhauled. Transparency International recommends in its working paper that there should be non-financial performance criteria when determining performance-related pay, which places a premium on integrity, behaviour and compliance with an anti-bribery and anti-corruption framework and in certain instances where such behaviour may pose a threat to a bank's values or override any positive assessment of financial performance. They also recommend the use of clawback options (with no limitation period) to increase accountability for wrongdoing. Additionally, in the interest of transparency, the remuneration policies of banks should be published, which would allow stakeholders (such as customers) to know if financial products and their sale are linked to faulty incentive structures. Other measures include rigorous restrictions on conflicts of interest; the Volker Rule introduced soon after the financial crisis in the US is one manifestation of this to prevent the moral hazard that could arise when the same entity undertakes investment and commercial banking. Such restrictions should be pervasive and should be enforced strictly. All these are in addition to the existing compliance frameworks for AML and combating the financing of terrorism.

Benefit, not cost

The banking industry usually sees compliance as an additional cost and a burden. It is imperative to change that perception and to instead make it see the benefits – that of better quality talent and leadership that results in better quality assets and stronger balance sheets, lower moral hazard, lower vulnerability to black swan events and crises and, therefore, better bank performance.

Anti-corruption developments affecting Latin America's mining industry

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Despite a slowdown in the global mining industry, Latin America remains a key destination for mining investment, because of the sizeable wealth of its mineral resources, reduced operating costs and incentive-based policies. As a result of the large number of mega-projects it is able to host, the region has been able to maintain the highest mining project-investment average of any other region, registering a median per project investment of US$780 million in 2013 (see Engineering and Mining Journal's 2014 Global Annual Mining Investment Survey at www.e-mj.com/features/3674-e-mj-s-annual-survey-of-global-metal-mining-investment.html). During 2014 and 2015, the region continued to attract key mining activity, including optimised drilling, commodity related revenues, important capital raising and considerable exploration budgets (See http://go.snl.com/rs/080-PQS-123/images/SNL-Metals-Mining-Infographic-Latin-America-English.pdf). Foreign-based companies have acquired hundreds of mining properties in Latin America for exploration and extraction, with Mexico securing the largest share of Latin America's 2014 exploration budget, followed by Chile, Peru and Brazil. Total projects by development stage appear to be equally divided among those at the grassroots, exploration, target outline, reserves development and production stages, with a lesser number of projects at the feasibility and preproduction stages. Given the cyclical nature of the industry, mining investment in Latin America is expected to remain large and continuous.

Corruption, however, is a key concern when it comes to doing business in Latin America. Despite a couple of notable exceptions such as Chile and Uruguay, most countries in Latin America score relatively low in the latest ranking of the Corruption Perceptions Index published by Transparency International. Preoccupation with the fight against corruption among Latin American nations, however, has been present for decades, as most countries in the region adopted the Inter-American Convention against Corruption between 1996 and 1998 (Peru, Mexico, Uruguay, Argentina, Colombia, Chile, Paraguay, Ecuador and Venezuela ratified the Inter-American Convention against Corruption between 1996 and 1998, see www.oas.org/en/member_states/default.asp). Because the mining industry remains highly regulated by local governments, it is exposed to an environment that is prone to bribery and corruption created by the familiar mixture of necessity, opportunity and justification. Such is the combination of deep pockets, inadequate infrastructure and public services, weak institutions and insufficient fiscal budgets in rural areas, cultural differences, public officials with low levels of education and ethics, inadequate and untimely sanctions, poor judicial systems and deficient due diligence of local partners. It is arguable, however, that the most crucial corruption risk of doing business in Latin America is the lack of knowledge of business people, executives and local employees of the reach and application of anti-bribery and anti-corruption legislation at their country level and internationally. More importantly, a large majority of them is either not aware or has a blatant disregard for the reach and application of the United States' Foreign Corruption Practices Act (FCPA), the most widely enforced anti-corruption legislation of the moment.

The FCPA imposes corporate liability, responsibility for third parties and extraterritoriality for corruption-related offences, thereby holding entities and individuals criminally and civilly responsible for corruption offences committed outside of the United States. Of critical importance is the increasing intertwine of the FCPA with other US laws that can establish corruption-related offences where FCPA offences are not present, thereby expanding the reach of the FCPA and prosecution of overseas activity that other laws do not reach, such as travel, commerce, mail and wire statutes, anti-money laundering, whistle-blower, fraud, data privacy and other laws. Furthermore, there are several recent developments that should arguably send a strong sign of caution to mining investors doing business internationally, such as the open investigations and hefty penalties involving mining and engineering companies in the past three years. Recent anti-fraud and anti-corruption investigations and penalties include: Odebrecht/Braskem (Brazil), penalty of US$419.8 million in December 2016; Newmont (US), self-disclosure for alleged FCPA violations (which may include operations within the Latin America region) in April 2016; Alcoa (US), penalty of US$384 million imposed in January 2014; Gold Fields (South Africa; NYSE), investigation begun in 2013 and concluded in June 2015; BHP Billiton (Australia; NYSE), penalty of US$25 million imposed in May 2015; Kinross Gold Corporation (Canada; NYSE), investigation begun in October 2015; and SNC Lavalin (Canada), investigation begun in February 2015.

With respect to important legal rulings affecting the mining industry worldwide, but more particularly mining operations in Latin America owing to its large peasant and indigenous population, close attention should be paid to the 2014 ground-breaking decision *United States v Joel Esquenazi and Carlos Rodriguez*, in which the Eleventh Circuit Court of Appeals was the first to review what is an 'instrumentality' under the FCPA, setting a precedent for the inclusion of non-traditional persons within the reach of the FCPA when these are deemed to perform a function that the government of the foreign country may treat as its own. In *Esquenazi*, the court defined the term 'instrumentality' as 'an entity controlled by the government of a foreign country that performs a function the controlling government treats as its own'. The court explained that 'what constitutes control and what constitutes a function the government treats as its own are fact-bound questions' and developed separate tests for each of these two key issues, which include, among other factors, whether the foreign government has 'formally designated' anyone to perform a government function.

When analysing peasant or indigenous communities in Latin America under *Esquenazi*, it is important to take into account that any 'formal designation' made by a Latin American government of a peasant or indigenous community may result from the historical perspective of the agrarian and land reforms that reached colossal proportions across the region. Land from the Spanish colonial landowners was distributed among peasant proprietors following civil wars and revolutions throughout the region. Formalisation of this land tenure resulted from the obligation imposed by most Latin American governments upon peasant proprietors to undergo specific administrative procedures and obtain registration before regional and national authorities. Further formalisation results from constitutional reforms in Latin America, which tend to recognise (in Bolivia, Colombia, Ecuador, Mexico, Paraguay, Peru and Venezuela) the multicultural character of these communities and their existence as singular entities with distinct cultural and linguistic attributes and specific rights (see www.upf.edu/dhes-alfa/materiales/res/dhgv_pdf/DHGV_Manual.275-300.pdf). Some reforms have strengthened the organisation of indigenous communities (in Bolivia, Guatemala and Colombia), creating bodies for public rule empowered to exercise certain levels of authority and

self-governance in their territories (see www.culturalsurvival.org/publications/cultural-survival-quarterly/notes-field-indigenous-peoples-and-democracy-latin-america). In addition, direct and indirect government subsidies in favour of peasant and indigenous communities already exist in the form of special taxes, mining royalties, canons, certain tax exemptions, preferential rights to obtain grants and loans, among others. International normative systems, such as the ILO's Convention 169, the Constitutive Agreement of the Indigenous Fund, the United Nations and the OAS further support the formal community designation by incorporating principles and operating guidelines based on the right of participation, the obligation of prior consultation and the protection of cultural rights, among others. In September 2011, Peru, for example, enacted the Law of the Right of Prior Consultation to Indigenous and Native Communities, which formally recognises the rights of such population to prior consultation of legislative or administrative measures that may impact upon their collective rights, physical existence, cultural identity, quality of life or development.

The interpretation of what is an 'instrumentality' under the FCPA appears to be broad enough to encompass a wide spectrum of entities with varying degrees of government ownership or control, or both. While this issue is likely to be ultimately addressed as a question of fact using a totality of the circumstances test with no single dispositive factor, *Esquenazi* nonetheless brings a new outlook when analysing FCPA compliance matters in Latin America from a mining industry perspective. Given the historical problems of cultural and social integration of its diverse population, various Latin American governments have not only formally designated and recognised, but also transferred traditional government functions, to certain groups in their population who often receive government subsidies and have varying degrees of government control. The probable classification of a community leader as a government official under the FCPA would have enormous implications for any mining investor operating in the region. It is a known fact that mining projects are often located in rural areas, in or near surface land often owned by peasant or indigenous communities, and that the development and other needs of the communities located in the direct and indirect area of influence of a mining project often include investment commitments that are part of a project's environmental impact studies. Each of these factors could involve different types of contributions by mining investors to public officials and to peasant or indigenous communities that need to be carefully and properly monitored, classified and registered to avert FCPA implications.

Adding to the concern of the possible classification of a community leader as a government official under the FCPA are certain provisions of Canada's Extractive Sector Transparency Measures Act (the ESTMA), which came into force on 1 June 2015 and is designed to complement Canada's existing anti-corruption regime in the Corruption of Foreign Public Officials Act by creating greater transparency over payments made to a government by the extractive sector, including payments made to certain aboriginal governments in Canada and abroad, with the latter subject to a two-year transitional period (see http://laws-lois.justice.gc.ca/eng/acts/E-22.7/page-1.html). The new mandatory reporting standard for extractive companies applies to payments made to foreign and domestic governments at all levels, including aboriginal groups. The ESTMA reporting requirements apply to companies engaged in the development of oil, gas or minerals that are either listed on a Canadian stock exchange or have a place of business in Canada, do business in Canada or have assets in Canada and which meet certain size thresholds. Companies subject to the ESTMA are required to report and publicly disclose all payments, including taxes, royalties, fees and any other consideration for licences, permits or concessions in excess of C$100,000. Non-compliance with the reporting requirements is an offence; thereby, any director or officer who directed, authorised, assented to, acquiesced in or participated in the non-compliance can also be held personally liable. Canada's new rules are intended to be similar to those being implemented in the European Union (the Extractive Industry Transparency Initiative) and in the US.

Additional trends impacting bribery and corruption in Latin America's mining industry are the efforts by mineral resource-rich countries, such as Brazil, Peru and Mexico, to develop anti-corruption legislation and compliance obligations as a response to recent domestic and international pressure to become aligned with worldwide integrity efforts, and to be able to remain attractive to mining investment. The new regulations to Brazil's Clean Companies Act, for example, impose civil and administrative penalties, set specific rules for compliance programmes, set codes of conduct and ethics and add whistle-blower and other integrity requirements, and create a registry of offending companies. The government has also announced new anti-bribery legislative proposals as part of a future 'anti-corruption package', which includes potential new criminal penalties and authority to confiscate property (see www.law360.com/articles/638561/a-comparison-of-anti-corruption-laws-in-us-uk-brazil).

Similarly, some important anti-corruption legal advances took place in the past couple of years in Peru. Law 30,111 (which introduces the imposition of fines for corruption crimes), Law 30,124 (which amends the criminal definition of public official), Law 30,161 and its regulations (which require a sworn declaration of the income, goods and rent received by public officials and civil servants), Legislative Decree 1243 (which broadened the penalty of civil disqualification of public officials by introducing the definitive civil disqualification resulting from corruption) and Law 30,424 (which introduced the concept of corporate administrative liability for entities involved in the crime of transnational active bribery) were enacted. More recently, Law 30,424 was further amended by Legislative Decree 1,352 (enacted 6 January 2017), extending corporate administrative liability to the crime of bribery of domestic public officials or servants, as set out in the Criminal Code. Both offences will become effective and enforceable as of 1 January 2018.

In addition, various government entities joined efforts to identify and provide information of ongoing legal actions and investigations involving corruption, terrorism, drug trafficking and other alleged crimes of political candidates running for office. Further, an online visitor registration system was introduced, requiring government entities to publish, in real time, the names of visitors of their public employees, contributing to increasing transparency and generating mechanisms

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of social control in the country. By way of these legal developments, Peru intends to continue towards its accession path to the OECD Convention, following becoming a participant country in the OECD Working Group on Bribery in International Business Transactions.

Mexico has not lagged far behind in enacting new anti-bribery measures. In April 2015, Mexico's Congress approved a new anti-corruption law, which creates the National Anti-Corruption System, extinguishes property rights resulting from illicit enrichment, strengthens oversight of public officials, designates a special prosecutor to tackle corruption, gives new powers to Mexico's existing Federal Audit Office and the Public Administration Ministry, and creates a special court to oversee all corruption related issues (see www.elfinanciero.com.mx/nacional/los-puntos-mas-importantes-de-la-ley-anticorrupcion.html).

Given Latin America's political and economic stability, the continuous growing trend in international anti-corruption regulation and enforcement, including the enactment of new legislation in several Latin American countries encouraging parallel investigations and cooperation with their foreign counterparts, mining companies, investors and corporate executives involved in the region need to be aware and better prepared for a stricter playing field, in which anti-corruption and anti-bribery measures will play a key role. Mining investors should be proactive in improving and implementing effective compliance programmes, taking into account the US Sentencing Guidelines and international and local anti-corruption legislation; conducting preventive and ongoing compliance trainings on-site and in Spanish by knowledgeable legal counsel capable of understanding the international anti-corruption context and educating employees and third parties at all levels – especially high-level management, community and social relations teams, security personnel, local partners (including community leaders), vendors and agents; conducting enhanced and integrity due diligence of local partners, suppliers and agents; carrying out country and cultural risk assessments; designing and implementing adequate and personalised internal controls able to satisfy the needs, operations and culture of each company; allocating sufficient resources and attention to designing, implementing, monitoring and reviewing internal policies and controls; and more importantly, constantly educating all project stakeholders about the evils of bribery and corruption and the worthiness of doing business freely and competitively.

Argentina

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1 International anti-corruption conventions

To which international anti-corruption conventions is your country a signatory?

Argentina is signatory to the following international anti-corruption conventions:

- the Inter-American Convention against Corruption (the IACAC) in 1997 (approved by Law No. 24,759);
- the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention) in 2000 (approved by Law No. 25,319); and
- the United Nations Convention against Corruption in 2006 (approved by Law No. 26,097).

2 Foreign and domestic bribery laws

Identify and describe your national laws and regulations prohibiting bribery of foreign public officials (foreign bribery laws) and domestic public officials (domestic bribery laws).

The Argentine Criminal Code (the ACC) is the main regulation that governs and punishes behaviours related to bribery and corruption. The legal framework punishing bribery is established in sections 256 to 259 of the ACC. Section 256 ACC punishes domestic public officials who directly or indirectly receive money or any other item of value in exchange for doing, delaying or omitting to do certain actions relating to their public duties or activities. The active bribery of a public official is also punished in section 258 ACC.

The offence of bribery of foreign public officials was introduced by means of Law No. 25,188 in section 258-bis ACC, which was also amended by Law No. 25,825 in order to cover the bribery of officials of international organisations.

In addition, there is civil and administrative liability regarding breaches of foreign and domestic bribery laws (see questions 16 and 23).

Finally, it is worth mentioning that the national executive branch sent a bill on corporate criminal liability for corruption cases (the Anti-corruption Bill) to Congress with the aim of assessing the deficiencies noted by the OECD in its evaluations.

Foreign bribery

3 Legal framework

Describe the elements of the law prohibiting bribery of a foreign public official.

Section 258-bis ACC sets forth that any person is punished with imprisonment from one to six years and special disqualification for life from the exercise of any public office if that person offers or gives a public official from a foreign state or from an international public organisation, personally or through an intermediary, money or any object of pecuniary value or other benefits such as gifts, favour, promises or benefits, for:

- that person's own benefit or for the benefit of a third party; and
- the purpose of having that official do or not do an act related to his or her office or to use the influence derived from the office he or she holds in an economic, financial or commercial transaction.

4 Definition of a foreign public official

How does your law define a foreign public official?

The ACC defines the terms 'public official' and 'public employee' in section 77 as 'any person who temporarily or permanently discharges public functions, whether as a result of popular election or appointment by the competent authority'. According to the OECD Report, this definition includes two deficiencies:

- it is not autonomous; and
- it is too narrow, as it does not cover bribery of employees of foreign state-owned or state-controlled enterprises or officials of any organised foreign area or entity, such as an autonomous territory or a separate customs territory.

In the Phase 3 OECD Report 2014 (the OECD Report) (see OECD Working Group on Bribery, Argentina, Phase 3 Report of 18 December 2014, available at: www.oecd.org/corruption/anti-bribery/Argentina-Phase-3-Report-ENG.pdf) it was stated that the definition of a foreign official would be broadly interpreted having regard to the Convention; however, there is no case law confirming such interpretation.

5 Travel and entertainment restrictions

To what extent do your anti-bribery laws restrict providing foreign officials with gifts, travel expenses, meals or entertainment?

Pursuant to Argentine anti-bribery laws, there is no specific restriction regarding the provision of gifts, travel expenses, meals or entertainment to foreign officials. However, it could be interpreted that this behaviour constitutes the offence of bribery of foreign public officials (see questions 27 and 28).

It is worth noting that in the OECD Report, the Working Group reflected that Argentina argued that all payments made personally to an individual public official are necessarily illegitimate (paragraph 35).

6 Facilitating payments

Do the laws and regulations permit facilitating or 'grease' payments?

According to Argentine legislation, facilitating payments could be characterised as bribery offences under the ACC. There are no safe harbours or exemptions, and 'grease' payments (for routine government actions) are not allowed.

7 Payments through intermediaries or third parties

In what circumstances do the laws prohibit payments through intermediaries or third parties to foreign public officials?

Argentine law prohibits payments through intermediaries or third parties: The bribery of a foreign public official offence can be committed either directly or indirectly (section 258-bis).

Additionally, section 45 of the ACC sets forth that the following would be punishable with the same penalty as the perpetrator:

- the person who takes part in the commission of a criminal act;

- the person who provides assistance or cooperation without which the offence could not have been committed; and
- the person who directly abets another to commit a criminal act.

Pursuant to section 46, the following are punishable with a reduced penalty (from one-third to one-half):

- the person who cooperates in any other form in the commission of a criminal act; and
- the person who gives assistance because a previous promise.

8 Individual and corporate liability

Can both individuals and companies be held liable for bribery of a foreign official?

Individuals can be held criminally, administratively and civilly liable for bribery of a foreign public official. However, in Argentina, companies cannot be held criminally liable for foreign bribery offences, and corporate criminal liability has been established in our country only for money-laundering (sections 303 and 304 ACC), terrorist-financing offences (section 306 ACC), insider trading (sections 307, 308 and 313 ACC), manipulation of financial markets and misleading offers (section 309 and 313 ACC), financial intermediation (sections 310 and 313 ACC), financial fraud (sections 311 and 313 ACC), financial bribery (sections 312 and 313 ACC), tax offences (Law No. 24,769 modified by Law No. 26,735, section 14), customs offences (Law No. 22,415, section 887), currency-exchange offences (Law No. 19,359, section 2f), antitrust law (Law No. 25,156, section 47), the supply law (Law No. 20,680 modified by Law 26,991, section 8), the criminal trade mark law (Law Nos. 11,723 and 22,362) and the environmental criminal law (Law No. 24,051).

9 Successor liability

Can a successor entity be held liable for bribery of foreign officials by the target entity that occurred prior to the merger or acquisition?

A successor entity cannot be held criminally liable for bribery of foreign officials by the target entity when it occurred prior to the merger or acquisition (see question 8).

It is important to point out that the Anti-corruption Bill sets forth joint and several liability of controlling companies for the penalties imposed on their controlled companies, as well as successor liability. Notwithstanding, successor liability could be avoided if appropriate anti-corruption due diligence processes and corrective measures are carried out.

10 Civil and criminal enforcement

Is there civil and criminal enforcement of your country's foreign bribery laws?

Yes, there is civil and criminal enforcement of foreign bribery laws. See question 16.

11 Agency enforcement

What government agencies enforce the foreign bribery laws and regulations?

The Federal Court on Criminal and Correctional Matters is the competent court for bribery and corruption matters concerning public officers, and the national Constitution provides a special mechanism for removal and prosecution of officials and judges called impeachment. Federal judges are assigned to conduct bribery and corruption investigations, and have broad powers under the Criminal Procedure Code (the CPC), including requesting reports from both public and private agencies; and ordering numerous procedural and precautionary measures, aimed at avoiding and preventing obstruction to investigations and the escape of criminals.

All national and provincial police forces are at the disposition of the federal judiciary, as court assistants, to perform, execute and comply with its orders. The authority of a federal judge is limited geographically to Argentina. In practice, the authorities and judiciary cooperate with overseas regulators. The only protection provided is that some people may be required to answer written reports so as not to testify as witnesses. This applies to the president, vice president, provincial governors, mayor of the City of Buenos Aires, national and provincial ministers and legislators, members of the judiciary and provinces, diplomatic ministers and general consuls, and senior officers of the armed forces (section 250, CPC).

There are no special procedures or guidance for investigating these crimes. However, the following institutions are important:

- the Anti-corruption Bureau (the OA). This operates under the Ministry of Justice, and is governed by National Decree 102/99, which grants various investigative powers. The OA has certain powers under National Decree 102/99, including powers to: request information, obtain expert opinions, conduct preliminary investigations and file criminal complaints with the federal judiciary;
- Administrative Investigations (a special prosecutor's office within the Public Prosecutor). This investigates and promotes the investigation of crimes concerning corruption and administrative irregularities; and
- the *Procuraduría de Criminalidad Económica y Lavado de Activos* (PROCELAC): This is a unit within the attorney general's office designed to combat money laundering and other economic crimes. PROCELAC has six operational areas: money laundering and terrorist financing; economic and banking fraud; capital market; tax crimes and smuggling; crimes against public administration; and bankruptcy.

12 Leniency

Is there a mechanism for companies to disclose violations in exchange for lesser penalties?

Pursuant to Argentine law, there is no legal obligation for corporations to self-report when they discover internal wrongdoing. Moreover, there are no benefits, such as leniency or immunity, for businesses that self-report.

13 Dispute resolution

Can enforcement matters be resolved through plea agreements, settlement agreements, prosecutorial discretion or similar means without a trial?

Pursuant to Argentine law, civil matters may be settled, but criminal cases must be subject to criminal prosecution and cannot be resolved through settlements or plea agreements just as in the US. According to section 71 ACC, prosecutors are not allowed discretion other than permitted by criminal procedural law. In this regard, section 431-bis of the CPC provides for abbreviated trials in cases where prosecution and defendants reach an agreement about guilt and sentence at the time of the beginning of the oral trial phase provided that the requested penalty does not exceed six years' imprisonment and the defendant accepts the charges and agrees to conduct the proceedings in such manner.

This is similar to the lenience programme established with the recent Law No. 27,304, sanctioned for, among other things, plea bargains in anti-corruption investigations. The defendant cannot avoid the trial, but can reduce the imprisonment by up to 15 years.

It is stated in section 76-bis ACC that suspension of trial testing may be requested by anybody convicted of a crime prosecutable ex officio with jailing or imprisonment punishment that does not exceed the term of three years. This petition shall not imply the confession of the crime or admission of civil liability, in contrast to the commonly known probation in other countries. The person shall offer to repair the damage caused 'whenever possible', and the court must determine the reasonableness of the offer filed. During the execution of this institute rules, prescription of the criminal action is suspended.

This suspension of trial test may be granted twice if the new crime is committed after eight years from the expiration of the previous test period. A new suspension of the trial test shall not be admitted in favour of any person who has failed to comply with the rules of conduct fixed in a previous suspension.

This shall not be granted when a public official, while holding office, participated in the perpetration of the crime nor in cases of crimes punishable by disqualification.

14 Patterns in enforcement

Describe any recent shifts in the patterns of enforcement of the foreign bribery rules.

It is not possible to describe shifts in the patterns of enforcement of the foreign bribery rules because there are no statistics regarding sanctions against natural persons for this offence, and Argentina does not have corporate liability for foreign bribery, and hence cannot impose sanctions.

15 Prosecution of foreign companies

In what circumstances can foreign companies be prosecuted for foreign bribery?

In Argentina, foreign companies cannot be held criminally liable for foreign bribery offences. See question 8.

16 Sanctions

What are the sanctions for individuals and companies violating the foreign bribery rules?

Individual, corporate or business fraud can also give rise to civil liability. Civil liability (unlike criminal liability) requires damage to a certain person to occur, and only that person (or an agent or successor) can bring a claim. Mere attempts are not punishable.

Liability in this area can arise under tort, through the fundamental principle of alterum non laedere, which precludes individuals from harming others. This principle is set out in section 19 of the Argentine Constitution and has been expressly regulated in sections 1716 of the Argentine Civil and Commercial Code (the ACCC) (among others).

For corporate or business fraud to give rise to civil liability, the following elements must be present:

- a breach of either a legal or contractual obligation, constituting an illicit act;
- the existence of actual damage;
- a sufficient causal relationship between the illicit act and the damage; and
- negligence or wilful misconduct from the damaging party.

In addition, pursuant to Argentine Law, the directors or managers of legal entities have the duty of to act with loyalty and with the diligence of a good businessperson (section 59, Business Associations Law No. 19,550). Failure to comply with this duty can give rise to unlimited joint and several liability for the damage caused to the company, the shareholders and other third parties (and among others, any creditors), by their actions or omissions.

Additionally, Law No. 26,944 sets forth the state tort liability and public official tort liability.

Regarding administrative sanctions, Law No. 25,164 on National Public Employment prohibits persons convicted of crimes against public administration to be appointed as public officials. Furthermore, section 30 of this Law provides for disciplinary sanctions to public officials who breach their duties.

Law No. 25,188 on Ethics in Public Office and its implementing legislation sets forth ethical and anti-corruption duties for all public officials.

Decree No. 41/1999 sets forth the Code of Ethics for Public Officials of the National Executive Branch.

Additionally, according to the General Regime for Public Procurement, a person who is convicted of 'fraudulent offences' or who is subject to criminal proceedings for an offence established by the IACAC is debarred from obtaining public contracts with the national public administration. The maximum debarment period is twice the length of the prison sentence, or the period of probation if no prison sentence is imposed. The offences covered by the IACAC include acts of domestic and foreign corruption (eg, offering or providing bribes to government officials).

Additionally, the recently issued Decree No. 1030/2016 sets forth as disqualifying circumstances the following cases:

- offers submitted by those convicted abroad by a final judgment for bribery or transnational bribery crimes according to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, for a period equal to twice the sentence; and
- offers submitted by those included in the World Bank or Inter-American Development Bank list of disqualified offerors because of corrupt practices or behaviours.

Moreover, section 10 of the Decree 1023/2001 sets forth that any offering or tender at any stage of a bidding process shall be denied without any further proceeding, and any contract shall be rescinded in full if money or any other undue advantage is given or offered so that:

- public officials or employees acting in their capacities in a bidding or procurement process act or refrain from acting in connection with their duties;
- public officials or employees use their influence on other public officials or employees, acting in such capacity, in order that they act or refrain from acting in connection with their duties; or
- any other persons who use their relation or influence on others acting in such capacity, in order that they act or refrain from acting in connection with their duties.

Those persons who have acted in the interest of the hiring party, whether directly or indirectly, either as management representatives, partners, agents, managers, factors, employees, hired employees, business brokers, trustees or any other natural or legal person shall be considered participants in the crime. The attempt of such illicit acts shall suffer the same consequences as if they had been consummated.

For criminal liability, see questions 3 and 8. Additionally, pursuant to section 22-bis ACC, a fine of up to 90,000 pesos may be imposed in addition to the reclusion sentence, where the foreign bribery offence is committed 'with the aim of a monetary gain'. Further, upon conviction individuals are subject to confiscation of the bribe and the proceeds of bribery (section 23.3 ACC).

17 Recent decisions and investigations

Identify and summarise recent landmark decisions or investigations involving foreign bribery.

See the cases described in the OECD Report: Case No. 1 – *River Dredging*; Case No. 2 – *Power Project (Philippines)*; Case No. 3 – *Undeclared Cash (Venezuela)*; Case No. 4 – *Gas Plant (Bolivia)*; Case No. 5 – *Inter-American Development Bank Debarment Case (Honduras)*; Case No. 6 – *Oil Refinery (Brazil)*; Case No. 7 – *Agribusiness Firms (Venezuela)*; Case No. 8 – *Grain Export (Venezuela)*; Case No. 9 – *Military Horses (Bolivia)*; and Case No. 10 – *Oil Sector Construction (Brazil)*.

Financial record keeping

18 Laws and regulations

What legal rules require accurate corporate books and records, effective internal company controls, periodic financial statements or external auditing?

The main legal rules that require accurate corporate books and records, effective internal company controls, periodic financial statements or external auditing are the following:

- the ACCC sections 320 to 327;
- the Business Associations Law No. 19,550 and the Financial Administration Law No. 24,156, regarding state-owned companies;
- the Stock Market Law No. 26,831;
- the regulations issued by the National Securities Commission (the CNV); and
- the regulations issued by local commercial registries.

19 Disclosure of violations or irregularities

To what extent must companies disclose violations of anti-bribery laws or associated accounting irregularities?

Pursuant to Argentine law, there is no legal obligation for corporations to self-report when they discover internal wrongdoing. Moreover, there are no benefits, such as leniency or immunity, for businesses that self-report. However, certain entities and agents under the supervision of the CNV have the obligation to disclose significant issues (ie, any fact or situation that could substantially affect the placement of securities of the issuer, the course of the securities' negotiation or the development of its activities).

Update and trends

In December 2015, the Argentine government changed. The new administration has promised to make the fight against corruption one of the main political goals of its administration. Regarding new legislation, there have been announcements that a set of anti-corruption bills is about to be sent to Congress. Among them, there is great expectation about the creation of a leniency programme specific to anti-corruption investigations.

Furthermore, on 20 October 2016 the government presented a Bill on Corporate Criminal Liability for Cases of Corruption, and the National Congress is also considering others anti-corruption initiatives.

20 Prosecution under financial record keeping legislation

Are such laws used to prosecute domestic or foreign bribery?

In recent times there has been increased emphasis on the use of financial record keeping laws to prosecute cases of bribery.

21 Sanctions for accounting violations

What are the sanctions for violations of the accounting rules associated with the payment of bribes?

Besides the bribery offence itself, section 300(2) ACC sets forth a sanction of six months to two years' imprisonment for the founder, director, trustee, liquidator or *síndico* of a corporation or cooperative, or of any other legal person who knowingly publishes, certifies or authorises an either false or incomplete inventory, balance sheet, profit and loss account or related reports on any event material to the assessment of the company's financial position, whatever the purpose sought.

Additionally, the CNV, commercial registries and professional associations can impose administrative and disciplinary sanctions to the wrongdoers.

22 Tax-deductibility of domestic or foreign bribes

Do your country's tax laws prohibit the deductibility of domestic or foreign bribes?

The recently issued Decree No. 1246/2016 explicitly prohibits the deductibility of bribes in the Argentine Income Tax Law. Before this Decree, the Argentine government had stated in the OECD Report that the deductibility of bribes was implicitly prohibited by Argentine tax law.

Domestic bribery

23 Legal framework

Describe the individual elements of the law prohibiting bribery of a domestic public official.

Section 258 of the ACC sets forth that any person who personally or through an intermediary gives or offers any gift for the purpose of obtaining any of the acts punished by sections 256 and 256-bis shall be punished with prison from one to six years. If the gift is given or offered with the purpose of obtaining any of the conduct described in sections 256-bis second paragraph and 257, the punishment shall be prison from two to six years. If the perpetrator is a public official, special disqualification from two to six years shall also be imposed in the first case, and from three to 10 years in the second case.

Section 256 of the ACC sets forth that any public official who, personally or by means of an intermediary, receives money or any other gift or, directly or indirectly accepts promise of such in order to carry out, delay or not to do something in relation to his or her duties shall be punished with imprisonment of one to six years and disqualification for life.

Section 256-bis of the ACC sets forth that any public official who, personally or through an intermediary, requests or receives money or any other gift or directly or indirectly accepts promise of such in order to make unlawful use of his or her influence before a public official, with the purpose of having such official do, delay or not do something in relation to his or her duties, shall be punished with imprisonment of one to six years and special disqualification from holding public office for life.

The second paragraph of this section 256-bis sets forth that if this conduct is intended to make unlawful use of any influence before a magistrate of the judiciary branch or the State Attorney's Office, with the purpose of having such magistrate issue, decree, delay or omit any resolution, sentence or judgement concerning any matter under his or her jurisdiction, the maximum of the imprisonment shall be increased to 12 years.

Section 257 of the ACC sets forth a punishment to any magistrate from the judiciary branch or the State Attorney's Office who personally or through an intermediary, receives money or any other gift, or directly or indirectly accepts promise of such in order to issue, decree, delay or omit any resolution, sentence or judgment concerning any matters under his or her jurisdiction. In such case, the defendant shall be punished with imprisonment for four to 12 years and total disqualification for life.

Additionally, a fine of up to 90,000 pesos can be imposed where an offence is committed 'with the aim of monetary gain' (section 22-bis of the ACC).

It is worth noting that in the Phase 3 OECD Report of December 2014, the Working Group reflected that Argentina argued that all payments made personally to an individual public official are necessarily illegitimate (paragraph 35).

Finally, it is important to point out that Argentina does not provide for corporate criminal offences regarding corruption (see question 8).

24 Prohibitions

Does the law prohibit both the paying and receiving of a bribe?

Yes; see question 23.

25 Public officials

How does your law define a public official and does that definition include employees of state-owned or state-controlled companies?

The ACC defines the terms 'public official' and 'public employee' in section 77 as 'any person who temporarily or permanently discharges public functions, whether as a result of popular election or appointment by the competent authority'. It could be interpreted that the definition includes employees of state-owned or state-controlled companies.

26 Public official participation in commercial activities

Can a public official participate in commercial activities while serving as a public official?

In principle, a public official can participate in commercial activities if there is no conflict of interest, as it is provided in Law No. 25,188 on Ethics in Public Office. Section 13(b) of Law No. 25,188 sets forth certain incompatibilities for public officials. However, certain public officials governed by the Ministries Law No. 22,520 (such as the head of the cabinet, ministers, secretaries and undersecretaries) and judges (by virtue of the National Justice Regulation, section 8) can only engage in teaching activities during their tenure.

27 Travel and entertainment

Describe any restrictions on providing domestic officials with gifts, travel expenses, meals or entertainment. Do the restrictions apply to both the providing and receiving of such benefits?

Section 18 of Law No. 25,188 on Ethics in Public Office permits public officials of any state power or agency, at all levels, to receive gifts given out of courtesy or diplomatic custom. Otherwise, it is prohibited.

Section 36 of Decree 41/1999 (the Code of Ethics for Public Officials) prohibits public officials of the national executive branch from solicitation or acceptance, directly or indirectly, of money, gifts, benefits, promises and other advantages, and no exceptions or minimum values are permitted.

However, section 38, subsections (a), (b) and (c) of Decree 41/1999 provides for the following exceptions:

- conventional official recognitions from foreign governments, international organisations or non-profit organisations, as long as said recognition is admitted by law, official practice or custom;

- travel expenses received from governments, academic institutions or public or private entities relating to conferences, lectures or academic or cultural activities, as long as there is no conflict with the public official's responsibilities and unless they are prohibited by specific applicable regulations; and
- gifts or benefits that could not reasonably be considered as intended to influence the will of the public official because of their exiguous value.

The enforcement agency of Law No. 25,188, the Anti-corruption Office, issued several advisory opinions regarding this matter.

28 Gifts and gratuities

Are certain types of gifts and gratuities permissible under your domestic bribery laws and, if so, what types?

See question 27.

29 Private commercial bribery

Does your country also prohibit private commercial bribery?

Currently, the offence of bribery does not apply to bribery between private individuals, but only where government officials and employees are involved. The exception to this concerns the recent introduction of an offence of bribery for employees or officials of financial institutions (ACC section 312), This provides that employees of financial institutions and entities operating on the stock exchange shall be punished from one to six years and special disqualification of up to six years if they personally, or through an intermediary, receive money or any other benefit as a condition of providing loans, finance or stock exchange transactions.

A Draft Reform of the Criminal Code is being considered, which will address bribery between private individuals.

In addition, under the terms of section 173, subsection 7 of the ACC, any person who, under the law, by authority or contract, is vested with the management, administration or care of goods or pecuniary interests belonging to another person and, with the purpose of obtaining an unlawful gain for himself or herself or a third party or violating his or her duties, damages such interests conferred upon him or her or makes excessive expenses to the detriment of the person he or she represents, shall be punished with prison from one to six years.

30 Penalties and enforcement

What are the sanctions for individuals and companies violating the domestic bribery rules?

See question 23.

31 Facilitating payments

Have the domestic bribery laws been enforced with respect to facilitating or 'grease' payments?

See question 6.

32 Recent decisions and investigations

Identify and summarise recent landmark decisions and investigations involving domestic bribery laws, including any investigations or decisions involving foreign companies.

The Miralles case

On 6 October 2016 Judges César Álvarez, Leopoldo Schiffrin and Olga Ángela Calitri declared for the first time that the statute of limitations did not apply to a corruption case investigating former La Plata judge Julio Miralles.

Former-president indicted

A criminal investigation is examining whether Cristina Fernandez Kirchner, elected president for two consecutive terms in Argentina (2007–2015), alongside several public officials, such as Julio de Vido, former minister of Planning, Public Investment and Services and José López, former secretary of Public Investments, among others, for illicit association fraudulent administration in connection to the use of public works funds.

Also indicted was businessman Lázaro Báez, whose Austral Construcciones company allegedly benefited from irregular contracts from the public administration. The Argentine judge, Dr Ercolini, construed that Mr Báez received irregular public contracts from the federal government and later on paid to Ms Kirchner through several investments and payments to business the former president holds mainly in the Patagonia area.

Despite the lack of public official statistics, recently the CSJN created the 'Corruption Observatory' to provide a national data base of the ongoing cases. The Observatory can be accessed in the following webpage: www.cij.gov.ar/causas-de-corrupcion.html.

Additional information regarding case law can be found in the reports made by the OECD Working Group on Bribery, which evaluate and make recommendations on Argentina's implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions.

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1 International anti-corruption conventions

To which international anti-corruption conventions is your country a signatory?

The Federative Republic of Brazil is a signatory to the following conventions:

- the Inter-American Convention Against Corruption, of the Organization of American States (OAS), adopted on 29 March 1996 (ratified by the National Congress of Brazil through Legislative Decree No. 152 of 25 June 2002, and promulgated by the President of Brazil through Presidential Decree No. 4,410 of 7 October 2002);
- the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, of the Organisation for Economic Co-operation and Development (OECD), adopted on 21 November 1997 (ratified by Legislative Decree No. 125 of 15 June 2000, and promulgated by Presidential Decree No. 3,678 of 30 December 2000); and
- the United Nations Convention against Corruption, approved on 31 October 2003 (ratified by Legislative Decree No. 348 of 18 May 2005, and promulgated by Presidential Decree No. 5,687 of 31 January 2006).

2 Foreign and domestic bribery laws

Identify and describe your national laws and regulations prohibiting bribery of foreign public officials (foreign bribery laws) and domestic public officials (domestic bribery laws).

In the Federative Republic of Brazil, the Union (ie, the federal entity) has the exclusive power to legislate on civil, commercial and criminal law and to establish general rules for governmental entities and other administrative law issues. The other federative entities (the federal district, and the various states and municipalities) have the authority to regulate within their territories the general rules enacted by the Union for administrative issues.

The prohibition of domestic bribery is provided for in articles 316 (graft or extortion), 317 (passive corruption), 332 (traffic of influence) and 333 (active corruption) of the Brazilian Criminal Code (Decree-Law No. 2,848 of 7 December 1940, with several modifications).

The first law to expressly prohibit bribery of foreign public officials was Federal Law No. 10,467 of 11 June 2002, which included Chapter II-A (Crimes Committed by Individuals against a Foreign Public Administration) in Title IX (Crimes against the Public Administration) of the Brazilian Criminal Code. The Law was enacted to comply with the OECD Convention. Chapter II-A, which is included in the Brazilian Criminal Code, holds criminally liable individuals who engage in bribing foreign public officials in international business transactions.

Corporate liability for bribery of foreign public officials was adopted by Federal Law No. 12,846 of 1 August 2013, which came into force on 29 January 2014, and is being called either the Anti-corruption Law or the Clean Companies Act. The Clean Companies Act establishes the administrative and civil liability of legal entities in general for bribery of either foreign or domestic public officials.

This Act was regulated by Presidential Decree No. 8,420, of 18 March 2015, as well as by four rules enacted by the Office of the Comptroller General (the CGU) on 7 April 2015:

- Rule No. 1, which establishes the methodology for the calculation of the gross turnover of the corporate entity, as well as the taxes to be excluded from the calculation of the fine that can be imposed on corporate entities, as per article 6 of the Clean Companies Act;
- Rule No. 2, which regulates the register of information in the National Registry of Incapable and Suspended Companies and in the National Registry of Sanctioned Companies;
- Ordinance No. 909, which regulates the assessment by the CGU of corporate entities' compliance programmes; and
- Ordinance No. 910, which establishes the procedure for finding administrative liability of legal entities and for entering into a leniency agreement.

Finally, there are two administrative rules that address leniency agreements:

- Rule No. 74, of 11 February 2015, enacted by the Federal Audit Court (the TCU), which establishes how the negotiation and execution of leniency agreements should be overseen by the TCU; and
- Interministerial Ordinance No. 2,278, of 15 December 2016, enacted by the Ministry of Transparency, Oversight and Office of the Comptroller General (current name of the CGU) and by the Federal Attorney General Office (the AGU), which regulates the procedure for the negotiation of leniency agreements by the CGU and the participation of the AGU.

Several states and municipalities have issued their own decrees to regulate the Clean Companies Act within their territories.

Foreign bribery

3 Legal framework

Describe the elements of the law prohibiting bribery of a foreign public official.

The Criminal Code establishes, in article 337-B, the crime of active corruption in international business transactions. Such crime consists of the act of promising, offering or granting, directly or indirectly, any improper advantage to a foreign public official or to a third party, in order to lead the official in practicing, omitting or delaying an official act related to an international business transaction. The sanctions for such crime are imprisonment from one to eight years and a fine to be set by the federal criminal judge. Such sanction can be raised by one-third if, owing to the improper advantage, the foreign public official delays or omits the official act or practises it in violation of an official duty.

Article 337-C of the Criminal Code sets forth the crime of influential trading in international business transactions. This crime comprises the act of requesting, demanding, imposing or obtaining, for the agent or a third party, directly or indirectly, any improper advantage or promise of advantage, with the intent to influence a foreign public official in the performance of his or her duties, related to an international business transaction. The sanctions for such crime are imprisonment from two to five years and a fine. The sanction can be increased by 50 per cent if the agent mentions or insinuates that the undue advantage will also be distributed to the foreign public official.

The elements of the law prohibiting foreign bribery of foreign public officials by legal entities are set forth in the Clean Companies Act and will be detailed in the answers to the following questions.

4 Definition of a foreign public official

How does your law define a foreign public official?

Both the Criminal Code and the Clean Companies Act similarly define a foreign public official as anyone occupying, even if transitorily or without compensation, a public office, job or position in administrative bodies or entities of a foreign country, in diplomatic representations, in companies directly or indirectly controlled by the government of a foreign country or in international public organisations.

5 Travel and entertainment restrictions

To what extent do your anti-bribery laws restrict providing foreign officials with gifts, travel expenses, meals or entertainment?

The Criminal Code and the Clean Companies Act have provisions prohibiting the offer, promise or granting of any 'improper advantage' to a foreign public official or to any third party related to him or her. Brazilian legislation and regulation do not have thresholds for what should be considered an 'improper advantage' given or offered to a foreign public official.

Therefore, in a case-by-case analysis, Brazilian public authorities can either argue that the offer of gifts and payment of travel expenses, meals and entertainment by private parties to foreign public officials is completely forbidden, or can adopt the regulation applicable to domestic public officials by analogy.

6 Facilitating payments

Do the laws and regulations permit facilitating or 'grease' payments?

No. The Criminal Code and the Clean Companies Act do not permit facilitating or 'grease' payments, and such payments should be considered broadly prohibited under Brazilian legislation.

7 Payments through intermediaries or third parties

In what circumstances do the laws prohibit payments through intermediaries or third parties to foreign public officials?

Both the Criminal Code and the Clean Companies Act expressly establish that domestic or foreign bribery can be committed not only directly but also indirectly (ie, Brazilian laws prohibit payments made through intermediaries or third parties to foreign public officials). Furthermore, the Clean Companies Act considers the use of intermediaries (either individuals or legal entities) to conceal or dissimulate the agent's real interests or the identity of the beneficiaries of the agent's acts to be an illegal act per se.

8 Individual and corporate liability

Can both individuals and companies be held liable for bribery of a foreign official?

Yes. Individuals can be held criminally liable, whereas companies can be held administratively or civilly liable for bribery of a foreign official. Moreover, the Clean Companies Act expressly establishes that the legal entity involved can be held liable regardless of the individual liability of its directors, officers or managers or of any individual suspect of being the agent, aider or abettor of the illegal act.

9 Successor liability

Can a successor entity be held liable for bribery of foreign officials by the target entity that occurred prior to the merger or acquisition?

Yes. The Clean Companies Act expressly sets forth that the liability of a legal entity subsists in cases of amendments to its articles of association, incorporation and by-laws; transformation into another type of entity; merger; and spin-off. Furthermore, the Act details that, in cases of mergers, the liability of the successor is restricted to the obligations of paying the fine imposed and the full compensation for damages caused, up to the limit of the transferred assets. In such situation, the other possible penalties (publication of the decision that imposed sanctions, loss of assets, rights or values illegally received, suspension or partial interruption of activities, compulsory dissolution of the legal entity, or prohibition to receive incentives, subsidies, donations or loans from public entities or bodies or from financial institutions wholly-owned or controlled by the public administration, for a period from one to five years) derived from acts prior to the merger would not be applicable to the successor, 'except in the case of fraud or simulation duly proven'.

By 'simulation', the Brazilian Clean Companies Act refers to an act performed to disguise reality in order for it to appear to be something different than what it really is. The 'simulation' aims at hiding something from third parties, for example, a sale of assets from a parent company to a subsidiary with a minimum price to disguise a donation. Conversely, 'fraud' has a stronger intention of committing an illicit act, and of breaching the law.

The Act requires that both the fraud or the simulation be 'duly proven', that is, supported by evidence produced by the authorities, in order to have the other penalties set forth by the Act applicable to the successor.

Finally, the Act also expressly establishes that the corporate veil can be pierced in the case of abuse of rights to facilitate, cover or dissimulate illicit acts set forth in the Clean Companies Act, or in the case of confusion of assets. As a result of the piercing of the corporate veil, liability can be imposed either on managing or controlling partners or the managers of the entity.

10 Civil and criminal enforcement

Is there civil and criminal enforcement of your country's foreign bribery laws?

Yes. Criminal enforcement can be sought against the individual involved in foreign bribery, under the Criminal Code. In addition, legal entities involved in such illegal acts can also face civil and administrative enforcement measures.

11 Agency enforcement

What government agencies enforce the foreign bribery laws and regulations?

The provisions of the Criminal Code that hold criminally liable individuals that engage in bribery of a foreign public official are to be enforced by federal criminal judges, by the Office of Federal Public Prosecutors, and by the Department of Federal Police, as the case involves a foreign state or international organisation and a person domiciled in Brazil.

The enforcement of the Clean Companies Act against a Brazilian legal entity suspect of foreign bribery is to be carried out exclusively by the CGU.

12 Leniency

Is there a mechanism for companies to disclose violations in exchange for lesser penalties?

Yes. Chapter V of the Clean Companies Act regulates leniency agreements. Presidential Decree No. 8,420, of 18 March 2015, and Ordinance No. 910, of 7 April 2015, issued by the CGU, further regulate the procedure to negotiate and enter into leniency agreements. Rule No. 74, of 11 February 2015, enacted by the TCU, establishes how the negotiation and execution of leniency agreements should be overseen by the TCU. Finally, Interministerial Ordinance No. 2,278, of 15 December 2016, enacted by the CGU and by the AGU, regulates the procedure for the negotiation of leniency agreements by the CGU and the participation of the AGU.

A Provisional Measure was enacted by former president Dilma Rousseff on 18 December 2015 to modify some provisions of the Clean Company Act. However, such Provisional Measure was not approved by the National Congress before its expiration term, on 29 May 2016. Therefore, the original text of the Act remains in force.

The original text of the Act sets forth that the CGU can enter into leniency agreements with legal entities that have bribed foreign public officials. The purposes of the leniency agreement are to identify the other parties involved in the foreign bribery, if any, and gather evidence of the illegal acts committed.

With the non-approval of the Provisional Measure, the Federal Public Prosecutors' Office lost its clear authority to enter into leniency

agreements. Therefore, the authority of such office in any agreement it enters could be challenged.

To enter into a leniency agreement, the legal entity must meet all the three following requirements:

- be the first to approach the CGU with the intention to cooperate in the investigations;
- completely stop its participation in the foreign bribery since the date of proposal of the leniency agreement to the CGU; and
- admit its participation in the illegal acts and cooperate fully and permanently in the investigations and in the enforcement proceeding to be brought by the CGU against other participants, making sure that its legal representatives attend any events of the investigation when their presence is required and bearing the necessary costs of such attendance.

The leniency agreement must establish the conditions for full cooperation of the signatory and for the achievement of valid results of the investigation and enforcement proceeding. The leniency agreement should contain clauses that:

- guarantee that the legal entity will meet the requirements listed above to enter into the agreement;
- establish the loss of any benefit if the agreement is not complied with by the legal entity;
- impose the adoption or improvement of a compliance programme; and
- recognise that the agreement should be subject to enforceability before the courts.

The approved leniency agreement can reduce by up to two-thirds the applicable fine because of the participation in the foreign bribery. Moreover, the agreement will exempt the signatory from the following sanctions: bearing the costs of broad publication of the CGU's final decision on the enforcement proceeding, and disbarment from receiving incentives, donations and loans by administrative bodies and by financial institutions wholly owned or controlled by the public administration, for a period between one to five years. The agreement will not exempt the signatory from the obligation of completely repairing the damage caused by the foreign bribery.

The effects of the leniency agreement will be extended to the companies that are part of the same economic group, provided that the agreement allows and that each company formally enters into the agreement. The rejected proposal of the agreement would not imply in the admission of the illegal conduct. In case of breach of the agreement, the company will be barred from entering into a new agreement for three months. The signing of the agreement interrupts the period of the statute of limitations of five years established in the Act.

Rule No. 74 of 2015, enacted by the TCU, establishes that such entity should oversee each step of the negotiation and execution of the leniency agreements. Interministerial Ordinance No. 2,278, of 2016, further details the negotiation of the leniency agreements by the CGU and the participation of the AGU. For instance, it determines that:

- attorneys from the AGU should be part of the committee created by the CGU to negotiate each agreement;
- such committee should negotiate the amount of indemnification to be paid by the company to the public entities; and
- the attorneys from the AGU should analyse whether the proposed leniency agreement should avoid lawsuits that can be brought by other authorities and public entities.

13 Dispute resolution

Can enforcement matters be resolved through plea agreements, settlement agreements, prosecutorial discretion or similar means without a trial?

The Brazilian criminal system provides for mandatory prosecution, which means that the prosecutor does not have discretion to freely negotiate a settlement with the offender to avoid trial.

There are two legal exceptions, however, that allow the prosecutor to negotiate an agreement with the offender to prevent him or her from going to trial.

The requirements for the application of both non-prosecution agreements and deferred prosecution agreements are defined by law and based on the amount of penalty imposed for the crime and on the offender's past criminal records. Penalties for corruption, however, do not allow for non-prosecution nor deferred prosecution agreements.

The Criminal Organizations Enforcement Act (Act 12,850/2013) introduced the possibility of actual declination of prosecution in exchange for full cooperation of the offender. Declining prosecution is only applicable if the offender is not the leader of the criminal organisation (defined as the gathering of at least four individuals with the intent of obtaining an advantage by committing crimes punishable with over four years of imprisonment or involving transnational crimes) and was the first to effectively cooperate with the authorities. In addition, the cooperation has to result in at least one of the goals provided in law, such as the identification of co-offenders and the crimes they committed and recovery of criminal profits. This cooperation agreement may apply to the crime of corruption if committed within the context of a criminal organisation.

14 Patterns in enforcement

Describe any recent shifts in the patterns of enforcement of the foreign bribery rules.

As there has not been a significant number of cases related to the enforcement of the foreign bribery rules in Brazil, it is not possible to identify a pattern yet. However, it is worth mentioning that the initial enforcement cases have revealed that Brazil has some strengths and weaknesses in enforcement of such rules. As per strengths, we can mention that Brazil has signed international cooperation agreements with several countries, and the Brazilian enforcement authorities have used such cooperation effectively.

On the other hand, Brazil is still beset by overwhelming bureaucracy in fighting corruption, including a lack of proper coordination among the authorities. Although some administrative rules have been enacted to streamline such cooperation (see answers to questions 2 and 12), there are signs that it is still weak. An emblematic case is the leniency agreement entered into by SBM Offshore with several public authorities, negotiated for more than a year by the federal public attorneys in Rio de Janeiro, but not confirmed by the Fifth Chamber of Coordination and Review of the Federal Public Prosecutors' Office. Apparently, because of what seems a poor dialogue among members within the same institution, the Chamber decided to reject the agreement and send the proceeding back to the prosecutors to renegotiate the agreement or continue investigating.

15 Prosecution of foreign companies

In what circumstances can foreign companies be prosecuted for foreign bribery?

According to the Clean Companies Act, foreign companies that have a registered office, branch or representation in Brazil, legally or de facto organised, even if temporarily, may be prosecuted in Brazil for foreign bribery.

16 Sanctions

What are the sanctions for individuals and companies violating the foreign bribery rules?

Individuals may be criminally prosecuted for the crime of bribery of foreign public officials as per the Brazilian Criminal Code, which establishes, in article 337-B, a penalty of imprisonment from one to eight years as well as a fine.

In addition, legal entities that engage in foreign bribery may be subject to administrative and civil sanctions established by the Clean Companies Act.

Regarding administrative sanctions, legal entities may be fined up to 20 per cent of the entity's gross revenue in the year prior to that in which the administrative proceeding is initiated, or even up to 60 million reais in circumstances in which it is not possible to calculate gross revenues. Other administrative sanctions include publication of the condemnatory decision in the mass media.

Moreover, if the legal entity is found civilly liable under the law, it may be subject to judicial sanctions, including loss of assets, rights and valuables, suspension or partial interdiction of company's activities, and prohibition to receive incentives, grants, donations or financing

from public entities and financial institutions owned or controlled by the government, for a period of one to five years.

Lastly, liability of the legal entity shall not exclude the personal liability of its directors, officers, or any individual who has directly contributed to the illegal act.

17 Recent decisions and investigations

Identify and summarise recent landmark decisions or investigations involving foreign bribery.

There are over 10 known ongoing investigations or enforcement proceedings involving foreign bribery in Brazil. However, in only few of them have details have been disclosed so far.

As part of the Car Wash Operation (see the answer to question 32 for details), the Brazilian authorities have found out that Odebrecht SA, the global construction company based in Brazil, and one of its subsidiaries, Braskem SA, a Brazilian petrochemical company, used a hidden but fully functioning Odebrecht business unit – a 'Department of Bribery' – that systematically paid millions of dollars to corrupt government officials in twelve countries (around US$788 million in bribes were paid). Both companies are entering into leniency agreements in Brazil and have pleaded guilty, on 21 December 2016, in both US and Swiss courts, and have agreed to pay a combined total penalty of at least US$3.5 billion to settle the cases in the three countries. The US FBI emphasised that the agreements were a result of an extraordinary multinational effort to identify, investigate and prosecute a highly complex and long-lasting corruption scheme. Under their respective plea agreements, the US and Switzerland will receive 10 per cent each of the principal of the total criminal fine, and Brazil will receive the remaining 80 per cent. Both companies were required to continue their cooperation with law enforcement, to adopt enhanced compliance procedures and to be subject to independent compliance monitors for three years. According to the Office of Public Affairs of the US Department of Justice, with a combined total of at least US$3.5 billion, the resolution with Odebrecht and Braskem is the largest-ever global foreign bribery resolution.

In July 2016, a Dutch company SBM Offshore entered into a leniency agreement with several Brazilian authorities to resolve allegations stemming from another Petrobras bribery probe. The company had agreed to pay US$340 million to resolve allegations that SBM won contracts from Petrobras as a result of bribery. The leniency agreement was the first such agreement in Brazil resolving both criminal and administrative charges and, as a result, was a significant step forward in resolving allegations made against companies implicated in Brazil's Petrobras scandals. Nevertheless, in September 2016, the Fifth Chamber of Coordination and Review of the Federal Public Prosecutors' Office, did not confirm the leniency agreement, arguing that it had various gaps, such as:

- insufficient documents;
- imprecise information; and
- low penalties.

The case was sent back to the federal public prosecutors of Rio de Janeiro for reanalysis and possible renegotiation of the terms and conditions of the leniency agreement.

Financial record keeping

18 Laws and regulations

What legal rules require accurate corporate books and records, effective internal company controls, periodic financial statements or external auditing?

In Brazil, there are two main types of entities: corporations (or SA) and limited liability companies. Corporations are governed by Law 6,404 of 15 December 1976 (the Corporations Law), while limited liability companies are governed by the Brazilian Civil Code (Law 10,406 of 10 January 2002). The basic rules governing corporate governance of corporations are in the Corporations Law. In such Law there are rules governing the general meetings of shareholders, board of directors, officers and other related matters. In addition to the Corporations Law, corporations that are publicly held are also governed by Law 6,385, of 7 December 1976 (the Capital Markets Law). In addition, publicly held corporations are also subject to rules issued by the Brazilian Securities Commission (known as CVM in Brazil).

Although there are no specific anti-bribery laws in relation to financial record keeping, the laws that regulate the Brazilian companies contain specific provisions that must be followed. Financial statements, including an annual balance sheet, accumulated profit and loss statement, income statement, cash flow statement (except for a privately held company) with a net worth of less than 2 million reais), and (in the case of a publicly held company) a value-added statement, must be prepared under the direction of the board of directors, approved by the shareholders and published in the Official Gazette and one other widely circulated newspaper. The financial statements of a publicly held company must also be audited. There are certain exceptions to the publication requirement for a privately held company with fewer than 20 shareholders and a net worth of less than 1 million reais.

Annual partners or shareholders meetings must be held within the first four months following the end of the fiscal year to consider and review financial statements and management accounts, appoint new managers, if applicable, and decide on any other matters included in the agenda. Copies of the financial statements must be forwarded to the partners at least 30 days prior to the annual meeting.

Fiscal board

The responsibilities of the fiscal board include, among others, the duty to:

- inspect the acts of management to ensure compliance with the law and the by-laws,
- comment on the annual management report and proposals to be submitted to general shareholders meetings, and
- denounce to the executive officers or the board of directors or, upon their omission, to the general shareholders meeting, any errors, wrongdoings or crimes relating to corporate matters, and make suggestions in the interest of the company.

The limited liability companies may have a fiscal board consisting of three or more members, but such board is not mandatory. In the case of SAs, the by-laws of the company must indicate whether a fiscal board will exist on a permanent basis or only become operational upon shareholder request.

19 Disclosure of violations or irregularities

To what extent must companies disclose violations of anti-bribery laws or associated accounting irregularities?

The Brazilian legal system does not encompass any specific rule requiring companies to disclose information related to any suspected or confirmed events related to any violations involving bribery.

Nonetheless, owing to certain rules by the Brazilian Securities Commission, Brazilian listed companies are required to disclose any 'material facts', save for situations where the disclosure would jeopardise corporate interests. For the purposes of Brazilian law, a 'material fact' refers to any decision taken at a shareholders meeting or by management bodies, or any other business fact that could substantially influence the value of the company's securities, the decision of investors in trading such securities or the decision of investors in exercising any rights inherent to the ownership of such securities.

20 Prosecution under financial record keeping legislation

Are such laws used to prosecute domestic or foreign bribery?

Rules relating to financial records are usually set for tax and commercial purposes. The financial record keeping legislation does not provide for, and it is not used for, the purposes of prosecuting domestic or foreign cases of bribery.

21 Sanctions for accounting violations

What are the sanctions for violations of the accounting rules associated with the payment of bribes?

Relating specifically to anti-bribery laws, there are no specific sanctions for cases related to the violation of accounting rules involving the payment of bribes.

It is important to mention, however, that as a general rule provided by the Corporations Law, directors and officers are not personally responsible for the liabilities of the company. They may, however, become personally liable for losses or damages caused as a result of actions taken by directors or officers with gross negligence, wilful misconduct and in violation of the law or company's by-laws. Directors and officers have fiduciary duties to the company, which include a duty of care in avoiding harm to the company and a duty of loyally placing the company's interests ahead of their own. Acting in the best interest of the company and avoiding any potential conflict of interests are also notions that must underpin all directors' decisions. Also, a director elected by a specific shareholder or representing a specific shareholder has the same responsibilities and duties as the other directors to the company and must not defend such interests to the detriment of the company.

22 Tax-deductibility of domestic or foreign bribes

Do your country's tax laws prohibit the deductibility of domestic or foreign bribes?

Brazilian Income Tax Regulation (RIR/99) establishes that expenses are only deductible for the purposes of corporate income taxes (IRPJ/CSLL) if they are normal for the type of business developed by the company, and necessary for the company's operational activities.

Any amount paid in connection with any illegal activity is not deductible. This non-deductibility includes penalties imposed by the authorities owing to a lack of compliance with any law or obligations.

Domestic bribery

23 Legal framework

Describe the individual elements of the law prohibiting bribery of a domestic public official.

Two main statues account for administrative and judicial sanctions for corrupt acts. Administrative sanctions are governed by the Clean Companies Act and judicial sanctions are governed by the Administrative Improbity Act (Law No. 8,429/1992).

In addition, individuals involved in corrupt practices can also be criminally liable under the Brazilian Criminal Code, irrespective of being the person who paid the bribe or the public official who received it.

24 Prohibitions

Does the law prohibit both the paying and receiving of a bribe?

Yes. Administrative and civil liabilities of companies for the practice of corruption acts are governed by the Clean Companies Act and sanctions relating to public officials involved in corrupt practices are governed by the Administrative Improbity Act.

Moreover, the Brazilian Criminal Code sets forth penalties for individuals who offer or promise undue advantages to public officials (article 333) and for public officials who request or receive undue advantages as result of the public office (article 317).

25 Public officials

How does your law define a public official and does that definition include employees of state-owned or state-controlled companies?

In Brazil, the concept of public official is broad.

The concept of public officials include public employees from all bodies and entities of the direct and indirect public administration, within the three levels of the Brazilian Federation, which include public employees working for regulatory agencies, public foundations, government agencies, public consortia, as well as public employees working for public companies and mixed-capital companies and employees of state-owned or state-controlled companies.

It also includes those individuals who hold high level positions in the federal, state and municipal governments: the president, vice president, state governors, vice governors, city mayors, vice mayors, ministries, state secretaries, municipal secretaries, as well as presidents and directors of mixed-capital companies and public companies.

For the purposes of ethics violations, any individual working for a public body or entity is considered a public official, regardless of whether such individual receives a salary or not, or holds temporary positions (such as jurors).

26 Public official participation in commercial activities

Can a public official participate in commercial activities while serving as a public official?

As a general rule, a public official may not participate in commercial activities while serving as a public official.

Public officials working for the federal government are not allowed to participate in the management of private companies, either incorporated or unincorporated. They may be shareholders of private companies.

The Code of Conduct of High-Level Federal Public Administration Officials (the High-Level Officials Code of Conduct) also prohibits high-level public officials (such as ministers, secretaries of state, presidents of regulatory agencies, among others) to practice commercial activities, or any other activities conflicting with their public functions.

In addition, high-level public officials who hold equity interest higher than 5 per cent in mixed-capital companies, financial institution or in companies that have business with the public administration, must keep this information publicly available in order to avoid a conflict of interests.

Provided that the regulations are sparse and vary for federal, state and municipal levels, each situation should be analysed on a case-by-case basis.

27 Travel and entertainment

Describe any restrictions on providing domestic officials with gifts, travel expenses, meals or entertainment. Do the restrictions apply to both the providing and receiving of such benefits?

There are no general rules governing the conduct of public officials. The federal government, federal district, and the various states and municipalities are entitled to enact their own regulations on public officials' ethics and conduct rules. Any regulation in this regard shall abide by the Brazilian Constitution. The rules vary according to the public entity to which the public official is bound. Therefore, private companies willing to give benefits, hospitalities, gifts or make any type of payment to public officials must check the rules applicable to the relevant public official.

As a rule, public officials are not allowed to receive any kind of financial aid, award, gratification, commission, donation or advantages on any matter.

With respect to public officials working for the federal government, there are some ethics and conduct rules with regard to gifts, hospitalities, accommodation, transportation, invitations for events, dinners, among other types of benefits. The federal government also set up an Ethics Commission, which regulates such benefits and provides guidance to public officials. Although these ethics and rules of conduct do not apply to state and municipal public officials, they could be considered as a guidance for rules regulating benefits offered to public officials.

There are also specific gift rules applicable to high-level officials.

The High-Level Officials Code of Conduct forbids, for instance, high-level public officials from receiving salary or any other remuneration of a private source, as well as transport, accommodation or any favours from private entities, since such conduct could put the public officials' probity in doubt.

The Conflict of Interests Law (Federal Law No. 12,813 of 16 May 2013, which came into force on 1 July 2013) defines what should be understood as conflict of interest for public officials of the Federal Executive Branch, as well as public officials who have access to privileged information, which could bring economic or financial benefit to such official or to third parties.

Such public officials are prevented from accepting gifts from anyone interested in decisions to be issued by them or by the collective body to which they belong.

In addition, such public officials are also prohibited from accepting gifts of any value whenever the gift is given by an individual, company or entity that maintains commercial relationships with the body to which the public official belongs, among other cases.

The Conflict of Interest Law is to be further regulated by a Presidential Decree which has yet to be enacted. Therefore, as of now, the parameters on what may be considered as illegal gifts or gratuities can also be found in the High-Level Officials Code of Conduct.

28 Gifts and gratuities

Are certain types of gifts and gratuities permissible under your domestic bribery laws and, if so, what types?

As explained in question 27, in addition to the federal public officials, various states and municipalities have enacted their own regulations on public officials' ethics and conduct rules.

Generally speaking, complementary gifts or promotional materials are allowed, provided they do not exceed the established threshold of 100 reais (in most of cases).

However, it should be noted that the line between courtesy and bribery is a grey area. The circumstances, periodicity and the value involved should be carefully considered and, for this reason, each situation requires a case-by-case analysis.

29 Private commercial bribery

Does your country also prohibit private commercial bribery?

There is no specific legislation prohibiting private commercial bribery. The bill of law of the new Criminal Code, however, intends to define the conduct of commercial bribery as a crime.

Nowadays, however, the conduct related to the payment of kickbacks may characterise other crimes to be assessed and defined on a case-by-case basis.

30 Penalties and enforcement

What are the sanctions for individuals and companies violating the domestic bribery rules?

The practice of corruption could lead to sanctions of administrative and judicial nature. Administrative penalties are ruled by the Clean Companies Act and judicial penalties are ruled by the Administrative Improbity Act and the Clean Companies Act as well.

As regards penalties under the Administrative Improbity Act, a company might be prevented from contracting with public bodies for up to 10 years. Another important sanction would be the inaccessibility of fiscal or credit benefits and incentives by public bodies, such as the Brazilian Bank for Social and Economic Development.

The sanctions for domestic and foreign bribery are the same. See question 16.

The Brazilian Criminal Code sets forth different conduct that is considered corruption. Penalties for the different types of corruption range from one to 12 years and a fine. If the public official is actually influenced by the undue advantage and violates his or her duties, the penalty will be increased by one-third, which means that the maximum penalty can go up to 16 years.

31 Facilitating payments

Have the domestic bribery laws been enforced with respect to facilitating or 'grease' payments?

Facilitating or grease payments are prohibited and considered a bribe under the Brazilian law. Therefore, any payment made to a public official to expedite or secure the performance of a routine governmental action is considered a bribe under Brazilian laws.

32 Recent decisions and investigations

Identify and summarise recent landmark decisions and investigations involving domestic bribery laws, including any investigations or decisions involving foreign companies.

The corruption scandal at Petrobras, investigated in Operation Lava Jato (Car Wash), has kept the Brazilian state-run oil company at the centre of a scheme of bid-rigging by a cartel of the main construction companies active in Brazil, money-laundering and payments of bribes involving the Petrobras contracts. Several investigations have been conducted by many public authorities, such as the Administrative Council of Economic Defence, National Congress, the federal police, the Securities and Exchange Commission of Brazil, the CGU and the Public Prosecutor's Office. The criminal actions deriving from the investigations are being decided by a federal judge, Sergio Moro, in the 13th Federal Court of the City of Curitiba-PR, and by the Brazilian Supreme Court as per the involvement of parliamentarians. The Lava Jato Operation has already resulted in more than 1,434 proceedings, 730 search and seizure orders, 120 requests of foreign collaboration, 71 plea-bargain agreements, seven leniency agreements, criminal charges against more than 259 individuals, 120 convictions and recovery of about 3.8 billion Brazilian reais.

Alongside the Brazilian investigation, Petrobras is also under investigation by the US Securities and Exchange Commission owing to alleged violations of the Foreign Corrupt Practices Act, since the company trades stocks on the New York Stock Exchange.

Another important investigation on corruption conducted by the Brazilian federal police, the Federal Public Prosecutors' Office, the 10th Federal Court of the Federal District and the Brazilian Supreme Court is Operation Zelotes. It investigates alleged corruption within the Administrative Council of Fiscal Appeals to benefit several national and international conglomerates, as well as the enactment of rules by the president (provisional measures) to grant fiscal incentives.

Finally, the Operation *Acrônimo* (Acronym), run by the federal police, the Federal Public Prosecutors' Office, the 10th Federal Court of the Federal District and by the Superior Court of Justice, began investigating illegal schemes in donations to the 2014 electoral campaign of the current governor of Minas Gerais State, Fernando Pimentel. At the time of publication, the authorities involved are investigating loans granted by the Brazilian National Bank for Economic and Social Development to several companies.

There are many other investigations involving domestic bribery laws in Brazil, but the main current cases have been mentioned above.

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1 International anti-corruption conventions

To which international anti-corruption conventions is your country a signatory?

Canada has signed and ratified the OECD Convention on Combating Bribery of Foreign Public Officials (OECD Anti-Bribery Convention), the OAS Inter-American Convention against Corruption and the United Nations Convention against Corruption (UNCAC). When ratifying the UNCAC and the Inter-American Convention, Canada declared that it would not create an offence of illicit enrichment as set out in UNCAC article 20 and Inter-American Convention article IX, because such an offence would be contrary to the presumption of innocence guaranteed by Canada's constitution.

2 Foreign and domestic bribery laws

Identify and describe your national laws and regulations prohibiting bribery of foreign public officials (foreign bribery laws) and domestic public officials (domestic bribery laws).

Bribery of foreign public officials is prohibited by the Corruption of Foreign Public Officials Act, SC 1998, c 34, as amended (CFPOA). The CFPOA makes bribery of a foreign public official a criminal offence. The CFPOA also contains exceptions with respect to offering a benefit to a foreign public official that is permitted or required by the local law of the official, or that was made to pay the reasonable expenses of the official in relation to the promotion, demonstration or explanation of a company's products, or in relation to the execution of a contract with the foreign state. The CFPOA includes a 'books and records' offence, which criminalises the creation or maintenance of secret, incomplete or inaccurate books and records for the purpose of engaging in or hiding the bribery of foreign public officials.

Separately, the Criminal Code, RSC 1985, c C-46, as amended, establishes criminal offences that apply to the possession of property or the proceeds of property obtained from the bribery of a foreign public official (section 354) and the laundering of property or proceeds of property obtained from the bribery of a foreign public official (section 462.31).

Bribery of domestic officials is addressed by the Criminal Code in sections 119 to 125, dealing with various forms of bribery, corruption, fraud on the Crown and breach of trust by public officials, and also by section 426, dealing with secret commissions received by an agent (including a public official). The Criminal Code offences in relation to possession of proceeds of crime and laundering of the proceeds of crime apply equally to bribery of domestic officials.

Foreign bribery

3 Legal framework

Describe the elements of the law prohibiting bribery of a foreign public official.

To obtain a conviction under the CFPOA prohibition on bribery of a foreign public official (section 3), the prosecution must prove both the actus reus (the prohibited act) and mens rea (a guilty mind).

With respect to the proof of mens rea in this context, there is no requirement to prove a specific 'corrupt' intent. It is sufficient for the prosecution to prove that the accused, having reason to know or suspect that a third party might make or offer a bribe on its behalf, failed to make appropriate further inquiry or take remedial action (wilful blindness).

The prosecution must also establish the following elements of the actus reus of the offence: a person, in order to obtain or retain business, or to retain or obtain an advantage in the course of business, directly or indirectly gives, offers or agrees to give or offer, a loan, reward, advantage or benefit of any kind, to a foreign public official or to any person for the benefit of a foreign public official, as consideration for an act or omission by the official in connection with the official's duties or functions, or to induce the official to use his or her position to influence any act or decision of the government for which the official performs duties or functions.

The offence contemplates an exchange, or quid pro quo, between the person making the bribe and the official such that the 'benefit' is given or offered to the official in order to induce the official to use his or her official position to the business advantage of the person making the bribe.

In *R v Karigar* [2013] ONSC 5199, the Ontario Superior Court of Justice concluded that the use of the word 'agree' in the phrase 'agrees to give or offer' imports the concept of conspiracy into the CFPOA, such that an agreement by persons to give or offer a bribe to a foreign public official is a violation of the act, whether or not there is proof that the public official was offered or received the bribe.

As of June 2013, the CFPOA provides nationality-based jurisdiction for CFPOA offences committed anywhere in the world by a Canadian citizen, a permanent resident, or a company, partnership or other entity formed or organised under Canadian law. For acts committed prior to 19 June 2013, the date the amendments came into force, the Crown must establish jurisdiction by demonstrating a 'real and substantial connection' with Canada pursuant to the jurisdictional test established by the Supreme Court of Canada in *R v Libman* [1985] 2 SCR 178. Jurisdiction over foreign companies and individuals for the purposes of CFPOA offences must still be established pursuant to the 'real and substantial connection' with Canada test.

4 Definition of a foreign public official

How does your law define a foreign public official?

'Foreign public official' is defined in section 2 of the CFPOA as:

- a person who holds a legislative, administrative or judicial position in a foreign state;
- a person who performs public duties or functions for a foreign state, 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 state, or is performing such a duty or function; or
- an official or agent of a public international organisation that is formed by two or more states or governments, or by two or more such public international organisations.

5 Travel and entertainment restrictions

To what extent do your anti-bribery laws restrict providing foreign officials with gifts, travel expenses, meals or entertainment?

The CFPOA does not expressly address gifts, travel expenses, meals or entertainment. The giving or offering of any of these items can be viewed as 'benefits' so as to trigger the bribery offence provided the other elements of the offence are satisfied, and the exceptions and defences under the CFPOA do not otherwise apply. Moreover, there is no de minimis threshold with respect to the value of the benefits required to trigger the offence, although a benefit of a particularly low or nominal value may well be insufficient to satisfy the quid pro quo aspect of the offence.

6 Facilitating payments

Do the laws and regulations permit facilitating or 'grease' payments?

Subsection 3(4) of the CFPOA currently provides that a payment 'made to expedite or secure the performance by a foreign public official of any act of a routine nature that is part of the foreign public official's duties or functions' does not amount to a 'loan, reward, advantage or benefit' paid to obtain 'an advantage in the course of business' such as to trigger the commission of the bribery offence.

Subsection 3(4) does not define such 'acts of a routine nature', but it does set out an illustrative list, as follows:

- the issuance of a permit, licence or other document to qualify a person to do business;
- the processing of official documents, such as visas or work permits;
- the provision of services normally offered to the public, such as mail pick-up and delivery, telecommunications services and power and water supply; and
- the provision of services normally provided as required, such as police protection, loading and unloading of cargo, the protection of perishable products or commodities from deterioration, or the scheduling of inspections related to contract performance or transit of goods.

A decision to award new business, to continue existing business or to encourage another person to make such a decision are deemed not to constitute an 'act of a routine nature' and therefore do not constitute facilitating payments under any circumstances (CFPOA, section 3(5)).

In June 2013, the CFPOA was amended to eliminate this 'facilitation payment' exception, however this change will only come into force at a future date to be determined by the federal Cabinet.

7 Payments through intermediaries or third parties

In what circumstances do the laws prohibit payments through intermediaries or third parties to foreign public officials?

The CFPOA prohibits giving or offering payments to an official, directly or indirectly. The word 'indirectly' captures bribes paid or offered through intermediaries or third parties, including agents and representatives, as well as persons who are mere conduits for the payment and are not, in any manner, parties to the underlying offence.

8 Individual and corporate liability

Can both individuals and companies be held liable for bribery of a foreign official?

Both individuals and companies can be convicted of the criminal offence of bribery of a foreign public official. The acts or omissions of a 'senior officer' (defined in section 2 of the Criminal Code) may give rise to corporate liability under specific circumstances. Pursuant to section 22.2 of the Criminal Code, a corporation will be deemed to be a party to the offence if the senior officer, acting with the intent at least in part to benefit the organisation:

- acts within the scope of his or her authority and is a direct party to the offence;
- acts within the scope of his or her authority, has the required mens rea for the offence, and directs a representative of the organisation to commit the actus reus; or
- knowing (or, as detailed above, being wilfully blind to the fact) that a representative of the organisation is or is about to be a party to the offence, fails to take all reasonable measures to stop the representative from doing so.

The definition of 'senior officer' includes the directors, chief executive officer, and chief financial officer of a corporation; however, this list is not exhaustive. Canadian jurisprudence has determined that relatively mid-level officials (eg, a regional sales manager) may be senior enough to trigger corporate liability, depending on duties and responsibilities. Courts will look to the particular facts of the case to determine whether the official was a 'directing mind', someone who wields authority or influence at the organisation, whether formally or informally. (See *R v Khan and Muellenbach*, 2015 ONSC 7283.)

9 Successor liability

Can a successor entity be held liable for bribery of foreign officials by the target entity that occurred prior to the merger or acquisition?

As a general rule, the sale of a corporation's assets and business will not result in the transfer of the corporation's liabilities, including criminal liability. However, in the context of civil tort liability, some Canadian courts have considered the availability of successor liability to be an 'open question' and have been willing to engage in a fact-specific inquiry to determine if exceptional circumstances exist that would justify the imposition of tort liability on a successor corporation. To date, no Canadian cases have determined if the logic applicable in cases of tort liability will apply to the prosecution of a successor company for bribery or other criminal offences by the target entity.

Where there has been a merger or amalgamation of the parent and the subsidiary, certain statutory provisions will result in criminal liability transferring if a criminal proceeding is already underway. Under section 186 of the Canada Business Corporations Act, an outstanding penal proceeding against one of the amalgamating corporations may be continued against the amalgamated corporation ('a civil, criminal or administrative action or proceeding pending by or against an amalgamating corporation may be continued to be prosecuted by or against the amalgamated corporation' and 'a conviction against, or ruling, order or judgment in favour of or against, an amalgamating corporation may be enforced by or against the amalgamated corporation', section 186(e) and (f)).

In addition, the CFPOA criminalises the maintenance of false accounts or knowingly using false documents for the purpose of hiding bribery. Accordingly, if a successor entity were to 'cover up' the bribery of foreign officials by the target entity in how it maintains books and records, it may be held liable under section 4 of the CFPOA.

10 Civil and criminal enforcement

Is there civil and criminal enforcement of your country's foreign bribery laws?

Bribery of a foreign public official is subject only to criminal enforcement under the CFPOA. Canadian prosecutors do not have a civil enforcement option under the CFPOA. In certain circumstances, it is possible that a person injured by virtue of the commission of the offence of bribery of a foreign public official (eg, the injured government or perhaps an injured competitor whose contractual relations with a foreign government have been interfered with) may be able to sue the offender civilly for damages in tort or delict. To date, this approach has not been tested in Canadian courts.

11 Agency enforcement

What government agencies enforce the foreign bribery laws and regulations?

The right to lay charges under the CFPOA rests exclusively with Canada's national police force, the Royal Canadian Mounted Police (RCMP). CFPOA offences are investigated by the RCMP's National Division Sensitive and International Investigations Section in Ottawa and the Calgary-based K Division.

CFPOA offences can be prosecuted by either federal or provincial prosecutors. Since mid-2012, the RCMP's policy has been to refer

CFPOA matters exclusively to the Public Prosecution Service of Canada (PPSC), which represents the federal Crown in criminal prosecutions. The PPSC has designated a subject-matter expert based in Ottawa to support CFPOA prosecutions, and in March 2014 issued a Guideline on the importance of coordinating CFPOA prosecutions at a national level. Accordingly, the chief federal prosecutor in each province or territory is required to notify the Deputy Director of Public Prosecutions of the Regulatory and Economic Prosecution and Management Branch in Ottawa of all requests for advice in relation to investigations, any prosecutions initiated and all developments in relation to cases involving the CFPOA.

Other government departments may assist with foreign bribery investigations. In 2014, the Income Tax Act and Excise Tax Act were amended to permit Canada Revenue Agency (CRA) officials to disclose taxpayer information to a law enforcement officer of an appropriate police force (domestic or foreign) where there are reasonable grounds to believe that the information will afford evidence of foreign bribery. As a matter of foreign policy, when allegations arise that a Canadian company or individual has bribed a foreign public official or committed other bribery-related offences, information in the possession of Canadian officials abroad is sent to Global Affairs Canada's headquarters in Ottawa (Canada's department of foreign affairs) and passed on to law enforcement in accordance with departmental procedures.

Canada has also begun to use alternative administrative measures to promote compliance with anti-corruption laws, including through its public procurement policies and services provided to Canadian companies operating abroad. Public Works and Government Services Canada (PWGSC), the federal government's procurement department, established its integrity framework in 2012 to disqualify companies found guilty of certain offences, including CFPOA offences, from competing for federal contracts for 10 years, and in 2014 the policy was extended to include bribery offences under foreign anti-corruption laws. In the same year, the federal government introduced a requirement that Canadian companies seeking the assistance of Canada's trade commissioners abroad must declare that they are not engaged in corruption, and specifically that neither the company nor its affiliates have been charged or convicted under Canada's anti-corruption laws. Export Development Canada and the Canadian Commercial Corporation have adopted similar policies.

Responding to criticisms of the regime, the federal government revised the PWGSC integrity framework in 2015. Among other things, the 2015 revisions added a measure of transparency to the process by which ineligibility decisions are made, no longer punish suppliers for the conduct of affiliate companies over which they exercise no control or influence, and permit the 10-year debarment period to be reduced by up to five years if the supplier establishes that it has cooperated with law enforcement or addressed the cause of the misconduct. Further revisions to the integrity framework were made in April 2016 to expand the definition of 'affiliated' entities by broadening both the indicia of control and the types of relationships that give rise to control. The revisions aimed to capture mergers, divestitures and other corporate reorganisations. The 2016 revisions also require suppliers to provide a certified list of all foreign criminal charges and convictions with regard to the supplier, its affiliates and its subcontractors, when submitting a bid for federal government procurement. The penalty for providing a false or misleading certification is automatic ineligibility to enter into procurement contracts for 10 years.

12 Leniency

Is there a mechanism for companies to disclose violations in exchange for lesser penalties?

There is no established way for a company to secure certainty in its criminal exposure in exchange for coming forward and reporting violations. A company can approach the RCMP and offer to make disclosure of an offence in exchange for leniency. When doing so, it is essential to involve the federal prosecution service early in the process as any plea agreement will need to be negotiated with and confirmed by the Crown.

The RCMP has made overtures to the private sector and the legal profession expressing an interest in promoting voluntary disclosure and in developing a protocol with respect to the process that would govern voluntary disclosure. The RCMP issued its first known declination in late 2015 to Nordion Inc. In 2012, Nordion disclosed to the RCMP, the US Department of Justice (DOJ), and the US Securities and Exchange Commission (SEC) evidence of payments made by an agent of the company to a Russian official. Nordion retained independent counsel to conduct a full investigation of the matter, and the RCMP conducted its own investigation. On 15 December 2015, the RCMP confirmed to Nordion's counsel that it had concluded the investigation and was taking no further action against the company. On 3 March 2016, the SEC imposed a civil monetary penalty of US$375,000 for contravention of the books and records and internal controls provisions of the US Foreign Corrupt Practices Act.

The 2013 conviction of Griffiths Energy International Inc (Griffiths Energy) was also the result of a voluntary disclosure that the court acknowledged warranted a reduced fine, and we are aware of three other voluntary disclosure matters. Nevertheless, recent experience with voluntary disclosures, including in cross-border cases, has shown that the RCMP and the PPSC have yet to establish a consistent and predictable process for voluntary disclosure.

13 Dispute resolution

Can enforcement matters be resolved through plea agreements, settlement agreements, prosecutorial discretion or similar means without a trial?

Canadian prosecutors have wide latitude to exercise discretion with respect to the disposition of criminal charges. Thus plea agreements are routinely concluded in relation to many white-collar offences and can include a wide range of penalties and restitution. The 2011 conviction of Niko Resources Ltd (Niko Resources) for bribery of a Bangladeshi minister illustrates the general principle in the context of foreign bribery. In this case, the company pleaded guilty to one count of bribery contrary to the CFPOA and was fined C$8.26 million. In addition to the criminal fine, the court imposed a victim surcharge of 15 per cent for a total monetary penalty of C$9.5 million. The court also issued a probation order for a period of three years requiring Niko Resources to report to the RCMP any evidence of corrupt payments made by or on behalf of the company, to adopt a robust anti-corruption compliance policy with elements determined by the court and to retain an independent auditor at the company's expense to prepare an annual compliance report to the court, the prosecution and the RCMP. To date, only one conviction under the CFPOA has been the result of a trial process (*Karigar*), which resulted in a sentence of three years' incarceration.

14 Patterns in enforcement

Describe any recent shifts in the patterns of enforcement of the foreign bribery rules.

There have been four convictions under the CFPOA to date: *Hydro Kleen Group* (2005), *Niko Resources* (2011), *Griffiths Energy* (2013) and *Karigar* (2013). The establishment of a dedicated RCMP enforcement unit in late 2007, followed by the appointment of dedicated federal prosecutors, were critical enforcement developments that are now showing results. An October 2016 report to Parliament on Canada's implementation of the OECD Anti-Bribery Convention disclosed that the RCMP had 10 active anti-corruption investigations, four convictions, and four cases in which charges have been laid but not yet concluded under the CFPOA.

The RCMP has executed at least five search warrants in international corruption matters and issued numerous production orders under the Criminal Code to financial institutions and other persons with information relevant to ongoing investigations.

15 Prosecution of foreign companies

In what circumstances can foreign companies be prosecuted for foreign bribery?

Foreign companies can be prosecuted under the CFPOA where jurisdiction can be established pursuant to the 'real and substantial connection with Canada' test established by the Supreme Court of Canada in *R v Libman* [1985] 2 SCR 178.

16 Sanctions

What are the sanctions for individuals and companies violating the foreign bribery rules?

Individuals are subject to imprisonment for up to 14 years upon conviction of bribery of a foreign public official. A convicted company or other organisation is subject to a fine in the discretion of the court (ie, there is no maximum fine set by the CFPOA and a court is free to establish a fine level that is appropriate in the circumstances of the offence). In 2014, the Ontario Superior Court commented that 'the primary objectives of sentencing must be denunciation and deterrence' (*R v Karigar*, 2014 ONSC 3093).

In the *Niko Resources* case, the court imposed a total monetary penalty of C$9.5 million for one count of bribery involving payment of goods and services valued at approximately C$195,984. In *Griffiths Energy*, the total monetary penalty was C$10.35 million for the payment of bribes including C$2 million and shares to a corporate entity owned by the wife of the foreign ambassador. In *Karigar*, the only case to date in which an individual has been sanctioned under the CFPOA, Mr Karigar was sentenced to three years of imprisonment for conspiring to bribe officials. In all of these cases, the corporation or individual cooperated with the authorities, and in each case this was noted by the court as a mitigating factor.

17 Recent decisions and investigations

Identify and summarise recent landmark decisions or investigations involving foreign bribery.

In June 2011 Niko Resources, a Canadian public company in the oil and gas exploration sector, pleaded guilty to one count of bribery in relation to the payment to a Bangladeshi energy minister of a luxury vehicle valued at C$190,000 and personal travel valued at C$5,000. These payments were allegedly made to obtain the minister's support in relation to the negotiation of a gas purchase and sale agreement with a state enterprise and mitigation of the fallout resulting from a gas blowout at one of Niko Resources's sites in Bangladesh. The company was sentenced to pay a fine of C$8.3 million plus a 15 per cent victim surcharge, for a total penalty of C$9.5 million.

In January 2013, Griffiths Energy entered a guilty plea on one count of bribery contrary to the CFPOA and was fined C$9 million plus a 15 per cent victim surcharge for a total penalty of C$10.35 million. Griffiths Energy admitted to having paid a C$2 million success fee to a company controlled by the wife of the ambassador to Canada of the Republic of Chad in connection with securing an oil and gas concession in the African country. The court took into consideration that the company voluntarily disclosed the matter to the Canadian and US authorities when it came to the attention of new management and cooperated fully in the RCMP investigation. The court's reasons suggested that the fine would have been considerably higher in the absence of the voluntary disclosure.

In June 2013 Nazir Karigar, a Canadian citizen, was found guilty of bribery under the CFPOA for an agreement to pay bribes to certain officials of Air India and the Indian Minister of Civil Aviation with regard to the procurement of an airport security system. In April 2014, Mr Karigar was sentenced to three years' imprisonment. The *Karigar* case was the first prosecution under the CFPOA to proceed through a trial on the merits, the first conviction of an individual under the CFPOA, and the first case to offer judicial interpretation of any of the CFPOA's provisions. Before *Karigar*, all other CFPOA convictions have been secured through guilty pleas without trial. In June 2014, the RCMP laid charges against three foreign nationals believed to have assisted in the bribery scheme, and Canada-wide warrants for these individuals remain outstanding.

Enforcement activity continues with respect to SNC-Lavalin Group and the World Bank-funded Padma Bridge construction project in Bangladesh, and public contracts in Libya. In September 2011, the RCMP executed a search warrant at SNC-Lavalin Group's premises outside Toronto in relation to the Padma Bridge investigation. In April 2013, the World Bank imposed a 10-year debarment on SNC-Lavalin Inc and over 100 of its affiliates after the company agreed not to dispute charges arising from the same matter. In 2012 and 2013 the RCMP charged five people, three former employees of SNC-Lavalin Group (including a former senior vice president) and two other individuals under the CFPOA in connection with the matter. In April 2014, the Ontario Superior Court found that Canada lacked adjudicative jurisdiction over one of these individuals, a Bangladeshi national who was not present in Canada and who lacks any citizenship or residency ties to Canada (*Chowdhury v HMQ*, 2014 ONSC 2635). The court found that although Canadian courts may have jurisdiction over the offence, unless and until the accused is physically present in Canada or Bangladesh offers to surrender him to Canada, Canadian courts do not have jurisdiction over his person. Accordingly, the prosecution against the Bangladeshi national has been stayed.

Subsequently, the remaining accused individuals brought a motion to require the World Bank to produce various documents from the World Bank investigation. Justice Nordheimer of the Ontario Superior Court of Justice ordered production and the World Bank Group appealed this order to the Supreme Court of Canada. In *World Bank Group v Wallace*, 2016 SCC 15, the Supreme Court of Canada held that documents from World Bank Group investigations remain immune from document production requests that are part of domestic court proceedings. The Court found that the Integrity Vice Presidency and the World Bank enjoyed immunities for their documents and personnel, which are important in the fight against corruption and ensuring the independence of international organisations. A significant concern was that cooperation between the World Bank and domestic law enforcement would suffer if the World Bank's immunity could be waived by sharing information with the RCMP.

The charges in relation to this matter against former SNC-Lavalin engineer, Mohammad Ismail, were stayed on 27 November 2015. Ismail is reportedly cooperating with the police and expected to testify against the remaining former employees, who are still awaiting trial.

Prosecutions and investigations also continue with respect to alleged payments to third parties relating to public contracts in Libya. In April 2012, the RCMP executed a search warrant at SNC-Lavalin Group's headquarters pursuant to a mutual legal assistance request by the Swiss authorities. The Swiss authorities had arrested a former executive vice president of SNC-Lavalin Group for money laundering and corruption and in August 2014 reached a plea deal which saw the executive plead guilty in October 2014 to bribery in exchange for the 29 months of incarceration he served and an order to repay millions of dollars to SNC. Two weeks later, the executive was extradited to Canada, where he faces prosecution on the domestic corruption charges laid against him in relation to a large public construction project in Quebec and, according to media reports, has agreed to cooperate with the RCMP. In May 2013, the RCMP obtained judicial authorisation to freeze assets of a different former executive vice president and his family, and in January 2014, the RCMP laid charges against that former executive vice president and a former vice president and financial controller in relation to the Libya corruption allegations. In September 2014, the RCMP laid additional charges against the former executive vice president of construction for obstructing justice and also against a Canadian lawyer for obstructing justice and extortion, alleging that the two men sought to obtain a statement from the former executive vice president detained in Switzerland in exchange for money. In 2015, SNC-Lavalin filed a civil suit against certain executives, alleging that they embezzled money and orchestrated the kickback scheme in Libya to defraud the company.

The RCMP charged SNC-Lavalin itself with fraud (Criminal Code, section 380) and corruption (CFPOA, section 3(1)) in February 2015. On 26 February 2016, a Quebec Court judge set 10 September 2018 as the date for the preliminary hearing of the charges. The preliminary hearing could take up to 50 days. Notwithstanding these charges, in December 2015 the company announced that it had entered into an administrative agreement with the federal government that would permit it to continue to participate in government procurement. SNC-Lavalin has also publicly lobbied the federal government to adopt deferred prosecution agreements similar to those used by the United States and the United Kingdom because the pending charges are hurting SNC-Lavalin's ability to compete globally.

In June 2013, the RCMP initiated an investigation of Brookfield Asset Management and submitted an information-sharing request to the US SEC for access to the SEC's investigative files regarding the company. The SEC began an investigation of Brookfield's Brazilian subsidiary for alleged bribery in 2012. The US DOJ also requested the SEC's files regarding the matter in September 2014. In 2013, a Brazilian

prosecutor filed civil and criminal complaints for bribery against the principals of the Brazilian subsidiary. The Brazilian complaints are still pending. The SEC ended its investigation in June 2015 and did not recommend any enforcement action. There is no further public information available regarding the RCMP and US DOJ investigations.

In January 2015, the RCMP executed a search warrant at the Toronto head office of MagIndustries Corp, a (formerly) TSX-listed mining company, in relation to alleged corrupt payments to foreign public officials in the Republic of Congo. To date, no charges have been laid. MagIndustries initiated an internal investigation, but this ground to a halt in June 2015 when the company's controlling shareholder, Evergreen Holding Group, withdrew funding. MagIndustries was delisted from the TSX in August 2015. In June 2016, bondholders of Evergreen expressed anger that Evergreen's May 2015 prospectus failed to mention the corruption investigation at MagIndustries.

In November 2016, the RCMP laid charges against Larry Kushniruk, the president of Canadian General Aircraft, under the CFPOA. Kushniruk is alleged to have conspired to bribe foreign public officials in the Thai military in order to secure the sale of a commercial passenger jet from the national airline, Thai Airways. The RCMP was tipped off in 2013, when the FBI flagged irregularities in the sale; however, the investigation has not revealed that Thai public officials were actually bribed or were parties to the conspiracy. Kushniruk appeared in provincial court in Calgary on 12 December 2016 to hear the charges, and the matter was adjourned to 2017 pending disclosures.

Financial record keeping

18 Laws and regulations

What legal rules require accurate corporate books and records, effective internal company controls, periodic financial statements or external auditing?

The CFPOA's books and records offence was established when the legislation was amended in June 2013. Under CFPOA section 4, it is an offence to keep secret accounts, falsely record, not record or inadequately identify transactions, enter liabilities with incorrect identification of their object, use false documents, or destroy accounting books and records earlier than permitted by law for the purpose of concealing bribery of a public official. As a result, CFPOA liability can now flow from conduct relating to the financial records of a corporation made after an alleged corruption offence. The CFPOA books and records offence is a criminal offence and therefore subject to a criminal standard of proof. However, from a day-to-day compliance standpoint it can be expected to require the same level of diligence in the recording of transactions, or in the face of red flags that give rise to concerns about potential unlawful payments or efforts to conceal them, as would be expected of corporate officials under the US Foreign Corrupt Practices Act.

More generally, the principal laws and regulations governing corporate books and records are the Canada Business Corporations Act and similar provincial corporate statutes, and the provincial securities laws. Both the corporate and securities laws require that financial statements of corporations be prepared in accordance with Canadian generally accepted accounting principles (GAAP) as set out in the Handbook of the Canadian Institute of Chartered Accountants. As of 2011, Canadian GAAP require public corporations in Canada to comply with the International Financial Reporting Standards. In the case of Canadian companies who are 'registrants' for the purposes of the US securities laws, they may prepare their financial statements in accordance with US GAAP (ie, the principles established by the US Financial Accounting Oversight Board).

The Extractive Sector Transparency Measures Act, SC 2014, c 39, s 376 (the ESTMA), which came into force on 1 June 2015, creates certain additional reporting obligations for businesses engaged in the commercial development of oil, gas or minerals in Canada or elsewhere. The purpose of the ESTMA is to implement Canada's international commitments to fight corruption by increasing transparency and payment-reporting obligations in the extractive sector. These measures are designed to deter corruption offences as defined by the Criminal Code and CFPOA. Under the ESTMA, extractive sector entities must report all 'payments' made to 'payees' annually where the aggregate of all payments in a given payment category to a specific payee exceeds $100,000 per financial year. The definition of 'payee' includes any Canadian or foreign government, body of two or more governments, other similar bodies conducting government functions, and state-owned entities. The ESTMA requires an entity to report payments if it is engaged in the commercial development of oil, gas or minerals in Canada or elsewhere or controls an entity that is, and either:

- is listed on a stock exchange in Canada;
- does business or has assets in Canada and, for at least one of its two most recent financial years, it fulfils two of the following three conditions:
  - has at least C$20 million in assets;
  - has generated C$40 million in revenue; and
  - employs an average of 250 employees; or
- is otherwise prescribed by regulation.

19 Disclosure of violations or irregularities

To what extent must companies disclose violations of anti-bribery laws or associated accounting irregularities?

There is no such obligation under Canadian law in relation to disclosure of the mere fact of bribery, domestic or foreign. Public companies, however, have certain obligations under Canadian securities laws to report 'material changes' and 'material facts'. In addition, the securities exchanges have their own rules with regard to disclosure of material information. As a result of heightened enforcement and rising levels of corporate awareness, Canadian companies are reviewing past and contemplated acquisitions more closely in order to identify potential exposure under the CFPOA. Correspondingly, where CFPOA violations are uncovered by these internal investigations, there has been a noticeable trend towards voluntary disclosures of infractions to the law enforcement authorities, and we are aware of such disclosures in the past.

20 Prosecution under financial record keeping legislation

Are such laws used to prosecute domestic or foreign bribery?

As noted above, the CFPOA contains a separate offence for concealing bribery in an entity's books and records. There do not appear to have been any instances of the use of more general financial record keeping legislation (ie, corporate and securities statutes and regulations) as a means to prosecute bribery offences, domestic or foreign.

21 Sanctions for accounting violations

What are the sanctions for violations of the accounting rules associated with the payment of bribes?

The books and records provisions under the CFPOA carry a maximum sentence of 14 years' imprisonment, or in the case of a company or other organisation, a fine in the discretion of the court.

22 Tax-deductibility of domestic or foreign bribes

Do your country's tax laws prohibit the deductibility of domestic or foreign bribes?

Yes. Section 67.5 of the Income Tax Act expressly denies the deductibility of expenses incurred for the purposes of an offence under section 3 of the CFPOA or the domestic bribery provisions of the Criminal Code.

Domestic bribery

23 Legal framework

Describe the individual elements of the law prohibiting bribery of a domestic public official.

The Criminal Code contains several provisions, each with different tests and elements, addressing various forms of domestic bribery and corruption, as follows:

- section 119 addresses bribery of judicial officers and members of parliament or of provincial legislatures;
- section 120 addresses bribery of law enforcement officials and persons employed in the administration of the criminal law;
- section 121 addresses fraud on the government and a broad range of bribery and influence peddling by domestic officials;
- section 122 addresses breaches of trust by public officers;

- section 123 addresses bribery and corruption of municipal officials; and
- sections 124 and 125 address the selling or purchasing of public offices and attempts to influence or deal in public offices.

The core domestic bribery offence, however, is contained in section 121(1)(a), which makes it an offence for a person to, directly or indirectly, give, offer or agree to give to an official or to a member of his family, or to anyone for the benefit of the official, or for an official to demand accept or offer or agree to accept, a loan, reward advantage or benefit of any kind as consideration for cooperation, assistance, exercise of influence or an act or omission in connection with any matter of business with the government.

In addition to the Criminal Code offences cited above, there are specific bribery and corruption provisions in many other federal and provincial statutes including, for example, the Royal Canadian Mounted Police Act with regard to the offence of inducing a member of the RCMP to forego his or her duties (subsection 48(1)), the Canada Elections Act in relation to the bribery of a voter (section 481), the Financial Administration Act with respect to the bribery of officials involved in the collection, management or disbursement of public money (section 81) and the Immigration and Refugee Protection Act concerning paying bribes to immigration officers or government employees (section 129(1)(b)). Similarly, many provincial statutes include provisions aimed at curbing bribery, corruption and influence peddling, particularly in the context of elections or the performance of a legislator's duties.

24 Prohibitions

Does the law prohibit both the paying and receiving of a bribe?

All but one of the offences relating to domestic bribery and corruption listed in question 23 apply to both the paying and receiving of a bribe. The offence of breach of trust by a public officer under section 122 of the Criminal Code applies only to the public official. Where the breach of trust was induced by a third party through a bribe, however, the payer would be caught by one of the other domestic bribery offences.

25 Public officials

How does your law define a public official and does that definition include employees of state-owned or state-controlled companies?

The domestic bribery provisions of the Criminal Code apply to 'officials'. Section 118 of the Criminal Code defines an 'official' as a person who holds an office or appointment under the government of Canada or a province, a civil or military commission, or a position or an employment in a public department; or is appointed or elected to discharge a public duty. The definition of 'official' does not generally extend to state-controlled companies unless they are also designated as an agent of the federal or provincial government. The bribery of directors, officers or employees of state-controlled companies would be subject to the 'secret commission' offence in section 426 of the Criminal Code.

26 Public official participation in commercial activities

Can a public official participate in commercial activities while serving as a public official?

The domestic bribery and corruption laws do not specifically prohibit public officials from engaging in independent commercial activities as such. However, where public officials abuse their position for personal gain or for the benefit of their personal business, they may be found in violation of section 122 of the Criminal Code prohibiting breach of trust. Payments received by a government official in the course of carrying on an independent business may also violate section 121(1)(c) of the Criminal Code where they are received from a person who has dealings with the government, unless the official has received the consent of head of their agency or department. In *R v Mathur*, a 2007 decision of the Ontario Superior Court affirmed by the Ontario Court of Appeal ([2010] ONCA 311), an employee of the National Research Council (the NRC) was convicted of both accepting a benefit from a company that did business with the NRC, and also of breach of trust as a result of his business dealings with the company. Moreover, regardless of the potential application of the Criminal Code, officials who engage in independent commercial activities that have a potential relationship to their office or employment risk running afoul of applicable codes of conduct, conflict of interest codes and guidelines, or the terms of their employment or office.

27 Travel and entertainment

Describe any restrictions on providing domestic officials with gifts, travel expenses, meals or entertainment. Do the restrictions apply to both the providing and receiving of such benefits?

Since 2012, public servants employed by 'core' government institutions (such as departments and administrative tribunals) are subject to a Policy on Conflict of Interest and Post-Employment (Conflict of Interest Policy). Under the Conflict of Interest Policy, public servants are not to accept or solicit any gifts, hospitality or other benefits that may have a real, apparent or potential influence on their objectivity in carrying out their official duties and responsibilities or that may place them under obligation to the donor. The Conflict of Interest Policy is complemented by the Values and Ethics Code for the Public Sector (revised in 2012), which sets out ethical principles applicable to all federal public servants (including employees of Crown corporations) except the Canadian forces, the Canadian Security Intelligence Service and the Communications Security Establishment, which are subject to more stringent requirements. Every government department, agency and corporation also has its own specific code relating to travel, entertainment and gifts.

Each of the 10 provincial and three territorial governments in Canada also administers its own conflicts of interest legislation and codes of conduct that limit the circumstances in which gifts and hospitality may be accepted by its officials. Where applicable, legislation includes a dollar value limit on gifts and hospitality that may be accepted by an official without disclosure or forfeiture to the government; the limits tend to be in the range of C$200–C$500 over the course of a calendar year. In all cases, the gifts or hospitality cannot appear to, or in fact, compromise the integrity of the public official or influence or appear to influence the performance of the official's duties.

28 Gifts and gratuities

Are certain types of gifts and gratuities permissible under your domestic bribery laws and, if so, what types?

The Criminal Code provisions on domestic bribery do not contain any safe harbours or exceptions for gifts and gratuities. If the gift or gratuity, however small, can be shown to have resulted in the prohibited influence on the official's conduct or performance of his or her duties, the offence will be made out. However, the judicial decisions regarding domestic bribery have made passing reference to gifts and benefits of a nominal value or quality as being insufficient to be found as a bribery offence (at least in the absence of clear evidence linking the gift to the prohibited outcome in relation to the official's duties or functions).

Separately, the acceptability of gifts and other forms of hospitality is generally addressed in federal and provincial codes of conduct for public officials. For example, the federal Conflict of Interest Policy provides that gifts, hospitality and other benefits are permissible if they are:

- infrequent and of minimal value (low-cost promotional objects, simple meals, souvenirs with no cash value);
- arise out of activities or events related to the official duties of the public servant concerned;
- are within the normal standards of courtesy, hospitality or protocol; and
- do not compromise or appear to compromise in any way the integrity of the public servant concerned or his or her organisation.

29 Private commercial bribery

Does your country also prohibit private commercial bribery?

Yes. Section 426 of the Criminal Code prohibits the payment or offering of secret commissions to agents (including employees of private entities) as consideration for the agent doing or forbearing to do any act in

Update and trends

The Supreme Court of Canada heard its first appeal involving an international corruption investigation. The Court's 2016 decision in *World Bank Group v Wallace* upheld the immunities of the World Bank's anti-corruption investigators and documents. The World Bank provided assistance to the RCMP in connection with an investigation of the SNC-Lavalin Group. Several individuals charged under the CFPOA in connection with the matter obtained an order from the Ontario Superior Court compelling the World Bank to produce certain records in its possession. The Supreme Court reversed the order noting the importance of international cooperation in the fight against corruption.

relation to the affairs or business of the principal, for showing favour or disfavour to any person in relation to the affairs or business of the principal, or using receipts, accounts or other writings with intent to deceive the principal.

30 Penalties and enforcement

What are the sanctions for individuals and companies violating the domestic bribery rules?

Bribery of judicial officers and members of parliament or provincial legislatures contrary to section 119 of the Criminal Code, and bribery of police officers and other officials employed in the administration of criminal law contrary to section 120 of the Criminal Code, are punishable by up to 14 years' imprisonment.

Other forms of official corruption and bribery contrary to sections 121 (fraud on the government and various forms of influence peddling), 122 (breach of trust by an official), 123 (bribery of municipal officials), 124 (selling and purchasing public offices) and 125 (influencing, negotiating appointments or dealing in public offices) of the Criminal Code are punishable by up to five years' imprisonment.

R v Morency [2012] QJ No. 4860, a decision out of the province of Quebec, contains a chart of 62 sentences imposed on public officials convicted of domestic bribery and corruption charges under Criminal Code. In the majority of cases, the public official was sentenced to a term of imprisonment despite mitigating factors such as no previous criminal conviction or a history of community service.

31 Facilitating payments

Have the domestic bribery laws been enforced with respect to facilitating or 'grease' payments?

The domestic bribery laws do not provide any exception for facilitating or 'grease' payments. If a payment is made or offered as consideration for the official to perform even a non-discretionary duty (eg, to expedite the performance of the duty), it is potentially subject to being caught by the applicable domestic bribery offence.

32 Recent decisions and investigations

Identify and summarise recent landmark decisions and investigations involving domestic bribery laws, including any investigations or decisions involving foreign companies.

In 2006, the Supreme Court of Canada issued its most recent decision in a matter of official corruption (*R v Boulanger* [2006] 2 SCR 49). In this case, the Supreme Court clarified a number of outstanding issues regarding the elements of the offence of breach of trust by a public official in section 122 of the Criminal Code. Each of the following elements must be proven beyond a reasonable doubt for the offence to be established:

- the accused is an official;
- the accused was acting in connection with the duties of his or her office;
- the accused breached the standard of responsibility and conduct demanded of him or her by the nature of the office;
- the conduct of the accused represented a serious and marked departure from the standards expected of an individual in the accused's position of public trust; and
- the accused acted with the intention to use his or her public trust for a purpose other than the public good, for example, for a dishonest, partial, corrupt or oppressive purpose.

In October 2011, the Quebec government established a commission of inquiry to investigate allegations of bid-rigging and corruption in construction contracts awarded by the province and municipalities (known as the Charbonneau Commission). The commission began its work in May 2012 and heard evidence from witnesses in the construction industry and municipal employees describing systemic corruption in bids for municipal contracts. Testimony included allegations of illegal political party financing, collusion, and connections between organised crime and the construction industry in Quebec. The commission rendered its final report in 2015 and made 60 recommendations, including creating a provincial public works authority to supervise the awarding of contracts and improving support and protection for whistle-blowers. In December 2015, the Quebec government introduced legislation to protect public sector whistle-blowers.

In parallel, a special anti-corruption enforcement unit (the Unité permanente anticorruption, or UPAC) of the Quebec provincial police has executed a number of high-profile search warrants against construction companies and public bodies, and made numerous arrests of construction executives and public officials. The UPAC is supported by a team of prosecutors within the office of the Quebec director of criminal and penal prosecutions. In its December 2016 annual report, the UPAC reported that it had 44 investigations in progress (30 criminal and 14 civil), that 67 individuals and entities were charged with offences in 2016 (15 under the Criminal Code and 52 under financial and construction laws) and that there were 27 active criminal cases before the courts. The UPAC has successfully engaged in joint investigations with federal agencies such as the Competition Bureau, enabling charges to be laid under both federal and provincial statutes.

Prosecutions and investigations continue with respect to alleged corruption relating to a large public construction project in Canada, the McGill University Health Centre. In March 2012, the SNC-Lavalin Group's CEO resigned in connection with the conclusion of an internal investigation that disclosed that he had approved approximately C$56 million to unnamed 'agents' to help secure two contracts. The former CEO was arrested by Quebec police in November 2012 and charged in February 2013 with fraud and conspiracy. As noted above, the former executive vice president of construction has also been charged and awaits prosecution in Quebec. Others charged include several former SNC executives (including some who have been charged with respect to the Libya investigations), consultants, lawyers and hospital officials, including the former CEO of the Health Centre, who is now deceased. In December 2014, the former Health Centre CEO's wife pleaded guilty to money laundering charges related to the project. SNC-Lavalin brought a civil suit against several individuals involved with the alleged scheme for the recovery of C$22.5 million paid out in alleged bribes. Notwithstanding the ongoing prosecutions, in 2014 the Autorité des marchés financiers issued the ethics certification required for any company wishing to contract with public authorities in Quebec to SNC-Lavalin.

In February 2014, the RCMP announced the conclusion of the Project COCHE investigations into alleged corruption at the CRA. In total, the six-year investigation resulted in the arrest of 15 individuals, including eight former CRA officials and in the laying of 142 counts of indictment.

In November 2016, it was reported that two prominent Ontario Liberal party members, Patricia Sorbara and Gerry Lougheed, are facing civil charges under the Ontario Elections Act for alleged bribery during a 2015 by-election involving an attempt to induce a competing candidate to drop his nomination bid. Criminal charges laid in 2015 against Lougheed under the bribery provisions of the Criminal Code were stayed by prosecutors in April 2016.

Two judicial decisions have clarified various aspects of Canada's domestic bribery laws in areas that could have implications for the CFPOA. In *R v Mathur* [2010] ONCA 311, the Ontario Court of Appeal confirmed that payments made to a family member of a government official are sufficient to make out an offence under section 121 and need not be independently established to have been for the official's personal benefit. In *R v ACS Public Sector Solutions Inc* [2007] ABPC 315, the Alberta Provincial Court noted that the giving of even a single

ticket to a sports event could amount to a 'benefit' within the meaning of the bribery provisions of the Criminal Code, and that the fact that one of the tickets (to a hockey game) was given to the officer at the time that the company's contract was being considered for renewal would have been sufficient to commit the company to trial on the basis that the ticket was given 'in respect of' the contract-approval process. Although the charges against the company were eventually dismissed on the ground that section 121 does not apply to municipal government officials as in that case, the finding nevertheless highlights the risk of hospitality and entertainment expenses incurred for the benefit of government officials. Had the charges been laid under section 123 of the Criminal Code, which applies to municipal officials, it is not certain that the outcome would have been the same.

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China

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1 International anti-corruption conventions

To which international anti-corruption conventions is your country a signatory?

China (the People's Republic of China (PRC)) is a signatory to the United Nations Convention against Corruption (UNCAC), subject to a reservation under article 66(2) (declining to accept the jurisdiction of the International Court of Justice over any disputes arising under the Convention).

2 Foreign and domestic bribery laws

Identify and describe your national laws and regulations prohibiting bribery of foreign public officials (foreign bribery laws) and domestic public officials (domestic bribery laws).

China's rules against official corruption, commercial bribery, and bribery of foreign officials appear in multiple laws, administrative regulations and guidelines, judicial interpretations and internal measures of the ruling Chinese Communist Party (CCP). The PRC Criminal Law criminalises bribery of Chinese 'state personnel' and foreign public officials, as well as serious cases of commercial bribery (including bribery of employees of private entities). The Anti-Unfair Competition Law (AUCL), in turn, broadly prohibits commercial bribery (including bribery of any employees of government-owned companies and institutions who do not qualify as 'state personnel').

China's anti-corruption regime comprises multiple authorities acting under different regulations through different enforcement structures.

Criminal bribery cases are investigated by the Public Security Bureau (PSB) or the Procuratorates, and tried before the People's Courts.

Commercial bribery cases under the AUCL are investigated by the Anti-Monopoly and Unfair Competition bureau of the State Administration of Industry & Commerce (SAIC), acting through the nationwide network of provincial and local administrations of industry and commerce (AICs). The AICs may also impose administrative penalties and refer criminal cases to the Police or Procuratorates for investigation.

The Ministry of Supervision monitors compliance with laws and internal regulations within the bureaucracy, investigates alleged misconduct, recommends disciplinary measures and hears appeals of internal disciplinary penalties for misconduct. The National Audit Office, and the internal audit and inspection departments of government agencies and state-owned enterprises, are also involved in detecting corruption (as well as embezzlement, waste and other misconduct) in the public sector. The National Corruption Prevention Bureau under the State Council helps coordinate policy making, enforcement and information-sharing among the judiciary, police and banks.

In addition to these government agencies, the Central Commission for Discipline Inspection (CCDI) of the CCP has sweeping authority to investigate and punish CCP members for corruption and other breaches of party disciplinary rules. Although the CCDI is a CCP entity rather than a government agency, it acts as the lead investigative authority in bribery cases involving CCP members. Officials determined by the CCDI to have engaged in corruption or other misconduct are frequently expelled from the party and then handed over to the state authorities for prosecution under the Criminal Law.

In January 2017, the CCDI confirmed plans to proceed with the establishment of a new National Supervision Commission integrating the functions of the CCDI and numerous other governmental anti-corruption and disciplinary offices at the national, provincial and local levels into a new anti-graft agency. Once established, the National Supervision Commission would lead the enforcement of relevant laws plus CCP rules on government and party personnel.

Foreign bribery

3 Legal framework

Describe the elements of the law prohibiting bribery of a foreign public official.

After China ratified the UNCAC in 2006, many trading partners urged China to adopt new laws prohibiting bribery of foreign public officials as contemplated by article 16 of the UNCAC. In 2011, the PRC Criminal Law was amended to create a new criminal offence of bribing foreign public officials and officials of public international organisations (the Foreign Bribery Clause). This new Foreign Bribery Clause was added to the prohibition of serious commercial bribery in article 164 rather than the prohibition of official corruption in article 389. It prohibits 'giving money or property' to any foreign public official or international public organisation official 'for the purpose of seeking illegitimate benefits'.

4 Definition of a foreign public official

How does your law define a foreign public official?

No judicial interpretation or implementing rules have been issued regarding the definition of a foreign public official or international public organisation official. Chinese authorities might interpret these terms with reference to the UNCAC.

5 Travel and entertainment restrictions

To what extent do your anti-bribery laws restrict providing foreign officials with gifts, travel expenses, meals or entertainment?

The Foreign Bribery Clause refers to bribes of 'money or property', which previously has been construed for purposes of the PRC Criminal Law to encompass other tangible and intangible benefits with monetary value (such as gift cards, travel expenses, club memberships). Accordingly, providing hospitality, travel or other valuable benefits to foreign officials to seek illegitimate commercial interests may be prohibited. The same principles used to distinguish permissible gifts and entertainment from unlawful bribery in domestic official corruption and commercial bribery cases might be applied to cases under the Foreign Bribery Clause. See question 26.

6 Facilitating payments

Do the laws and regulations permit facilitating or 'grease' payments?

The Foreign Bribery Clause does not explicitly address facilitating payments to secure or expedite the performance of non-discretionary ministerial tasks (as opposed to influencing discretionary official

decisions), and no judicial interpretation or administrative guidance has clarified whether such payments would qualify as payments 'to seek illegitimate commercial interests'.

7 Payments through intermediaries or third parties

In what circumstances do the laws prohibit payments through intermediaries or third parties to foreign public officials?

Although the Foreign Bribery Clause does not explicitly address the issue of indirect payment of bribes, Chinese authorities might construe the PRC Criminal Law to prohibit bribery of foreign public officials channelled through third parties based on analogous principles of the domestic bribery laws.

8 Individual and corporate liability

Can both individuals and companies be held liable for bribery of a foreign official?

Both individuals and companies may be held liable for bribing a foreign official. If a company is convicted of the crime of bribing a foreign official, the company may be fined, and the responsible individuals may be punished.

9 Successor liability

Can a successor entity be held liable for bribery of foreign officials by the target entity that occurred prior to the merger or acquisition?

Violations of the PRC Criminal Law or the AUCL may result in liability for legal entities or natural persons. As a general rule, a change of ownership of a legal entity will not extinguish its liabilities.

10 Civil and criminal enforcement

Is there civil and criminal enforcement of your country's foreign bribery laws?

The Foreign Bribery Clause establishes a criminal offence. In some circumstances, bribery of foreign public officials or public international organisation officials in the course of business dealings within China might also involve the general rules against commercial bribery under the AUCL.

11 Agency enforcement

What government agencies enforce the foreign bribery laws and regulations?

Foreign bribery offences may be investigated by the Ministry of Public Security and prosecuted by the Procuratorate at the provincial or local levels.

12 Leniency

Is there a mechanism for companies to disclose violations in exchange for lesser penalties?

Article 164 of the Criminal Law provides that an offender who confesses voluntarily prior to prosecution may be given a mitigated punishment or be exempted from punishment. These principles of mitigation and exemption are general principles of Chinese criminal law, not limited to bribery. On 18 April 2016, the Supreme People's Court and the Supreme People's Procuratorate jointly issued new guidance for penalties in cases involving bribery, corruption and embezzlement; these measures allow mitigation of punishment in certain instances for voluntary disclosure and cooperation in the investigation and recovery of assets. Lenient treatment may sometimes be secured through informal dialogue with enforcement personnel and relevant government and party leaders. Although such ad hoc arrangements may sometimes be reached through informal channels, there are no formal procedures for plea agreements or settlement agreements.

13 Dispute resolution

Can enforcement matters be resolved through plea agreements, settlement agreements, prosecutorial discretion or similar means without a trial?

See question 11.

14 Patterns in enforcement

Describe any recent shifts in the patterns of enforcement of the foreign bribery rules.

To date, no enforcement actions under the Foreign Bribery Clause have been officially publicised. However, according to China Business News, the CCDI has inquired into the possibility that a state-owned oil company may have been implicated in corrupt payments in Africa before the enactment of the Foreign Bribery Clause.

15 Prosecution of foreign companies

In what circumstances can foreign companies be prosecuted for foreign bribery?

According to article 6 of the Criminal Law, the Criminal Law generally applies both to criminal actions committed in China as well as criminal actions committed outside China where the injury occurs within China. Under these principles, foreign companies can be prosecuted for bribery of foreign public officials or public international organisational personnel occurring within or impacting China.

16 Sanctions

What are the sanctions for individuals and companies violating the foreign bribery rules?

Violations of the Foreign Bribery Clause are subject to the same penalties as criminal commercial bribery offences under article 164 of the PRC Criminal Law where the amount of bribes is 'relatively large' or 'huge'. But whereas domestic commercial bribery cases involving smaller bribes may still be punished under the Anti-Unfair Competition Law, the penalties for foreign bribery involving bribes of lower value remain unclear.

17 Recent decisions and investigations

Identify and summarise recent landmark decisions or investigations involving foreign bribery.

No actions enforcing the Foreign Bribery Clause have been reported to date.

Financial record keeping

18 Laws and regulations

What legal rules require accurate corporate books and records, effective internal company controls, periodic financial statements or external auditing?

Numerous laws and regulations prescribe specific accounting and internal controls practices and proscribe fraudulent or deceptive record-keeping practices, with different rules applying to specific sectors or to entities listed on Chinese stock exchanges. Recent audits targeting waste and mismanagement in state-owned enterprises have also highlighted weaknesses in accounting and compliance.

The key laws and regulations concerning accounting practises and internal controls are as follows:

- the Company Law of the People's Republic of China (adopted by the fifth Session of the Standing Committee of the eighth National People's Congress on 29 December 1993 and amended for the first time by the 18th Session of the Standing Committee of the 10th National People's Congress on 27 October 2005, amended for the second time by the sixth Session of the Standing Committee of the 12th National People's Congress), section 8, captioned 'Financial Affairs and Accounting of Companies';

- the Accounting Law of the People's Republic of China (adopted by the ninth Session of the Standing Committee of the sixth National People's Congress on 21 January 1985 and amended by the 12th Session of the Standing Committee of the ninth National People's Congress on 31 October 1999);
- General Financial Rules for Enterprises (promulgated by the Ministry of Finance on 4 December 2006);
- General Financial Rules for Financial Enterprises (promulgated by the Ministry of Finance on 7 December 2006);
- Implementation Guidelines for the General Financial Rules for Financial Enterprises (issued by the Ministry of Finance on 30 March 2007); and
- the PRC Criminal Law of the People's Republic of China (adopted by the second Session of the National People's Congress on 1 July 1979 and amended by the fifth Session of the National People's Congress on 14 March 1997, last amended on 29 August 2015), article 161, 'Crime of Providing False Financial Statements';
- Basic Norms for Internal Control of Enterprises (promulgated by the Ministry of Finance, China Securities Regulatory Commission, National Audit Office, China Banking Regulatory Commission, China Insurance Regulatory Commission on 22 May 2008); and
- Guidelines for Internal Control of Enterprises (promulgated by the Ministry of Finance, China Securities Regulatory Commission, National Audit Office, China Banking Regulatory Commission, China Insurance Regulatory Commission on 15 April 2014).

Party and government leaders have released measures aimed at promoting ethical conduct and enhancing the compliance environment in state-owned enterprises (SOEs). On 12 July 2009, the Chinese Communist Party Central Committee and the State Council jointly issued Several Provisions Regarding Non-Corrupt Practices of Leaders of State-Owned Enterprises. These measures prohibit various acts of public waste, abuse of power, conflict of interest and corruption by SOE leaders, restrict former SOE executives' dealings with their former employers after leaving office and call upon SOEs to implement stricter compliance programmes. In a similar vein, on 22 May 2008 (effective on 1 July 2009) the Ministry of Finance, the China Securities Regulatory Commission, the National Audit Office, the China Banking Regulatory Commission and the China Insurance Regulatory Commission released the Basic Standard for Enterprise Internal Controls, outlining internal control practices and calling for listed companies to disclose annual self-assessment reports.

At the onset of the current anti-corruption campaign in December 2012, the Political Committee of the CCP Central Committee announced 'Eight Rules' for avoiding extravagance and promoting propriety. In October 2015, the CCP adopted the new Self-discipline Standards for CCP Members' Clean Politics, replacing 2010 rules for party leaders with new standards applicable to all CCP members. At the same time, the CCP overhauled the CCP Disciplinary Regulations, setting the strictest standards for CCP discipline since the beginning of the reform era.

19 Disclosure of violations or irregularities

To what extent must companies disclose violations of anti-bribery laws or associated accounting irregularities?

Chinese anti-bribery laws generally do not require companies to disclose violations to authorities. However, companies listed on Chinese securities exchanges may be required to disclose certain violations of anti-bribery laws or associated accounting irregularities. Pursuant to article 30 of the Administrative Measures for the Disclosure of Information of Listed Companies (promulgated by the China Securities Regulatory Commission on 30 January 2007), a public company must disclose in its interim report any major events, including circumstances when the company, its directors, its supervisors or its senior managers are under investigation or subject to material administrative or criminal penalties.

20 Prosecution under financial record keeping legislation

Are such laws used to prosecute domestic or foreign bribery?

Chinese laws regulating financial record keeping are not commonly viewed as part of China's anti-bribery regimes. Chinese authorities generally address official corruption and commercial bribery directly as bribery offences under the PRC Criminal Law or AUCL rather than indirectly as cases of defective record keeping or internal controls.

21 Sanctions for accounting violations

What are the sanctions for violations of the accounting rules associated with the payment of bribes?

Chinese law does not prescribe specific penalties for bribery-related violations of accounting laws and regulations. Instead, bribery-related violations are subject to the same punishments as other violations of such measures. Penalties for violating accounting laws and regulations include various forms of administrative or criminal punishment. Administrative punishment may include: official criticism in published circulars; fines for the companies; fines for the individuals who are directly in charge and other persons who are directly responsible for the offence; dismissal of the state functionaries involved; and cancellation of the qualification certificates of accountants involved. Criminal punishment may include criminal detention or imprisonment of responsible individuals and fines on the companies involved.

22 Tax-deductibility of domestic or foreign bribes

Do your country's tax laws prohibit the deductibility of domestic or foreign bribes?

According to the Measures on Advance Deductibility of Enterprise Income Tax, Chinese companies may not deduct bribes when calculating the payable enterprise income tax.

Domestic bribery

23 Legal framework

Describe the individual elements of the law prohibiting bribery of a domestic public official.

Official corruption is generally addressed under article 389 of the PRC Criminal Law, which broadly prohibits the bribery of public officials by 'offering' 'money or property' to 'state personnel' either to 'obtain illegitimate benefits' or in the 'course of commercial dealings'.

Money or property

Although the Criminal Law describes the corrupt consideration paid to a state functionary as 'money or property', this term has been broadly construed to encompass any tangible or intangible benefits with monetary value. On 20 November 2008, the Supreme People's Court and Supreme Procuratorate issued the Opinions on Several Issues in Applying Law to Handling Criminal Commercial Bribery Cases (the Opinion on Handling Criminal Commercial Bribery Cases), which clarifies that the corrupt consideration used in commercial bribery cases is not limited to currency, financial assets and tangible property, but also intangible benefits for which a monetary value may be calculated. Examples may include valuable interior decoration and other services, prepaid membership cards, gift cards and travel expenses.

On 8 July 2007, the Supreme People's Court and Supreme Procuratorate issued the Opinions on Several Issues Concerning the Application of Laws in Hearing Cases of Accepting Bribes. These opinions explicitly extend the prohibition of bribery to several prevalent methods of concealing bribes, including:

- sham transactions involving sale to officials of real estate, cars or other property at prices 'obviously' much lower than fair market value (or purchasing assets at inflated prices);
- providing securities in exchange for no consideration;
- inclusion in investment without any capital contribution;
- providing profits from a company or investment that are artificially high or disproportionate to capital contribution;
- bribes through gambling (ie, letting the official win);
- indirect bribes through third parties; and
- deferring corrupt payment until after the official leaves office.

Bribery to 'secure illegitimate benefits'

Article 389 of the PRC Criminal Law prohibits 'offering money or property to state personnel for the purpose of securing illegitimate benefits'. Although the PRC Criminal Law itself does not define 'illegitimate benefits', the Opinion on Handling Criminal Commercial Bribery Cases and the Interpretation of the Supreme People's Court

and the Supreme People's Procuratorate on Several Issues concerning the Specific Application of Law in the Handling of Criminal Cases of Offering Bribes (issued on 26 December 2012) define efforts 'to secure illegitimate benefits' to include either securing benefits that directly violate laws, regulations, rules or policies, or requesting state personnel to provide assistance or favours in violation of laws, regulations, rules, policies and industrial norms. Moreover, providing money or property in order to gain competitive advantages contrary to the principles of fairness and justness in commercial activities (such as bidding or government procurement) and organisational and personnel management matters is also deemed attempting 'to secure illegitimate benefits'.

Most Chinese laws include broad statements of legislative purpose articulating the goals and principles to be advanced by the measures, and many laws incorporate express provisions prohibiting malfeasance (including bribery) in the course of their administration. Consequently, payments and gifts made to influence the official decisions of state personnel to benefit the payer may readily be construed as 'securing illegitimate benefits'.

Bribery in 'commercial activities'

Article 389 of the PRC Criminal Law further provides that violating other state regulations in the course of commercial activities by offering state personnel 'a relatively large amount of money or property' or 'rebates or service charges of various descriptions in violation of published rules' should be punished as bribery.

Prosecutorial Guidelines

On 18 April 2016, Supreme People's Court and the Supreme People's Procuratorate jointly issued the Interpretation for Application of Laws in Handling Corruption and Bribery Criminal Cases, clarifying principles for the prosecution and penalisation of offering or accepting bribes and misappropriating state assets. These Interpretations call for prosecution of cases involving bribery by individuals exceeding 30,000 yuan and bribery by entities exceeding 200,000 yuan. Bribes of 10,000 yuan to 30,000 yuan should also be prosecuted where bribes: are offered to more than three recipients; are made using illicit income; seek promotion; are offered to any state functionaries responsible for food, drug, or workplace safety or environmental protection to conduct illegal activities; are offered to judicial personnel; or cause economic losses of 500,000 yuan to 1 million yuan. Potential penalties increase with the value of the bribes and magnitude of the resulting harm; acceptance of bribes is punishable by death in especially serious cases.

24 Prohibitions

Does the law prohibit both the paying and receiving of a bribe?

Payment and receipt of bribes may be prosecuted under different provisions of the PRC Criminal Law:

- article 385 prohibits state personnel from accepting or soliciting bribes;
- article 387 prohibits state agencies, state-owned companies, enterprises, institutions and people's organisations from accepting or soliciting bribes;
- article 388(1) prohibits close relatives of or people who have close relationships with state personnel from seeking any illegitimate benefits on behalf of any third party either through influencing the official acts of the related state personnel or through influencing the official acts of any other state personnel by using the advantages generated from the authority or position of the related state personnel. If the related state personnel have left their positions, their close relatives and associates may not seek illegitimate benefits by using the advantages generated from the former state personnel's previous authority or position.;
- article 389 (as discussed above) prohibits individuals from offering bribes to state personnel;
- article 390(1) prohibits offering bribes to close relatives or 'people who have close relationships' to current state personnel or former state personnel for the purpose of securing illegitimate benefits;
- article 391 prohibits offering bribes to state agencies, state-owned companies, enterprises, institutions and people's organisations (entity bribery);
- article 392 prohibits facilitating bribes to state personnel; and
- article 393 prohibits entities from offering bribes to state personnel.

25 Public officials

How does your law define a public official and does that definition include employees of state-owned or state-controlled companies?

Article 93 of the PRC Criminal Law defines 'state personnel' (also translated as 'state functionaries') to encompass 'all personnel of state organs'. It further provides that:

> *personnel engaged in public service in state-owned corporations, enterprises, institutions and people's organisations; and personnel assigned by state organs, state-owned corporations, enterprises and institutions to engage in public service in non-state-owned corporations, enterprises, institutions and social organisations; as well as other working personnel engaged in public service according to the law, are to be treated as state personnel.*

Although there is no strict legal definition of 'public service,' the Supreme People's Court has interpreted 'public service' to involve the organisation, supervision, and management of state-owned property on behalf of state organs, state-owned companies, enterprises, institutions or civil associations. In practice, the category of 'personnel engaged in public service' in state-owned corporations and other entities is generally understood to encompass government personnel seconded to major state-owned enterprises or senior executives of state-owned enterprises appointed by the government.

Consequently, many employees of state-owned companies and public institutions may not be treated as 'state personnel' for the purposes of the PRC Criminal Law (even though they would qualify as public officials under the US Foreign Corrupt Practices Act (the FCPA) and many other countries' foreign bribery rules). However, bribery involving such employees would still be covered by the rules against commercial bribery under the PRC Criminal Law and the Anti-Unfair Competition Law. For example, GlaxoSmithKline and several of its employees were prosecuted for bribery of state-owned hospital personnel for the offence of criminal commercial bribery rather than bribery of state personnel.

26 Public official participation in commercial activities

Can a public official participate in commercial activities while serving as a public official?

According to article 53 of the PRC Civil Servants Law, civil servants are prohibited from undertaking or participating in any profit-making activity, or holding a concurrent position in an enterprise or any other profit-making organisation. 'Civil servants' are defined under article 1 of the PRC Civil Servants Law as personnel who perform public duties pursuant to the laws, are included in the state administrative system, and whose salary and social securities are covered by the state treasury. Pursuant to article 102 of the PRC Civil Servants Law, civil servants may not work in enterprises or other profitable entities or engage in any profitable activities directly related to the responsibilities of their official position concurrently with their term or service or within two years) after retirement or resignation (three years for those who were previously in senior leadership positions). The definition of civil servants under the PRC Civil Servants Law appears narrower than the definition of state personnel for purposes of the PRC Criminal Law, which can include SOE personnel who perform public services.

In addition, CCP members are subject to separate party rules on profit-making activities. Party members are prohibited from engaging in profit-making activities, including doing trade, setting up companies in China or overseas, investing in existing companies, acting as paid middlemen, holding concurrent jobs in enterprises or any other profit-making organisations or being paid if they are approved for holding current jobs. New Party Disciplinary Regulations prohibit party cadres, within three years following retirement or departure from their official posts, from accepting employment from private companies, foreign investment enterprises or intermediaries in the regions and sectors subject to the jurisdictions of their official posts, or otherwise engaging in profit-making activities in sectors subject to the jurisdictions of their official posts, or acting as independent directors or supervisors of listed companies or fund management companies.

27 Travel and entertainment

Describe any restrictions on providing domestic officials with gifts, travel expenses, meals or entertainment. Do the restrictions apply to both the providing and receiving of such benefits?

Chinese law does not categorically prohibit the provision of any gifts, hospitality, travel and other benefits to government officials. As in many other jurisdictions, permissible gifts and entertainment are formally distinguished from unlawful bribes based on the intentions and understandings of the giver and recipient, which in turn are determined based on an assessment of the relevant circumstances.

With respect to official corruption and commercial bribery cases under the PRC Criminal Law, the Opinion on Handling Criminal Commercial Bribery Cases prescribes the 'careful distinction' of bribes from gifts based on 'comprehensive analysis and judgment' based on the following factors:

- the context of the presentation, including the nature and duration of the giver and recipient's friendship or other relationships;
- the value of the gift;
- the purpose, time, and method of the presentation, and whether the giver had requested any favours related to the recipient's position; and
- whether the recipient had taken advantage of his or her position to benefit the giver.

Similarly, with respect to commercial bribery offences under the Anti-Unfair Competition Law, article 8 of the Commercial Bribery Rules provides an exception for 'promotional gifts of small value which are offered in accordance with commercial custom'.

Several CCP guidelines help distinguish permissible from impermissible gifts and entertainment for government officials. Although such internal CCP measures technically apply only to party members, they may be treated as evidence of government policy given the CCP's constitutionally-mandated role as China's ruling party.

First, the CCP adopted internal party rules in 1995 governing the acceptance of gifts by CCP members serving as personnel of the 'central party' and 'government agencies' in the course of their duties in China, the Measures Concerning Registration and Disposal of Gifts Accepted or Received from Contacts in China by Personnel of Central Party and Government Agencies. Article 1 prohibits their acceptance or receipt 'from contacts in China any gift that is likely to affect fair performance of official duties.' Any such gifts that are 'likely to affect fair performance of civil service' must be refused or registered and surrendered to the government 'regardless of value'. Article 2 categorically requires the surrender of all gifts of 'cash, securities, gold, silver or jewellery that they fail to refuse from contacts in China (excluding contacts between relatives or friends), regardless of its value'. Article 3 governs other gifts received from contacts in China (excluding contacts between relatives or friends). All such gifts must be registered if valued at more than 100 yuan and must be surrendered if valued at more than 200 yuan. In addition, if CCP members and civil servants receive gifts from one source exceeding 600 yuan in one year, such gifts should be surrendered to the state treasury. (State personnel may be charged with embezzlement under article 394 of the PRC Criminal Law for failing to turn over gifts as required by government regulations where the value of the gifts is 'relatively large'.)

This 200 yuan threshold appears in numerous local regulations and party guidelines as well. Problematically, these quantitative thresholds have never been adjusted since 1996. The context implies that these rules apply to tangible items that may be surrendered (rather than intangible meals and entertainment). The 1996 'Replies to Several Questions Regarding the Regulations Prohibiting State Administrative Agencies and Their Personnel from Presenting or Accepting Gifts in Performing Official Duties in China issued by the Central Committee for Discipline Examination of the Party' defined 'gift' to include 'any present, cash, coupon or any item purchased at a token low price'. (However, some Chinese lawyers have suggested informally that this limit might apply to intangibles in some cases.)

Certain senior personnel of state-owned companies are subject to the gift rules as well. In practice, an SOE's senior personnel for the purposes of gift registration are likely to include the CCP committee secretary, vice-secretary, members of the board of directors and managers.

On 21 October 2015, the CCP issued new Disciplinary Regulations (effective 1 January 2016) prohibiting CCP members from accepting gifts, money and cards 'obviously exceeding normal social courtesy'. According to the CCDI, 'obviously exceeding normal social courtesy' refers to 'obviously exceeding local normal economic level, social custom and habits and personal economic capabilities'. The CCP did not repeal the 1995 gift rules, suggesting that the 200 yuan threshold remains a useful touchstone for the appropriate value for commercial gifts.

In this environment, many companies treat the 200 yuan limit from the CCP gift rules as a flexible benchmark for the value of a reasonable promotional gift or meal. When hosting government officials at conferences or seminars or providing travel benefits to government officials, companies often use formal written memoranda of understanding, 'transparency letters', and similar measures to document the relevant agency's acknowledgment and approval of the substance, value, and purpose of the event and confirmation that the arrangements comply with its internal policies.

28 Gifts and gratuities

Are certain types of gifts and gratuities permissible under your domestic bribery laws and, if so, what types?

See question 26.

29 Private commercial bribery

Does your country also prohibit private commercial bribery?

The general prohibition against commercial bribery appears in article 8 of the Anti-Unfair Competition Law, which provides that 'business operators shall not resort to bribery with money, property, or by other means in buying or selling commodities'.

The Provisional Regulations Regarding the Prohibition of Acts of Commercial Bribery clarify this general prohibition. Commercial bribery is specifically defined as 'giving valuable items or resorting to other means to bribe the counterparty, either an entity or individual, to sell or purchase goods'. 'Valuable items' is broadly defined to encompass 'cash and property', 'including payments in the guise of expenses for promotion, advertising, sponsorship, research, labour services, consultation, commissions, or reimbursement or otherwise' made for the purpose of buying or selling goods. 'Other means' includes 'other means of conferring benefits such as the provision of tours, visits, and so forth, inside or outside China in the name of travel or study'.

In addition, particularly serious acts of commercial bribery may be punished as criminal offences. Article 164 of the PRC Criminal Law makes it a crime to give 'relatively large' or 'huge' amounts of money or property to any employee of a company or enterprise – including wholly private entities – for the purpose of seeking illegitimate benefits.

The Opinion on Handling Criminal Commercial Bribery Cases issued by the Supreme People's Court and Supreme Procuratorate on 20 November 2008 addresses corrupt practices prevalent in the health care, construction and government procurement sectors.

The Provisional Regulations Regarding the Prohibition of Acts of Commercial Bribery (the Commercial Bribery Rules) also address the presentation of gifts in the course of business relationships: 'No business operator shall make a present of money or materials to any units or individuals in commercial transactions other than the payment of prices for such commodities, except for small presents given for promotional purposes according to business practices.' No published implementing measures further clarify this 'promotional gift' or 'business practices' exception.

Entity bribery

The prohibition against 'bribing' entities can present unique challenges in China. Although the rules generally target the use of 'off-the-books' to conceal embezzlement, kickbacks or other misuses of funds, some enforcement actions have targeted rebates or discounts as anticompetitive or unfair (essentially asserting antitrust concerns rather than anti-corruption concerns). For example, in September 2016, the Shanghai AIC fined Bridgestone 150,000 yuan and confiscated 17 million yuan in illegal income on grounds that promotional programmes offering retailers gift cards and other benefits as incentives for tyre purchases constituted commercial bribery.

30 Penalties and enforcement

What are the sanctions for individuals and companies violating the domestic bribery rules?

Official bribery

Criminal sanctions for individuals convicted of the crime of bribing state personnel include imprisonment or criminal detention of up to five years plus fines in most cases, with sentences of ten years to life plus higher fines and confiscation of personal property in 'especially serious' cases or if 'especially heavy loss is caused to the interests of the State'.

Criminal sanctions for entities convicted of the crime of bribing state personnel include monetary fine for the entities and up to five years of imprisonment or detainment and as well as monetary fine for the individuals who are 'directly in charge' or are 'directly responsible for the offence'. Personal appropriation of the fruits of an organisation's misconduct is also punishable as bribing state personnel by individuals.

Commercial bribery

Criminal sanctions for individuals convicted of the crime of bribing non-state personnel range from up to three years in prison or detainment and as well as monetary fine in the case of 'relatively large' amounts of money or property is involved to up to ten years in prison and as well as monetary fine in the case of 'huge' bribes are given.

Criminal sanctions for entities convicted of the crime of bribing non-state personnel include monetary fine for the entities and sanctions for the individuals who are 'directly in charge' or are 'directly responsible for the offence'. The criminal sanctions for these individuals are the same as those for individuals convicted of the crime of bribing non-state personnel.

Administrative penalties for commercial bribery by companies in violation of the AUCL include being subject to an administrative fine ranging from 10,000 yuan to 200,000 yuan, and any illegal gains from the offence may also be confiscated. Companies may be held liable for AUCL violations committed by their employees pursuant to article 3 of the Commercial Bribery Rules. In addition, individuals or entities injured by violations of the Anti-Unfair Competition Law (such as the employers of bribe recipients) may also sue for damages in Chinese courts.

31 Facilitating payments

Have the domestic bribery laws been enforced with respect to facilitating or 'grease' payments?

There are no rules under Chinese law comparable to those under the FCPA exempting liability for facilitating or 'grease' payments. However, article 389 of the PRC Criminal Law does provide that 'any person who offers money or property to a State employee under extortion but gains no illegitimate benefits shall not be regarded as offering bribes'.

32 Recent decisions and investigations

Identify and summarise recent landmark decisions and investigations involving domestic bribery laws, including any investigations or decisions involving foreign companies.

Since Xi Jinping assumed leadership of the Chinese Communist Party in late 2012, China has launched an unprecedented crackdown on corruption and other misconduct in the CPC, government, military and state-owned enterprises. On 4 December 2012, the Political Bureau of the CPC Central Committee adopted 'Eight Provisions' broadly aimed at combating waste, largesse and inefficiency in the public sector, and Xi vowed new anti-corruption enforcement efforts targeting both 'tigers and flies' – the senior officials as well as junior cadres.

Enforcement of domestic anti-bribery rules has surged. In 2015, the Supreme People's Procuratorate handled 4,490 cases of corruption, bribery and embezzlement of public funds involving over 1 million yuan. Overall, 13,210 individuals were prosecuted for receiving bribes, while 8,217 individuals were prosecuted for offering bribes. During the first half of 2016, the CCDI investigated 5,393 cases of corruption or breaches of party discipline and punished 5,737 individuals. From January to September of 2016, 67 senior officials at the provincial and ministerial level from 31 provinces were punished for bribery offences.

Domestic media have highlighted the prosecution of many senior 'tigers' in the state and military.

- Bo Xilai, former Party Secretary of Chongqing Municipality, was sentenced to life imprisonment for bribery, embezzlement and abuse of power in October 2013.
- Zhou Yongkang, a former member of the Standing Committee of the Political Bureau of the CPC Central Committee and secretary of the Commission for Political and Legal Affairs of the CPC Central Committee, was expelled from the party for disciplinary violations, leaking state secrets and suspicion of accepting bribes in December 2014. He was sentenced to life imprisonment in June 2015.
- Guo Boxiong, former vice chairman of the Central Military Commission, was expelled from the CPC for disciplinary violations and suspicion of accepting bribes in July 2015. His case has been transferred to the Military Procuratorate.
- Ling Jihua, head of the party's United Front Work Department and a deputy chairman of the CPPCC, was expelled from the CPC for disciplinary violations, leaking state secrets and suspicion of accepting bribes in July 2015. His case has been transferred to the Procuratorate.
- Xu Caihou, former Vice-chairman of the Central Military Commission, was expelled from the CPC on suspicion of accepting bribes in June 2014. The Military Procuratorate decided not to prosecute him owing to his illness. He died in March 2015.
- Su Rong, former Vice-chairman of the Chinese People's Political Consultative Conference, was expelled from the CPC for disciplinary violations and suspicion of accepting bribes in February 2015. His case has been transferred to the Procuratorate.
- Liu Zhijun, former Minister of the Ministry of Railway, was sentenced to death with a two-year suspension in July 2013 for accepting bribes. His sentence was recently commuted to life imprisonment.
- Jiang Jiemin, former Director of State-Owned Assets Supervision and Administration Commission, was subject to investigation for 'severe disciplinary violations' since September 2013. He was sentenced to 16 years in prison for accepting bribes in October 2015.
- Li Chuncheng, former deputy secretary of the Sichuan Provincial Party Committee, was officially removed for suspicion of serious disciplinary violations in December 2012. He was sentenced to 13 years in prison for accepting bribes in October 2015.
- Liu Tienan, former vice chairman of National Development and Reform Commission, was expelled from the CPC for suspicion of embezzlement and bribery. He was sentenced to life imprisonment for accepting bribes and abuse of power in December 2014.
- Bai Enpei, former vice chairman of the Environment and Resources Protection Committee of the National People's Congress and former secretary of the Yunnan Provincial Party Committee, was sentenced to death with suspension of execution for two years for accepting bribes and holding a huge amount of property with unidentified sources in October 2016.
- Zhu Mingguo, former chairman of the Chinese People's Political Consultative Conference of Guangdong Province, was expelled from the CPC for disciplinary violations in October 2015. He was sentenced to death with suspension of execution for two years for accepting bribes and holding a huge amount of property with unidentified sources in November 2016.
- Li Dongsheng, former deputy minister of Ministry of Public Security, was expelled from the CPC in June 2013. He was sentenced to 15 years in prison for accepting bribes in October 2015.
- Zhou Benshun, a former member of the Standing Committee of the Political Bureau of the CPC Central Committee, was expelled from the CPC for disciplinary violations and suspicion of accepting bribes in October 2015, and referred for prosecution.
- He Jiacheng, former executive vice president of the National School of Administration, was expelled from the CPC for disciplinary violations and suspicion of accepting bribes in November 2015, and went to trial in December 2016.
- Wang Baoan, former secretary of the National Bureau of Statistics, was expelled from the CPC for disciplinary violations and suspicion of accepting bribes in August 2016.
- Wang Jianping, deputy chief of staff of the Joint Chiefs of Staff of the Central Military Commission, is under investigation for accepting bribes.

Authorities are also cracking down on corruption and irregularities within SOEs. Recent CCDI inspections of 55 'Key State-owned Enterprises' uncovered violations of the Eight Provisions in 50 of the companies. Executives in leading SOEs in the petroleum, automotive, steel, airline and financial sectors have been punished.

Chinese authorities have also prioritised the extradition of suspects of economic crimes from foreign jurisdictions and the recovery of misappropriated assets from abroad, increasing collaboration with their foreign counterparts.

Enforcement efforts targeting private companies have also intensified. On 19 September 2014, the China subsidiary of GlaxoSmithKline (GSK) was fined 3 billion yuan for criminal commercial bribery for channelling bribes to doctors and administrators of state-owned hospitals through travel agencies and disguising bribes as event expenses and fees. The former head of GSK China, a UK citizen, received a three-year suspended prison sentence, a four-year probationary period and was deported, while four Chinese executives of GSK China received suspended prison sentences of two to three years.

On 30 December 2015, the SAIC promulgated the Interim Measures for the Administration of the List of Dishonest Enterprises in Serious Violation of Laws, establishing a new 'blacklist' for companies that repeatedly violate rules against commercial bribery and certain other forms of unfair competition. The blacklist will be disseminated to other government agencies and published online through the National Company Credit Information System, so blacklisted companies will face reputational risks and the threat of additional probes and penalties from other authorities.

On 8 November 2016, the General Office of the Central Committee of the CPC and the General Office of the State Council published the Opinions on Further Promoting the Experiences from Reforms in the Healthcare System by the Team of the State Council for Deepening Healthcare System Reform. These Opinions direct healthcare administration authorities nationwide to 'establish the blacklist system for any entities involved in commercial bribery and revoke their qualification as suppliers or logistic vendors of medical products when such enterprises conduct any commercial bribery misconduct, such as offering kickbacks'.

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1 International anti-corruption conventions

To which international anti-corruption conventions is your country a signatory?

Denmark has ratified several international anti-corruption conventions, the most notable being the United Nations Convention against Corruption (UNCAC) (ratified in 2006), the Council of Europe Criminal Law Convention on Corruption (ratified in 2002), and the Organisation for Economic Co-operation and Development (OECD) Anti-Bribery Convention (ratified in 2000) according to which Denmark has implemented changes into Danish legislation, regarding, inter alia, accounting rules that ensure transparency in annual reports. Furthermore, in 1998 Denmark implemented a tax deduction rule that explicitly states that expenses used in connection with bribery of public officials (as defined by the Danish Criminal Code) are not deductible. This implementation was carried out in accordance with the OECD recommendations of 1996. Finally, Denmark is a member of the Group of States Against Corruption (GRECO), which monitors the member countries' compliance with the organisation's anti-corruption standards (Denmark has been a member since 2000).

Being a part of the European Union, Denmark has also implemented the relevant directives and protocols issued by the European Union against corruption, for example, the Directive on Procurement implementing restrictions on participation in public procurement tenders and the convention on the protection of the European Communities' Financial Interests from 1995 with subsequent protocols. Denmark has also committed itself to the Council's Joint Action of 22 December 1998 on corruption in the private sector.

2 Foreign and domestic bribery laws

Identify and describe your national laws and regulations prohibiting bribery of foreign public officials (foreign bribery laws) and domestic public officials (domestic bribery laws).

The rules prohibiting bribery of foreign public officials and domestic public officials appear from the Criminal Code. Generally, the Criminal Code distinguishes between 'public active bribery' (section 122), 'public passive bribery' (section 144) and 'private bribery' (active and passive – section 299(2)). The relevant elements of the different provisions are described below under question 3.

Section 122 of the Criminal Code prohibits the unduly granting, promising or offering of a gift or another privilege to a person exercising a Danish, foreign or international public office or function in order to induce him or her to do or fail to do anything related to his or her official duties. The wording 'exercising a Danish, foreign or international public office or function' is subject to a broad interpretation in accordance with the guidelines from the OECD and the Council of Europe. As such, the phrase covers any individual employed, elected to or acting on behalf of the Danish judicial system, the Danish state and any Danish municipalities as well as any person employed, elected to or acting on behalf of a foreign government or international public organisations (such as the OECD, NATO, UN and the EU).

Further, section 144 of the Criminal Code prohibits any person exercising a Danish, foreign or international public office or function from unduly receiving, demanding or accepting the promise of a gift or other privilege.

Finally, section 299(2) of the Criminal Code regulates bribery in the private sector, including in the form of kickbacks, whereby a person who is trusted with handling matters of financial nature for another person receives, demands or accepts the promise of, for the benefit of himself or herself or of others, a pecuniary advantage, as well as any person who grants, promises or offers such advantage. Recent city court case law in the *Aller* case, suggests that section 299(2) only applies where the receiver is authorised to enter into agreements on behalf of the receiver's principal. The city court's conclusion on this matter does not appear to be fully consistent with the wording of section 299(2) of the Criminal Code and will likely be the subject of further debate.

According to section 306 of the Criminal Code, sections 122, 144 and 299(2) also apply to legal persons. Consequently, both individuals and legal persons may incur criminal liability under said provisions. See also question 8.

Concerning jurisdiction, see questions 4 and 15.

Foreign bribery

3 Legal framework

Describe the elements of the law prohibiting bribery of a foreign public official.

See question 2. Section 122 of the Criminal Code applies to bribery of both foreign and domestic public officials. However, the legislative comments to the current wording of section 122 assumes that the assessment of whether a payment is undue or not is influenced by the local context in which it is made, and, consequently, a payment that is made to a Danish public official may be deemed within the scope of section 122, whereas the exact same payment made to a foreign public official may be deemed outside the scope of section 122.

4 Definition of a foreign public official

How does your law define a foreign public official?

As mentioned under question 2, the wording 'exercising a Danish, foreign or international public office or function' in sections 122 and 144 is interpreted broadly in accordance with the guidelines from the OECD and the Council of Europe. In this respect the term 'foreign public official' includes any individual employed, elected to or acting on behalf of a foreign government or international public organisations (eg, the OECD, NATO, UN and the EU).

Generally and in accordance with the guidelines from the OECD, the term public office or function will include, inter alia, functions that are carried out through commercial companies on behalf of a public office (ie, public enterprises). In that regard 'public enterprises' are defined as any enterprise, regardless of its legal form, over which a government, or governments, may, directly or indirectly, exercise a dominant influence. The dominant influence in said enterprise may be exercised by either the majority of share capital, the majority of votes or the ability to appoint a majority of the members of the enterprise's administrative or managerial body or supervisory board.

Finally, it should be noted that the general rules on jurisdiction under the Criminal Code contain certain limitations on the prosecution of violations as the Criminal Code only grants jurisdiction to acts committed outside Denmark if:

- the act is carried out by a Danish natural or legal person, etc, and the act is also considered a crime in the state in which it was carried out;
- the act is carried out in Denmark;
- the act is being carried out outside of Denmark, if it has an effect in Denmark; or
- the action is deemed a 'serious crime' or a crime against the security and interests of the Danish state (including bribes).

Consequently, the jurisdiction rules of the Criminal Code do not contain the same extensive extraterritorial jurisdiction as the Foreign Corrupt Practices Act or the UK Bribery Act.

5 Travel and entertainment restrictions

To what extent do your anti-bribery laws restrict providing foreign officials with gifts, travel expenses, meals or entertainment?

Section 144 of the Criminal Code prohibits any person or individual from unduly receiving, demanding or accepting the promise of a gift or other privilege while exercising a Danish, foreign or international public office or function. The section covers even minor unduly gifts, travel expenses, meals or entertainment. In practice, however, it has been recognised that certain gifts and expenses are excluded.

Some guidance regarding the scope of section 144 is found in the 2007 and 2010 guide to public employees, which was published by the Danish Agency for the Modernisation of Public Administration. The guide sets forth, among other things that certain anniversary gifts are considered reasonable and proportionate. The guide does not include any specific guidance on hospitality lunches provided in connection with meetings. However, according to the guide, a reasonable and proportional lunch that has a direct connection to a justifiable meeting will, in general, be considered compliant and thus outside the scope of section 144 of the Criminal Code. This would generally be the case, in so far that the hospitality lunch is of a modest nature and the meeting in question is work-related and can be considered a customary part of doing business.

Consequently, and as a starting point, both the granting of unreasonable and/or disproportionate gifts, travel expenses, meals or entertainment, etc, to foreign officials as well as the receiving, demanding or accepting of such gifts and privileges are prohibited by sections 122 and 144 of the Criminal Code.

In 2015, the parliamentary ombudsman took on a case towards the Danish Ministry of Culture in connection with three government agency employees with escorts receiving tickets to and participating in an event held by the Danish Broadcasting Corporation. The tickets were received by the employees in connection with contract negotiations with the Danish Broadcasting Corporation regarding lease of the building housing the event from the government agency in question. The Ministry of Culture stated that the employees participated in the event on official business and consequently no case was made against the employees in that respect. However, the Danish Ministry of Culture agreed with the parliamentary ombudsman that the employees should not have been with individual escorts at the event. Prior to the case being made it had been the policy of the government agency only to return gifts from customers and suppliers of more than 300 kroner. However, as it was the opinion of the Danish Ministry of Culture that all gifts from customers and suppliers should be returned, the Danish Ministry of Culture instructed the government agency to change its policy and to undertake an individual assessment of each gift received in the future. Further, the government agency was instructed to write down a long-standing but unwritten praxis of the government agency informing the gift giver of the government agency not accepting any gifts.

Recent Danish case law has established that a gift in the form of an iPad and other IT equipment of a total value of approximately US$1,200 to a Danish public official in a municipality from an IT supplier was sufficient for the court to establish passive public bribery for the public official. The case should not be deemed seen as threshold for the economic value of acceptable gifts to public officials. Even gifts of a minor value could be deemed bribery under Danish law.

6 Facilitating payments

Do the laws and regulations permit facilitating or 'grease' payments?

Under Danish law, facilitation payments are generally considered bribes falling within the scope of sections 122 and 144 of the Criminal Code. However, pursuant to the legislative comments on the 2000 Act that incorporated the current wording of section 122, special circumstances in other countries may cause facilitation payments to be outside of the scope of the provision. More specifically, gifts or other privileges provided to a public official to induce him or her to do or fail to do anything related to his or her official duties may fall outside the scope of the provision if the facilitating payment is kept to a minimum and is made in a country where such facilitating payments are customary. Whether facilitating payments provided under such circumstances fall outside the scope of section 122 of the Criminal Code must be assessed on a case-by-case basis depending on the circumstances, including the purpose of the facilitation payment, which has been provided. There is no published Danish case law in which the Danish authorities have prosecuted for bribery in the form of facilitating payments.

7 Payments through intermediaries or third parties

In what circumstances do the laws prohibit payments through intermediaries or third parties to foreign public officials?

Direct payments and indirect payments through intermediaries or third parties to foreign public officials are treated equally under sections 122 and 299(2) of the Criminal Code. Consequently, any payments made through intermediaries or third parties, which knowingly are conducted as bribes, are also prohibited under Danish law. However, under Danish law the principal is only liable for the actions of the intermediary if the necessary criminal intent can be established with respect to the principal.

8 Individual and corporate liability

Can both individuals and companies be held liable for bribery of a foreign official?

Both natural and legal persons (corporations, funds, partnerships, publicly owned companies, etc) can be held liable for violations of sections 122 and 299(2) of the Criminal Code, see section 306 of the Criminal Code. In this respect, it follows from a general corporate liability perspective of Danish law, that a legal person cannot act independently and consequently any violation by a legal person therefore requires an act or omission by one or more natural persons acting on behalf of the legal person. It is not a requirement that the acting individual is part of the management. Furthermore, the legal person can only be held liable if the natural person(s) offering bribes was (or were) not acting abnormally, taking into consideration the businesses, practices and procedures of the specific legal person. The abnormality of the actions conducted by the natural person must be assessed on a case-by-case-basis, taking into consideration the specific circumstances of the action in question.

9 Successor liability

Can a successor entity be held liable for bribery of foreign officials by the target entity that occurred prior to the merger or acquisition?

The liability of a target entity for bribery of foreign officials prior to an acquisition is not affected by the change of ownership that follows the acquisition. As such, the acquiring entity (successor entity) may not be held liable for the bribery carried out by the target entity prior to the acquisition. The liability of the target entity (and also that of the members of the company management) will remain regardless of the acquisition of the target entity taking place.

With respect to mergers, a merger of a company pursuant to the Companies Act would imply a transfer of assets and liabilities, including any criminal liability, from the dissolved entity to the surviving entity. In this respect, the surviving entity of a merger (either a merger by formation of a new company or by way of absorption of the company being dissolved) would assume the criminal liability from the dissolved entity.

10 Civil and criminal enforcement

Is there civil and criminal enforcement of your country's foreign bribery laws?

Under question 16, the possible sanctions (and maximum penalties) for violations of sections 122, 144 and 299(2) of the Criminal Code are listed. Furthermore, both individuals and legal persons may be subject to civil actions and claims for damages put forward by a claimant with reference to violations of the mentioned sections of the Criminal Code.

11 Agency enforcement

What government agencies enforce the foreign bribery laws and regulations?

The Danish State Prosecutor for Serious Economic and International Crime (SØIK) deals with cases concerning economic and international crime, including allegations of bribery and corruption that are substantial in scale, are part of organised crime, which is carried out by applying unique business practices, that otherwise qualifies for special attention or is of comprehensive nature. SØIK is nationwide and a part of the Danish Prosecution Service. The Prosecution Service is governed by the Minister of Justice who supervises all public prosecutors. The investigations conducted by SØIK are subject to the Danish Administration of Justice Act, which, inter alia, provides the setting of the rights and limitations of the public authorities in general.

Should any act of bribery covered by the relevant sections of the Criminal Code fall outside the field of work of SØIK, the section in question is to be enforced by the local police prosecutors.

12 Leniency

Is there a mechanism for companies to disclose violations in exchange for lesser penalties?

Self-reporting of bribery may have an influence on a sentence imposed on a person or a company if criminal proceedings lead to a person or a company being convicted under the Criminal Code.

Furthermore, when determining a sentence regarding a violation of the Criminal Code, it must normally be considered a mitigating circumstance that the offender either voluntarily reported himself to the authorities and made a full confession, or provided information crucial to solving criminal acts committed by others, see sections 82(9) and 82(10) of the Criminal Code. However, the Danish bribery provisions in the Criminal Code do not contain the same well-established leniency principles as, for example, the UK Bribery Act or Danish competition law infringements, which provide for immunity or significant reductions.

13 Dispute resolution

Can enforcement matters be resolved through plea agreements, settlement agreements, prosecutorial discretion or similar means without a trial?

Enforcement matters involving the possibility of fines may be resolved through settlement agreements entered into with the Prosecution Service. An example hereof is a case involving a Danish company alleged to be involved in bribery in Africa, which was resolved through a settlement agreement entered into between the company and SØIK. The agreement imposed a combined criminal fine and confiscation of 2.5 million kroner and 20 million kroner respectively. It should be noted that such settlement agreements are not subject to court approval in Denmark.

14 Patterns in enforcement

Describe any recent shifts in the patterns of enforcement of the foreign bribery rules.

The Danish State Prosecution for Serious Economical and International Crime has over the years only brought very few bribery cases before the Danish courts and has faced harsh criticism for the lack of engagement in bribery cases. Following the October 2014 report from Transparency International on enforcement levels, which grouped the Danish authorities' enforcement efforts with the enforcement efforts from countries like Russia, Mexico and Colombia, SØIK has, however, publicly announced that a team dedicated to strengthen bribery enforcement has been appointed and that investigation and enforcement of bribery cases in the future will be carried out.

15 Prosecution of foreign companies

In what circumstances can foreign companies be prosecuted for foreign bribery?

Danish and foreign individuals or companies are treated equally under sections 122 and 299(2) of the Criminal Code in terms of acts of bribery carried out in Denmark. Consequently, both Danish and foreign individuals or companies that carry out actions of bribery in Denmark can be prosecuted in Denmark.

However, in terms of acts of bribery covered by sections 122, 144 and 299(2) of the Criminal Code that have been carried out outside Denmark there is a distinction between Danish and foreign natural or legal persons, as the Danish Prosecution Service only has jurisdiction towards foreign individuals or companies if the action in question is deemed to have effect in Denmark. Consequently, foreign individuals or companies can only be prosecuted for foreign bribery if the action is covered by section 8 of the Criminal Code, which grants the Danish prosecution service jurisdiction in cases of certain serious crimes and crimes against the security and interests of the Danish state. In general, bribery will consequently not be covered by section 8 of the Criminal Code.

To the contrary, the Danish prosecution has jurisdiction over all Danish natural or legal persons if the action in question is also prohibited in the country in which it has been carried out.

16 Sanctions

What are the sanctions for individuals and companies violating the foreign bribery rules?

Violations of sections 122, 144 and 299(2) of the Criminal Code can be sanctioned with criminal fines, imprisonment (only individuals) and forfeiture. Furthermore, violations may be sanctioned with exclusion from public procurement contracts. In this regard, Denmark has implemented the Directive on Procurement implementing restrictions on participation in public procurement tenders. With respect to imprisonment, the maximum penalty is six years for violations of section 122 (active bribery) and section 144 (passive bribery), whereas the maximum penalty for violations of section 299(2) is four years. A person found guilty of bribery could potentially be barred by the court from engaging in business similar to the context in which the bribery occurred for one to five years.

17 Recent decisions and investigations

Identify and summarise recent landmark decisions or investigations involving foreign bribery.

Legal proceedings involving bribery abroad are very rare in Denmark. The most recent case related to foreign bribery dates back to 2012.

A landmark decision in Denmark included a ruling from August 2012 from the Danish Supreme Court deciding on forfeiture of 10 million kroner from the Danish company Bukkehave, which between 2000 and 2002 had supplied trucks to the government in Iraq under the UN Food for Oil programme. The company had paid an 'after-service fee' in violation of the UN embargo rules. Charges for violations of section 122 of the Criminal Code were not raised as the 'service fee' was not paid to a specific individual but to the Iraqi government and other relevant charges were dropped as the statute of limitations of five years barred such charges. A key issue in the case related to the calculation of the proceeds to be confiscated and the case was appealed to the Danish Supreme Court. The Supreme Court ruled that only the profit and interest after deduction of expenses to the local agent were to be forfeited even though at least some of these expenses were incurred in order to facilitate the bribes.

Financial record keeping

18 Laws and regulations

What legal rules require accurate corporate books and records, effective internal company controls, periodic financial statements or external auditing?

The primary relevant laws and regulations are the Companies Act, the Bookkeeping Act and the Financial Statements Act.

Pursuant to the Bookkeeping Act, companies incorporated in Denmark and foreign corporations conducting business in Denmark must comply with the requirements for bookkeeping and record keeping set forth in the Act. In general, corporations must further keep their financial records and related documentation safely stored for a period of up to five years following the financial year to which the records and documentation relate.

The obligation to comply with the Bookkeeping Act is placed with the management of the company pursuant to the Companies Act. The Companies Act contains provisions requiring that the supreme management body of the company must ensure a proper organisation of the company's activities, including, inter alia, that the bookkeeping and financial reporting procedures of the company are satisfactory, having regard to the circumstances of the company, and that adequate risk management and internal control procedures have been established.

Finally, the Financial Statements Act sets forth rules regarding the obligation to prepare periodic financial statements and external audit requirements.

The criminal sanctions imposed for failures to comply with the Bookkeeping Act, the Companies Act and the Financial Statements Act range from fines for simple mistakes to imprisonment for wilful and serious violations, such as trying to hide criminal activities, including bribery.

19 Disclosure of violations or irregularities

To what extent must companies disclose violations of anti-bribery laws or associated accounting irregularities?

No Danish legislation requires Danish companies to report on instances of bribery and corruption as such. This is consistent with the generally applicable principle in Denmark that any person or entity cannot be required to self-incriminate.

The consequences of an instance of bribery or corruption may indirectly be subject to reporting under Danish GAAP or IFRS as the case may be. If material changes to a company's activities and financial situation have occurred the management is, pursuant to the Danish Financial Statements Act, required to explain these changes in a management report, which is an integrated part of the annual report. Hence, if an instance of bribery has a material impact on the company's activities or financial situation, there will be an obligation to report this in the annual report.

For listed companies the EU Market Abuse Regulation requires that the company disclose an occurrence of an anti-bribery law violation if the occurrence may have an impact on the price of the listed company's shares. Such disclosure obligation may include the fact that a bribery incident has occurred.

20 Prosecution under financial record keeping legislation

Are such laws used to prosecute domestic or foreign bribery?

No publicly available Danish case law exists where financial record keeping legislation has been used to prosecute bribery offences. Under Danish law, if one offence is included in another offence the court will only penalise for the one offence that includes the other offence.

From a theoretical perspective, the prosecutor could base a bribery case on financial record keeping legislation; however, the maximum penalty will be significantly less for violations of financial record-keeping legislation compared with the maximum penalty for a bribery offence.

The Danish rules on bribery are part of the Criminal Code, and a sentence for a bribery offence requires that the prosecutor can prove criminal intent. The financial record keeping legislation is not part of the Criminal Code and a sentence based on financial record keeping legislation can also be rendered in cases of negligence.

21 Sanctions for accounting violations

What are the sanctions for violations of the accounting rules associated with the payment of bribes?

The penalty applicable to companies and employees for negligent and fraudulent accounting under the Bookkeeping Act and the Financial Statements Act is a fine with no statutory limit. The same applies in case of negligent or fraudulent non-compliance with the provisions in the Companies Act. Such fines will normally be in the range from 10,000 kroner to 20,000 kroner, and in severe cases 50,000 kroner, though no statutory limit applies.

If the wrongful bookkeeping was made with fraudulent intent, the offence will be covered by the provisions on fraud in the Criminal Code and the maximum sentence will in this situation be 18 months' imprisonment. The maximum sentence is in severe cases raised to eight years' imprisonment.

22 Tax-deductibility of domestic or foreign bribes

Do your country's tax laws prohibit the deductibility of domestic or foreign bribes?

Since 1 January 2014, Danish companies cannot deduct any bribe payments for tax purposes. This applies both to domestic and foreign bribes, as well as to private bribes and bribery payments made to public officials, even if such payments are not deemed an illegal bribe abroad.

As mentioned in question 6, facilitating payments may in some situations be acceptable abroad under Danish law. Based on the recent changes to the tax legislation, some payments made abroad may be acceptable from a criminal law perspective but may not be tax-deductible.

It should be noted that even though corporate hospitality in the private sector, which is not unduly provided, in general is deemed outside the scope of the Danish anti-bribery provisions, companies are only allowed to deduct 25 per cent of such corporate hospitality costs. Restrictions also apply to VAT refunds related to such costs.

Domestic bribery

23 Legal framework

Describe the individual elements of the law prohibiting bribery of a domestic public official.

The legal framework prohibiting bribery of a Danish public official is set forth in sections 122 and 144 of the Criminal Code.

Section 122 in the Criminal Code prohibits any individual and legal persons from unduly granting, promising or offering a person exercising a public office or function a gift or other privilege in order to induce him or her to do or fail to do anything related to his or her official duties (ie, 'public active bribery').

People employed in publicly owned companies are in the terminology of section 122 public officials to the extent that they carry out public functions.

Section 122 is not limited to situations where the bribe is paid to induce the public official to act contrary to his or her official duties. The only requirement is that the briber unduly grants, promises or offers the public official a gift or other privilege. 'Unduly' is a dynamic term. For public officials in a position to make any decisions, even very small gifts may be deemed 'unduly'.

Section 144 in the Criminal Code prohibits any natural person from unduly receiving, demanding or accepting the promise of a gift or other privilege, while exercising a public office or function (ie, 'public passive bribery').

'Public official' in the terminology of section 144 mirrors the definition of public official in section 122. Both provisions follow the definition of public officials in the OECD Anti-Bribery Convention.

Receiving a gift or other privilege may be within the scope of section 144 even if the gift or other privilege is not provided in order to induce the public official to do or fail to do anything related to his or her official duties. Also, the public official's receiving of subsequent acknowledgements may be within the scope of section 144.

24 Prohibitions

Does the law prohibit both the paying and receiving of a bribe?

Section 122 of the Criminal Code prohibits paying a bribe to a public official, and section 144 prohibits public officials from accepting or receiving a bribe. Prior to 1 July 2013, the maximum penalty for passive bribery was six years imprisonment, whereas the maximum sentence for active bribery was three years' imprisonment. As of 1 July 2013, the maximum sentence for active bribery was aligned with the maximum sentence for passive bribery, and both are now six years' imprisonment. With respect to bribery between private individuals, see question 29.

25 Public officials

How does your law define a public official and does that definition include employees of state-owned or state-controlled companies?

See question 4. The definition of public officials is the same for foreign and domestic public officials and in general, the definition follows the definition of public officials in the OECD Anti-Bribery Convention.

Employees of state-owned or state-controlled companies are included in the definition of public officials to the extent they exercise a public function.

26 Public official participation in commercial activities

Can a public official participate in commercial activities while serving as a public official?

No general prohibition on public officials participating in commercial activities exists in Denmark. However, for certain groups of public officials, certain restrictions apply.

A public official having status as a civil servant can only engage in other activities provided that his or her official tasks can still be conducted in a diligent way and provided that it does not adversely affect the esteem and trust associated with the public function.

Judges can only have other ongoing engagements besides their public office in case of statutory requirements for judges taking on the specific engagements or if approved by a special committee. Further, judges may act as arbitrators.

Certain high-ranking senior officials cannot accept positions as board members without prior approval from the relevant minister and are required to notify the minister in advance before taking on other engagements.

In general, public officials cannot carry out their function in specific situations if a conflict of interest occurs and must notify their superior on any potential conflict of interest.

27 Travel and entertainment

Describe any restrictions on providing domestic officials with gifts, travel expenses, meals or entertainment. Do the restrictions apply to both the providing and receiving of such benefits?

Danish public officials are prohibited from receiving gifts, travel expenses, meals or entertainment if this constitutes bribery, see question 22.

In addition, in 2007 and 2010 the Agency for the Modernisation of Public Administration issued an internal memo describing when public officials are allowed to receive such goods. The memo in general calls for public officials to reject receiving any gifts, travel expenses, meals or entertainment if this is provided in connection with the public function. However, proportionate gifts in connection with an anniversary, birthday or similar can be accepted. Also, small gifts in connection with Christmas or similar can be accepted from entities or persons, with whom the public official is cooperating. Finally, customary gifts in connection with visits to or from foreign countries or foreign public entities can be accepted.

The memo from the Agency for the Modernisation of Public Administration provides examples of gifts that should be returned:

- an IT supplier sends tickets for a concert to a public official following a contract negotiation;
- an amusement park provides free admission to the park for public officials;
- a private supplier of corporate events offers free admission to an event for a public official; and
- a telecom provider, which delivers home internet access for public officials, offers discounts to public officials on additional services.

The memo also provides examples of gifts that can be accepted:

- an annual dinner offered by an industry organisation, provided that it is relevant for the relationship and future corporation and has a limited value; and
- three bottles of wine following a speech given by a public official.

The provisions in sections 122 and 144 of the Criminal Code apply to both the providing and receiving of benefits. However, the restrictions set forth in the memo referred to above apply only to receiving such benefits and the consequence of breaching these and not section 144 will be limited to the consequences for the public official as employee. However, over time the memo may have an impact on the dynamic term 'unduly' in sections 122 and 144 in the Criminal Code.

28 Gifts and gratuities

Are certain types of gifts and gratuities permissible under your domestic bribery laws and, if so, what types?

There are no specific guidelines or permitted items contained in Danish legislation and no de minimis provisions apply. A recent case established bribery in a situation where a businessman had offered a tax official's three bottles of wine, a cheap Chinese vase and offered to buy the tax official's car at market value. Hence the bar for such gifts or gratuities is set very low.

29 Private commercial bribery

Does your country also prohibit private commercial bribery?

Section 299(2) of the Criminal Code prohibits private commercial bribery. Private commercial bribery in the Danish context is often referred to as return commission or kickbacks. The provision includes situations where a person who is trusted with handling matters of financial nature for another person, typically on behalf of an employer, unduly accepts, demands or accepts the promise of a pecuniary advantage.

Section 299(2) also prohibits giving and offering such pecuniary advantage.

The provision is not limited to situations where the employer can prove or has suffered any loss. Further, it is not a condition that the pecuniary advantage is given to an employee and a pecuniary advantage can be deemed a bribe even if the pecuniary advantage is not concealed from the employer. Finally, a sentence for private commercial bribery requires that the prosecutor can prove criminal intent with respect to the unauthorised act in question.

The provision includes both domestic and foreign bribes.

30 Penalties and enforcement

What are the sanctions for individuals and companies violating the domestic bribery rules?

The maximum sentence for public officials receiving and for natural persons giving a bribe to public officials is six years' imprisonment or alternatively a fine with no statutory limit.

The maximum sentence for giving and receiving private commercial bribery is four years' imprisonment or alternatively a fine with no statutory limit.

The most recent case law suggests a trend towards sentencing individuals with imprisonment or conditional imprisonment, the latter meaning that the individual in question is found guilty but is exempted from serving the sentence subject to certain conditions being fulfilled, for example, no criminal offences in a certain period and frequently also fulfilment of community service.

For companies the maximum sentence for both public official and private commercial bribery is a fine with no statutory limit.

The Public Prosecutor has rendered a memo to Danish prosecutors describing when to prosecute individuals, when to prosecute companies and when to prosecute both. As a general rule, if non-senior

employees have engaged in bribing in the interest of the company, the public prosecutor will not file charges against such non-senior employees, but will concentrate its efforts on prosecuting the company. If a senior employee has engaged in bribery, whether directly or indirectly, the prosecutor may file charges against both the company and the senior employee.

Even though the maximum sentence for active and passive bribery is six years' imprisonment, Danish case law shows that penalties are significantly less. In 2013 a private individual was sentenced to a 15,000 kroner fine for bribing a tax official. The most recent case law suggests a trend towards sentencing individuals with conditional imprisonment or imprisonment; see also the case law described under question 32.

31 Facilitating payments

Have the domestic bribery laws been enforced with respect to facilitating or 'grease' payments?

Facilitating payments are as a general rule prohibited under Danish law, provided that such payments are unduly provided in the country in which it is paid. Danish authorities have so far not prosecuted Danish companies for providing facilitating payments.

32 Recent decisions and investigations

Identify and summarise recent landmark decisions and investigations involving domestic bribery laws, including any investigations or decisions involving foreign companies.

In recent linked cases, employees of the Danish publishing company Aller and the publishing company itself were charged with allegations of systematically bribing, or complicity in bribing, an individual who had or gained access to credit card information of Danish celebrities including the royal family, politicians, etc. Further, the individuals and the publishing company were charged with allegations of wrongfully gaining access to data of another person intended for use in an information system and with allegations of gaining such access with intent to obtain or become acquainted with the business secrets of an enterprise (or complicity therein). The informant was charged with the same allegations.

Two of the employees and the publishing company declared themselves guilty to said allegations and were sentenced to six months' conditional imprisonment and with a fine of 10 million kroner, respectively.

Of the remaining employees, one employee was found not guilty of all charges, whereas the other employees were given sentences ranging from four months' conditional imprisonment (see question 30 for further information on conditional imprisonment under Danish law). None of the remaining employees were, however, found guilty of the bribery charges.

The informant was not found guilty with respect to the bribery charges, but was found guilty of wrongfully gaining access to data of another person intended for use in an information system and, therefore, sentenced to imprisonment of one and a half years. Further, his proceeds of approximately 365,000 kroner were forfeited.

During the case, the Supreme Court decided that the prosecutor, even in a situation where the journalistic interest to protect sources may apply, could conduct a broad search in the files, documents and emails of a company under investigation for bribery.

In another set of linked cases stemming from a high-profile investigation initiated in 2015 against a major supplier to Danish businesses and public authorities of IT hardware, 31 public officials have been charged with allegations of having accepted bribes primarily in the form of electronic equipment such as computers and telephones as gifts, 'test-products' or through large price reductions in connection with

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the conclusion of IT-supply agreements with several public authorities. Further, one particular public employee has been charged with bribery for having accepted a Formula 1 trip to Dubai representing a value of more than 400,000 kroner. So far, the Danish Prosecution Service has brought 12 cases to court while nine other cases have been dropped. Recently the cases against four of the employees were decided against the public employees, who were found guilty of accepting bribes in the form of smartphones, iPads and other electronic equipment. The employees were sentenced to four months' imprisonment, 60 days' imprisonment, 20 days conditional imprisonment and community service (two individuals), respectively. At the time of writing it is unknown whether the cases will be appealed. The Danish authorities appear still not to be active in relation to investigations and enforcement against Danish companies using bribery abroad.

As for case law involving foreign bribery, see question 17.

France

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1 International anti-corruption conventions

To which international anti-corruption conventions is your country a signatory?

France is signatory to the following European and international anti-corruption conventions:

European Union
- the Convention on the Fight against Corruption Involving Officials of the European Union or Officials of Member States of the European Union, Brussels, 26 May 1997 (Convention on European Officials).

Council of Europe
- the Criminal Law Convention on Corruption, signed by France on 9 January 1999 (accompanied by an agreement establishing the Group of States against Corruption (GRECO)) and ratified on 25 April 2008; and
- the Civil Law Convention on Corruption signed by France on 26 November 1999 and ratified on 25 April 2008. No reservations were taken by France.

International
- the OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions, Paris, 17 December 1997, ratified by France on 31 July 2000 (OECD Anti-Bribery Convention); and
- the United Nations Convention against Corruption, New York, 31 October 2003, ratified by France on 11 July 2005.

2 Foreign and domestic bribery laws

Identify and describe your national laws and regulations prohibiting bribery of foreign public officials (foreign bribery laws) and domestic public officials (domestic bribery laws).

Foreign bribery laws
Following the OECD Anti-Bribery Convention, domestic bribery laws were completed with the implementation of international and European conventions regarding international corruption. Notably, the OECD Anti-Bribery Convention and the Convention on European Officials were incorporated into French law by Criminal Act No. 2000-595 of 30 June 2000, which modified the French Penal Code and the French Code of Criminal Procedure.

In order to implement provisions of four additional international agreements relating to corruption, a new legislative reform was then introduced by Act No. 2007-1,598 of 13 November 2007 on the fight against corruption. With this new law, French legislation tends towards assimilation between incrimination of domestic bribery and corruption of foreign public officials. However, international observers, such as the Council of Europe's Group of States against Corruption (GRECO) and the monitoring group of the OECD, underlined remaining shortcomings of French law.

Finally, Law No. 2013-1,117 of 6 December 2013 relating to the fight against tax fraud and economic and financial crime introduced major progress towards better efficiency of the French legal system in the fight against transnational corruption.

Domestic bribery laws
Domestic bribery laws apply to all domestic public officials, including members of the judiciary, the legislature and executives.

Domestic bribery laws criminalise both the active and passive corruption of public officials. The mere soliciting or offering of a bribe is construed as an act of corruption regardless of whether the bribe has actually been paid. Such an act may be punished as though the bribe had been fully paid (see articles 432-11 and 433-1 of the French Penal Code).

Foreign bribery

3 Legal framework

Describe the elements of the law prohibiting bribery of a foreign public official.

Active corruption
With respect to article 435-3 of the French Penal Code, it is a criminal offence to proffer, at any time, directly or indirectly, any offer, promise, donation, gift, or reward to a person holding public office or discharging a public service function, or an electoral mandate in a foreign state, or within a public international organisation with a view to requesting this person to perform or fail to perform, or because he or she has done or abstained from doing any part of his function, mission or mandate, or facilitated by his function, mission or mandate.

Yielding to a request by a foreign public officer as defined above is also a criminal offence.

Passive corruption
With respect to article 435-1 of the French Penal Code it is a criminal offence for a person holding public office or discharging a public service function, or an electoral mandate in a foreign state, or within a public international organisation to request without justification or to accept at any time, directly or indirectly, any offer, promise, donation, gift or reward to perform or fail to perform, or because he or she has done or abstained from doing any part of his or her function, mission or mandate, or facilitated by his function, mission or mandate.

Similar provisions contained in articles 435-7 and 435-9 of the French Penal Code apply to members broadly defined as the judiciary of a foreign state or members of an international court or an arbitration court.

Trafficking in influence laws
With respect to article 435-2 of the French Penal Code, it is a criminal offence to request or to accept at any time, directly or indirectly, any offer, promise, donation, gift or reward to abuse or have abused one's real or supposed influence with a view to obtaining distinctions, employment, contracts or any other favourable decision from a person holding public office or discharging a public service function, or an electoral mandate in a foreign state or in a public international organisation.

With respect to article 435-4 of the French Penal Code, it is a criminal offence to proffer at any time, directly or indirectly any offer, promise, donation, gift or reward to a person to abuse or have abused his or her real or supposed influence, with a view to obtaining from this person distinctions, employment, contracts or any other favourable decision from a person holding public office or discharging a public service

function, or an electoral mandate in a foreign state or in a public international organisation. Yielding to a request is also a criminal offence.

Similar provisions contained in articles 435-8 and 435-10 of the French Penal Code apply to trafficking influence targeted at members of an international court.

4 Definition of a foreign public official

How does your law define a foreign public official?

Applicable articles concerning foreign public officials refer to the French notion of a domestic 'public official', namely 'a person holding public office or discharging a public service function, or an electoral mandate'.

A person holding public office
This includes state representatives and civil servants such as police and military officers, tax administrators and teachers. They have the power to make decisions and constrain individuals and things owing to their position of public authority.

A person discharging a public office function
This includes those working in funeral homes, universities, chambers of commerce, Métro employees and journalists on public television channels. These people do not derive their power directly from their position as officers of public authority, but from the fact that their function is to act for the general public interest in the application of their legal status. Both employees of state-owned or controlled (or both), as well as private, companies can be considered public agents so long as they discharge a public service function.

A person holding an electoral mandate
This includes members of parliament and mayors – those elected for traditional mandates. This definition extends to elected public administrators of entities such as chambers of commerce.

As explained above, similar provisions apply to members of the judiciary.

5 Travel and entertainment restrictions

To what extent do your anti-bribery laws restrict providing foreign officials with gifts, travel expenses, meals or entertainment?

There are no specific provisions restricting the giving of gifts, travel expenses, meals or entertainment to foreign officials; however, the general provisions concerning such advantages fall within the scope of bribery. The weakness of enforcement in France makes it difficult for companies to really grasp what is acceptable when it comes to gifts and business courtesies. There are few guidelines in case law and neither public administrations (with the exception of the Ministry of Defence) nor enforcement authorities provide guidance to companies on these issues. Thus, companies often rely on foreign examples to draft their policies. Such policies become accepted rules in the business community in the hope that enforcement authorities will consider them relevant.

With regard to case law, the courts construe all gifts, presents or advantages of any kind as acts of bribery depending on the actual intention that lies beneath their proffering, rather than on their actual value.

What matters to the courts is whether the advantage has been offered as consideration (quid pro quo) for obtaining an advantage

6 Facilitating payments

Do the laws and regulations permit facilitating or 'grease' payments?

Facilitating or 'grease' payments are not allowed. These fall within the scope of the bribery provisions.

7 Payments through intermediaries or third parties

In what circumstances do the laws prohibit payments through intermediaries or third parties to foreign public officials?

Bribes are prohibited whether the payments are carried out directly or indirectly, that is, through intermediaries or third parties. Therefore, in the case of payments through intermediaries, the courts must determine whether the accused had knowledge that the third party was going to divert payments to pay bribes.

8 Individual and corporate liability

Can both individuals and companies be held liable for bribery of a foreign official?

Both individuals and companies may be held liable for bribery of a foreign official.

9 Successor liability

Can a successor entity be held liable for bribery of foreign officials by the target entity that occurred prior to the merger or acquisition?

According to article 121-1 of the Criminal Code, one can only be held liable for one's own acts. Under this principle of personal responsibility, in the context of a merger, the acquiring company does not have to answer for the offences committed by the company acquired (Cass Crim, 20 June 2000, No. 99-86,742). The merger, therefore, excludes criminal proceedings not only in respect of the acquired company (since it does not exist anymore) but also in respect of the acquiring company. Still, this position might have to be revised in the light of a 2015 CJEU decision (C-343/13), which says that the acquiring company can be fined for the acts committed by the merged company. Still, in a recent decision (Cass Crim, 25 October 2016, No. 16-80366), the Court of Cassation did not accept the CJEU position, considering that the successor entity cannot be held liable for the acts committed by the target entity before the merger.

10 Civil and criminal enforcement

Is there civil and criminal enforcement of your country's foreign bribery laws?

In practice, bribery laws are mainly enforced in France through criminal procedures. Private parties may solicit damages in the course of criminal procedures as civil parties.

Act No. 2013-1,117 of 6 December 2013 relating to the fight against tax fraud and economic and financial crime instituted a new financial prosecutor, based in Paris, in charge of large and complex corruption cases.

11 Agency enforcement

What government agencies enforce the foreign bribery laws and regulations?

In practice, bribery laws are enforced in France through criminal procedures. There was no specific government agency in France responsible for the enforcement of bribery laws. Rather, enforcement is conducted by the public prosecutor, who might be informed about corruption-linked irregularities by some agencies as TRACFIN, the French financial intelligence unit responsible for collecting information about suspicious financial operations and by auditors of companies. Note that an Anti-corruption Agency, has been instituted Act No. 2016-1691 of 9 December 2016 (also known as loi Sapin II). This new authority will be in a position to impose administrative fines if it considers a company has not a proper anti-corruption compliance programme.

12 Leniency

Is there a mechanism for companies to disclose violations in exchange for lesser penalties?

Law No. 2013-1,117 of 6 December 2013 relating to the fight against tax fraud and economic and financial crime introduced article 435-6-1 into the Penal Code, which provides for a reduction by half of the prison sentence incurred by the perpetrator or accomplice for the offences of passive and active bribery and trading in influence of foreign public officials, when the perpetrator or accomplice helped to end the infringement or identify the other perpetrators or accomplices. A similar mechanism exists concerning domestic bribery. In practice, these provisions are not used because of the lack of any sentencing guidelines.

Loi Sapin II introduces a deferred prosecution agreement (DPA) mechanism. The financial prosecutor will have to say how he or she intends to use this new tool and whether self-reporting will give right to leniency. More is stated about Loi Sapin II below.

13 Dispute resolution

Can enforcement matters be resolved through plea agreements, settlement agreements, prosecutorial discretion or similar means without a trial?

Up to Loi Sapin II, the only plea mechanism available under French law was *comparution sur reconnaissance préalable de culpabilité*. If and only if a person or a company pleads guilty, can the prosecutor choose to suggest a sentence without going to trial. If the person or the company accepts the sentence, the prosecutor submits the procedure to an individual judge for approval of the sentence.

In practice, it has not been used in major cases (it has only been used once in a major case having to do with the laundering of tax fraud proceeds) in spite of several attempts in that direction. The fact that one has to plead guilty before a plea can be entered into has rendered this mechanism difficult to use in large cases.

This is why Act No. 2016-1691 of 9 December 2016 (Loi Sapin II), introduced a DPA called *convention judiciaire d'intérêt public*. This French DPA does not require the entity to plead guilty; it is merely an agreement between a legal person and the prosecutor. The negotiation will turn around the payment of a fine, which might be up to 30 per cent of the average annual turnover of the company over the last three years, and around a possible compliance monitorship by the new Anti-corruption Agency.

14 Patterns in enforcement

Describe any recent shifts in the patterns of enforcement of the foreign bribery rules.

French criminal enforcement can efficiently deal with regular crime, but it lacks the tools to deal with more complex white-collar crimes, including corruption. The lack of plea bargaining and immunity mechanisms prohibits both prosecutors and investigating judges from obtaining disclosures. In addition to these problems, proceedings are extremely lengthy. Because of the time lapse between criminal acts and judgment, sanctions are often lenient because harsh sentencing is considered irrelevant by the time of judgment.

A number of investigations concerning bribery of foreign officials have been pending for many years, and yet almost none have led to a conviction.

France has been criticised by the OECD peer-monitoring process for this inefficiency by its enforcement authorities (the Phase 3 report was issued in October 2012). France has also been criticised for its blocking statute, which limits any form of voluntary disclosure and internal investigation for the purpose of proceedings outside France.

Loi Sapin II is clearly an attempt to respond to these criticisms. The obligation for companies to put in place compliance programmes and the introduction of a French DPA might prove efficient. The new Anti-corruption Agency and the financial prosecutor now have the tools to enforce the foreign bribery rules.

15 Prosecution of foreign companies

In what circumstances can foreign companies be prosecuted for foreign bribery?

Articles 113-2, and 113-5 to 113-8 of the French Penal Code provide that:

(i) French criminal law is applicable to all offences committed within the territory of the French Republic. An offence is deemed to have been committed within the territory of the French Republic where one of its constituent elements was committed within that territory (article 113-2);

(ii) French criminal law is applicable to any person who, within the territory of the French Republic, is guilty as an accomplice to a felony or misdemeanour committed abroad if the felony or misdemeanour is punishable both by French law and the foreign law, and if it was established by a final decision of the foreign court (article 113-5);

(iii) French criminal law is applicable to any felony committed by a French national outside the territory of the French Republic. It is applicable to misdemeanours committed by French nationals outside the territory of the French Republic if the conduct is punishable under the legislation of the country in which it was committed. The present article applies even if the offender has acquired French nationality after the commission of the offence of which he or she is accused (article 113-6);

(iv) French criminal law is applicable to any felony, as well as to any misdemeanour punished by imprisonment, committed by a French or foreign national outside the territory of the French Republic, where the victim is a French national at the time the offence took place (article 113-7);

(v) in the cases set out in (iii) and (iv), the prosecution of offences may only be instigated at the behest of the public prosecutor. It must be preceded by a complaint made by the victim, his or her successor, or by an official accusation made by the authority of the country where the offence was committed (article 113-8); and

(vi) French criminal law is applicable to any felony or misdemeanour committed by means of an electronic communication network when it damages a natural person living, or/ a legal person registered, in France (article 113-2-1).

Moreover, as provided by article 689-8 of the French Code of Criminal Procedure, a person accused of bribing a European public official or a European public official accused of being bribed outside the territory of France and who happens to be in France may be prosecuted and tried by French courts.

Finally, Loi Sapin II extends the extraterritorial reach of French foreign bribery laws. The condition set out at (ii) above is not applicable when it comes to foreign bribery nor the condition mentioned at (v) above concerning a precedent complaint by the victim or by the foreign authority. French foreign bribery laws will also apply to any person carrying out all or part of his, her or its activity in France.

16 Sanctions

What are the sanctions for individuals and companies violating the foreign bribery rules?

Individuals

Sanctions imposed on individuals violating foreign bribery laws and regulations are the same as those imposed for violating domestic bribery laws, namely up to a maximum term of 10 years' imprisonment and fines up to €1 million or up to the double of the proceeds. The trafficking of influence offence is only punishable by imprisonment of up to five years and a fine of €500,000 in the international arena.

Additional penalties may be added, including the forfeiture of civil and family rights, the prohibition on holding public office for a maximum of five years, or undertaking the professional or social activity in the course of which the offence was committed, public dissemination of the decision, or confiscation of the sums or objects unlawfully proffered or the sum representing the benefit of the corruption.

A foreigner found guilty of one of these offences is also subject to these penalties. In addition, he or she may be banished from French territory for a period of up to 10 years or permanently.

Companies

Criminal liability for companies is a general principle under French criminal law. Companies that violate bribery laws and regulations are liable to a fine of up to €5 million or up to the double of the proceeds.

Additional penalties may be imposed such as being prohibited from undertaking, either directly or indirectly, the professional or social activity in which or on the occasion of which the offence was committed, being placed under judicial supervision, closure of the establishment or one of the establishments of the company used to commit the offence, being disqualified from public tenders, being forbidden from drawing cheques, or certified cheques, or being prohibited from using payment cards. The sums or objects unlawfully proffered or given or the sum representing the benefit of the corruption may be confiscated. The judgment may also be published.

Additional penalties

Apart from sanctions set out in the French Penal Code, there are additional automatic sanctions which can be applied without a judicial order. These include the prohibition on undertaking certain professional activities and ineligibility or disqualification from public tenders under other French statutes. Noteworthy among these is the French Public Procurement Contracts Code. Article 43 implements the provisions of article 45 of the Public Procurement Directive (2004/18/EC) by imposing an automatic and invariable sanction and disqualification from public tenders for legal persons convicted of corruption. However, the automatic nature of these sanctions that cannot be moderated by a judge means that they may be deemed contrary to article 8 of the Declaration of Human and Civic Rights, 26 August 1789, and thus unconstitutional. However, the Court of Cassation held, in a decision dated 6 April 2011, that this provision was constitutional. But other judicial bodies, including France's Constitutional Court, may decide otherwise in the future.

17 Recent decisions and investigations

Identify and summarise recent landmark decisions or investigations involving foreign bribery.

The Oil-for-Food I and II cases

In 2013, Total and some of its directors, as well as politicians and diplomats, were found not guilty of bribery connected to the Oil-for-Food programme, but the prosecutor appealed this first-instance decision.

In the appeal procedure, in October 2015, a fine of €750,000 was required by the prosecutor against Total. This amount corresponds to the maximum penalty at the time of the facts. In addition to Total, 13 other defendants also appeared before the Court of Appeal of Paris. The prosecutor requested a symbolic condemnation against the Swiss oil company Vitol, already convicted in the United States to pay US$17.5 million. On 26 February 2016, Total and other defendants including Vitol were found guilty, and Total was given a €750,000 fine. Total further appealed to the French Supreme Court. This case raises extremely interesting double jeopardy/ne bis in idem issues.

The Oil-for-Food II trial, where 14 companies, including Renault Trucks, Schneider Electric and Legrand were prosecuted for amounts paid to embargoed Saddam Hussein in exchange for contracts, was completed in June 2015 by a general discharge. The prosecutor appealed this decision.

The 'biens mal acquis' cases

In a decision dated 9 November 2010, the Court of Cassation ruled in favour of the admissibility of the non-governmental organisation Transparency International France to trigger, as a civil party, a criminal investigation concerning the 'ill-gotten gains' of the family members of presidents Ali Bongo Ondimba of Gabon, Denis Sassou-Nguesso of Congo-Brazzaville and Teodoro Obiang Nguema of Equatorial Guinea.

A judicial inquiry is pending and the judge will determine the conditions under which the assets in question were acquired, as well as how the numerous bank accounts identified by the police were accumulated. The case concerning Equatorial Guinea is now at trial.

Ongoing investigations for foreign bribery

In November 2015, the financial prosecutor opened an investigation for bribery of foreign public officials against the mayor of the city of Levallois-Perret, Patrick Balkany, following a complaint by the Central African Republic that accused him of having been an intermediary to resolve the dispute between the French company Areva and the previous Central African government about the takeover of the mining company Uramin, which would have resulted in the payment of more than €30 million in commissions.

Financial record keeping

18 Laws and regulations

What legal rules require accurate corporate books and records, effective internal company controls, periodic financial statements or external auditing?

It is punishable for chairmen, directors or managing directors of a company to publish or to present to shareholders annual accounts not providing, for each financial year, a fair representation of the results of the operations for the financial year, financial situation and assets on the expiration of this period, to hide the company's true situation (mostly article L242-6(2) of the French Commercial Code).

Most companies are required to file, with the court registry, the annual accounts, the annual report and the auditors' report on the annual accounts and, if applicable, the consolidated financial statements, the group annual report, the auditors' report on the consolidated financial statements and the report of the supervisory board.

Listed companies must give financial information on a quarterly basis.

Since an act dated 26 July 2005, the chairman of the supervisory board of listed companies must describe the preparation and organisation of the board's work and the internal auditing procedures put in place by the company in a specific report (article L225-68(7) of the French Commercial Code).

Most companies of a certain importance must have at least two external auditors (article L823-2 of the French Commercial Code).

Update and trends

Loi Sapin II, together with the institution of a financial prosecutor in 2013, is undoubtedly changing the enforcement landscape in France when it comes to bribery. The financial prosecutor now has tools that were lacking before to enforce bribery laws in a similar manner to one of his or her most efficient counterparts abroad. 2017 will be interesting, seeing how efficiently these new tools are going to be used.

19 Disclosure of violations or irregularities

To what extent must companies disclose violations of anti-bribery laws or associated accounting irregularities?

Companies have no obligation to disclose violations of anti-bribery laws or associated accounting irregularities to the prosecutor.

External auditors, have a duty to disclose to the prosecutor any crime they become aware of in the course of their audit.

20 Prosecution under financial record keeping legislation

Are such laws used to prosecute domestic or foreign bribery?

In practice, such laws are not used to prosecute bribery, although they could. In practice, apart from bribery laws, the laws prohibiting the misuse of corporate assets are mostly used to prosecute bribery.

21 Sanctions for accounting violations

What are the sanctions for violations of the accounting rules associated with the payment of bribes?

A five-year term of imprisonment and a fine of €375,000 are the penalties imposed for the unfair representation of a company's accounts.

22 Tax-deductibility of domestic or foreign bribes

Do your country's tax laws prohibit the deductibility of domestic or foreign bribes?

France's tax laws prohibit the deductibility of domestic or foreign bribes.

Domestic bribery

23 Legal framework

Describe the individual elements of the law prohibiting bribery of a domestic public official.

The same rules for international corruption apply to domestic corruption, the only difference being that they must involve a person holding public authority or discharging a public service function, or a person holding a public electoral mandate in France.

The same rules for international trafficking pertain to domestic trafficking, the difference being that domestic trafficking is carried out with a view to obtaining distinction, employment contracts or any other favourable decision from a French public authority or administration.

24 Prohibitions

Does the law prohibit both the paying and receiving of a bribe?

The law prohibits both the paying and the receiving of a bribe under the criminal offences known either as active or passive corruption. Soliciting or offering a bribe is also prohibited.

25 Public officials

How does your law define a public official and does that definition include employees of state-owned or state-controlled companies?

See question 4.

26 Public official participation in commercial activities

Can a public official participate in commercial activities while serving as a public official?

In principle, public officials cannot participate in commercial activities, but some exceptions exist.

27 Travel and entertainment

Describe any restrictions on providing domestic officials with gifts, travel expenses, meals or entertainment. Do the restrictions apply to both the providing and receiving of such benefits?

See question 5.

28 Gifts and gratuities

Are certain types of gifts and gratuities permissible under your domestic bribery laws and, if so, what types?

See question 5.

In June 2010, the Court of Cassation ruled that the firing of an employee for accepting a €28 seat at a football match from a subcontractor was too harsh. Mr X had been hired as programme director for an agency that managed low-income housing in 1993 and was fired in 2003 for misconduct when he accepted tickets to a football match from a subcontractor for the agency he worked with. This decision was reversed by the courts on the basis that it was not founded on real and serious grounds, despite the fact the agency had set out explicit rules forbidding the acceptance of gifts of any type from companies performing work on its behalf. The Court of Cassation found that both the low value of the ticket and the fact that it is almost obligatory as part of state involvement in local life to take part in such activities made the firing of Mr X unreasonable. It is important to note that this decision was rendered by the employment division of the Court of Cassation, which is generally in favour of employees. The criminal section of the Court of Cassation might have a different approach.

29 Private commercial bribery

Does your country also prohibit private commercial bribery?

Articles 445-1 and 445-2 of the French Penal Code prohibit both passive and active private commercial bribery. The conditions are the same as those that apply to the domestic bribery of a public official.

Bribery of a private person may be sanctioned by a term of five years' imprisonment and a fine of €500,000 or up to the double of the proceeds. Articles 445-3 and 445-4 of the French Penal Code also provide for the imposition of other penalties.

30 Penalties and enforcement

What are the sanctions for individuals and companies violating the domestic bribery rules?

Individuals violating the domestic bribery laws and regulations may receive a maximum of 10 years' imprisonment and a maximum fine of €1 million or up to the double of the proceeds. The same additional penalties as described in question 16 may also be imposed. Companies may incur a fine of up to €5 million or up to the double of the proceeds and additional penalties as described in question 16.

31 Facilitating payments

Have the domestic bribery laws been enforced with respect to facilitating or 'grease' payments?

The French courts construe facilitating payments as bribery.

Similarly, the Court of Cassation ruled that there is passive trading in influence and not a mere advisory business strategy for an individual, in exchange of a remuneration, to put at the disposal of a company, in this particular case the French company Thales, its network and address book within government departments in order for the company to secure a public weapons contract with the help of various interventions before civil and military authorities (Crim 4 May 2011, No. 10-85.38).

32 Recent decisions and investigations

Identify and summarise recent landmark decisions and investigations involving domestic bribery laws, including any investigations or decisions involving foreign companies.

The investigation of arbitration proceedings which awarded large amounts of public money to businessman and politician Bernard Tapie. Apart from Bernard Tapie, Christine Lagarde, former minister of finance and present managing director of the IMF, is being investigated together with some arbitrators. Christine Lagarde was found guilty of negligence by the Justice Court of the Republic on 19 December 2016, but was exempted of any sentence.

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1 International anti-corruption conventions

To which international anti-corruption conventions is your country a signatory?

Germany is a signatory to the Convention on the protection of the European Communities' financial interests (signed 27 September 1996; ratified 10 September 1998), the OECD Convention on Combating Bribery of Foreign Public Officials in International Business (signed 17 December 1997; ratified 10 September 1998), the Council of Europe's Civil Law Convention on Corruption (signed 27 January 1999), the Council of Europe's Criminal Law Convention on Corruption (signed 27 January 1999), amended by the Additional Protocol to the Criminal Law Convention on Corruption (signed 15 May 2003) and the United Nations Convention against Corruption (signed 9 December 2003; ratified 12 November 2014).

2 Foreign and domestic bribery laws

Identify and describe your national laws and regulations prohibiting bribery of foreign public officials (foreign bribery laws) and domestic public officials (domestic bribery laws).

In Germany, bribery of domestic public officials as well as European public officials is a criminal offence and prohibited by sections 331 to 334 of the German Criminal Code. In addition, section 335 provides aggravations for especially serious cases. Section 335a broadens the scope of these regulations with respect to specific foreign and international public officials.

Foreign bribery

3 Legal framework

Describe the elements of the law prohibiting bribery of a foreign public official.

The elements of the law are identical to those of the law prohibiting bribery of a domestic public official, which are described in question 23. The only difference is the perpetrator or the target depending whether a case of passive or active bribery is concerned.

4 Definition of a foreign public official

How does your law define a foreign public official?

The German Criminal Code does not provide a definition of a foreign public official in general. In respect of certain acts falling within the scope of sections 331 to 335, section 335a only equates specific public officials of foreign countries or public officials of international organisations with specific domestic public officials. For example, a member of a foreign or an international court is therewith equal to a German judge.

5 Travel and entertainment restrictions

To what extent do your anti-bribery laws restrict providing foreign officials with gifts, travel expenses, meals or entertainment?

Under German Criminal Law, the provision and acceptance of any kind of advantage (material or non-material) to public officials is forbidden. Therewith even gifts, meals or entertainment of low value or small travel expenses can fulfil the legal criteria. An exception is only made in cases where the advantage is socially accepted.

6 Facilitating payments

Do the laws and regulations permit facilitating or 'grease' payments?

In Germany, facilitating or grease payments are forbidden as the provision of any other kind of material or non-material advantage to public officials is.

7 Payments through intermediaries or third parties

In what circumstances do the laws prohibit payments through intermediaries or third parties to foreign public officials?

The only decisive factor is that an *Unrechtsvereinbarung* (inner connection between the advantage and the discharge of duty) exists. Therefore the actual parties have to see the connection between the payment and the discharge of duty as a mutuality relationship of a general kind. In this case, the law prohibits the payment, even if it is made by an intermediary or a third party.

8 Individual and corporate liability

Can both individuals and companies be held liable for bribery of a foreign official?

The regulations in sections 331 to 335a apply solely to individuals. Companies can be held civilly liable for a violation of these rules committed by their representatives, or if individuals with management functions intentionally or negligently omit necessary supervisory measures designed to prevent criminal activities, under the Administrative Offences Act (sections 30 and 130). Alternatively, anything that has been acquired by the company in connection with a violation of the rules in sections 331 to 335a by one of its employees can be confiscated in accordance with section 73(3) of the German Criminal Code.

9 Successor liability

Can a successor entity be held liable for bribery of foreign officials by the target entity that occurred prior to the merger or acquisition?

In the event of a universal succession or a partial universal succession by means of splitting (section 123(1) of the Reorganisation Act), the regulatory fine – in accordance with section 30 of the Administrative Offences Act – may be imposed on the legal successors (section 30(2a)). The same applies in general, when the former and the latter entity are identical from an economic point of view (*BGH*, 16 December 2014 – KRB 47/13).

10 Civil and criminal enforcement

Is there civil and criminal enforcement of your country's foreign bribery laws?

The German state does not have an opportunity of a civil enforcement comparable to countries like the United States or United Kingdom.

Update and trends

Prosecution has become more international. Foreign bribery has become a bigger issue in the past couple of years. Eurojust, Europol and the EPPO will be the most relevant authorities in anti-corruption laws – on the procedural side.

This year the offence itself has been broadened; not only is it forbidden to bribe or be bribed in order to get a better position within the competition of a free market. In the summer of 2017, any behavior will fall under the corruption offence that includes one employee taking a bribe, not to improve the bribers position in the market, but to neglect the bribee's duties towards his or her employer. So an event like 'I give you money and you let me onto the premises' will be deemed corruption from now on.

Instead the German foreign bribery laws are enforced by criminal law only.

11 Agency enforcement

What government agencies enforce the foreign bribery laws and regulations?

In Germany, the foreign bribery laws are enforced by the prosecutor's office (which directs the police).

12 Leniency

Is there a mechanism for companies to disclose violations in exchange for lesser penalties?

The German legal system does not recognise such specific mechanism for companies. However, the prosecution service as well as the deciding judge may take account of the disclosure of the violation or any other act of cooperation by the company in respect of section 17(3) of the Administrative Offences Act within the context of setting the fine.

13 Dispute resolution

Can enforcement matters be resolved through plea agreements, settlement agreements, prosecutorial discretion or similar means without a trial?

In contrast to countries like the United States, the German criminal law is characterised by the inquisitorial principle as well as the principle of legality. Therefore, the possibility of resolving enforcement matters without a trial is very limited. Only in cases involving a misdemeanour may the public prosecution office dispense with prosecution. This assumes in respect of section 153(1) of the German Code of Criminal Procedure that the perpetrator's guilt is considered to be of a minor nature and there is no public interest in the prosecution. In more severe cases, the degree of guilt must not present an obstacle. Under this condition, the prosecution office can dispense the preferment of public charges in respect of section 153a(1) of the German Code of Criminal Procedure, if conditions and instructions that have to be imposed concurrently upon the accused are able to eliminate the public interest in criminal prosecution.

14 Patterns in enforcement

Describe any recent shifts in the patterns of enforcement of the foreign bribery rules.

Prosecution has become more international. Foreign bribery has become a bigger issue in the past couple of years.

15 Prosecution of foreign companies

In what circumstances can foreign companies be prosecuted for foreign bribery?

Foreign companies can be prosecuted for foreign bribery in accordance with section 30 of the Act on Regulatory Offences if these four provisions are fulfilled:

- the German Criminal Law must be applicable by virtue of its sections 3 to 7;
- the foreign legal entity must be typologically comparable to the legal entities and associations of persons with legal capacity defined by German law;
- the misbehaviour must fulfil the requirements of either sections 333 or 334 in conjunction with section 335a; and
- the individual perpetrator must be responsible for the management of the company's operation or enterprise.

Furthermore, foreign companies can be held civilly liable in accordance with sections 30 and 130 of the Act on Regulatory Offences, if an individual with management functions intentionally or negligently omits to take the supervisory measures required to prevent contraventions, within the operation or undertaking, of duties incumbent on the owner, and, therefore, one of the company's employees was more likely to be able to violate the rules in section 333 and 334 of the German Criminal Code.

16 Sanctions

What are the sanctions for individuals and companies violating the foreign bribery rules?

Individuals can be fined or sentenced to up to 10 years' imprisonment. A company can be fined up to €10 million. Alternatively, anything that has been acquired by the company in connection with a violation of the rules in sections 331 to 335a can be confiscated. In addition to those measures, German authorities have to exclude companies found guilty of corruption in Germany and abroad from bidding on public tenders.

17 Recent decisions and investigations

Identify and summarise recent landmark decisions or investigations involving foreign bribery.

In recent years, one of the most important criminal cases concerning foreign bribery was the corruption affair at Siemens. According to the settlement between the German engineering company and the American and European authorities, Siemens routinely bribed government officials and other parties worldwide to win lucrative contracts from 2001 to 2007. In Germany alone, the company paid a fine of €395 million. In total, the affair cost Siemens round about €2.9 billion, including fines, additional tax payments and advisory costs.

Financial record keeping

18 Laws and regulations

What legal rules require accurate corporate books and records, effective internal company controls, periodic financial statements or external auditing?

The requirements for accurate corporate books and records, effective internal company controls, periodic financial statements or external auditing are regulated essentially in sections 238 to 330 of the German Commercial Code.

19 Disclosure of violations or irregularities

To what extent must companies disclose violations of anti-bribery laws or associated accounting irregularities?

In contrast to other countries, Germany does not have specific rules forcing companies to disclose violations of anti-bribery laws or associated accounting irregularities. Nevertheless, the disclosing of those misbehaviours can help to minimise a company's fine or the effects of an ongoing prosecution.

20 Prosecution under financial record keeping legislation

Are such laws used to prosecute domestic or foreign bribery?

Experience has shown that it is not uncommon in Germany, and that the criminal laws concerning record keeping are used to prosecute or to start a prosecution in cases in which the suspicion of a violation of anti-bribery rules is not sufficient.

21 Sanctions for accounting violations

What are the sanctions for violations of the accounting rules associated with the payment of bribes?

The penal and monetary fines for violations of the accounting rules in association with the payments of bribes are regulated essentially in sections 331 to 335c of the German Commercial Code. Individual perpetrators can be fined or sentenced to up to five years' imprisonment. Companies can be held civilly liable for a violation of these rules committed by their representatives, or if individuals with management functions intentionally or negligently omit necessary supervisory measures designed to prevent criminal activities, under the Administrative Offences Act (sections 30 and 130). Alternatively, anything that has been acquired by the company in connection with a violation of the rules in sections 331 to 335a by one of its employees can be confiscated in accordance with section 73(3) of the German Criminal Code.

22 Tax-deductibility of domestic or foreign bribes

Do your country's tax laws prohibit the deductibility of domestic or foreign bribes?

As of 1996, section 4(5) No. 10 of the German Income Tax Act forbids the deduction of bribery payments. After initially affecting only cases in which a person has been finally convicted of corruption, from 1999 it is sufficient that the payment is a punishable offence under German law. This means, for example, that culpability as well as the start of criminal proceedings or a verdict are not required any longer.

Domestic bribery

23 Legal framework

Describe the individual elements of the law prohibiting bribery of a domestic public official.

In sections 333 and 334, the German Criminal Code forbids granting and receiving of advantages as well as active and passive bribery. The main element of the law is the *Unrechtsvereinbarung* (inner connection between the advantage and the discharge of duty). In this respect it is sufficient that the parties see the connection between the advantage and the discharge of duty as a mutuality relationship of a general kind. The main difference between granting and receiving advantages on the one hand and active or passive bribery on the other hand consists in the fact that in cases of the latter the public official has to violate his or her duties.

24 Prohibitions

Does the law prohibit both the paying and receiving of a bribe?

The German Criminal Code penalises both the paying as well as the receiving of bribes. While the first is prohibited by sections 333 and 334, the latter is regulated in sections 331 and 332.

25 Public officials

How does your law define a public official and does that definition include employees of state-owned or state-controlled companies?

The German Criminal Code defines the term public official in section 11(1) No. 2. It encompasses civil servants and judges as well as anybody else who otherwise carries out public official functions or has otherwise been appointed to serve with a public authority or other agency or has been commissioned to perform public administrative services. The organisational form chosen to fulfil such duties does not matter. Therefore, employees of state-owned or state-controlled companies may be included, if those companies operate as an extension of the state.

26 Public official participation in commercial activities

Can a public official participate in commercial activities while serving as a public official?

It is generally possible that public officials can serve as public officials and participate in commercial activities at the same time. However, the prerequisite is that he or she is still performing a public function.

27 Travel and entertainment

Describe any restrictions on providing domestic officials with gifts, travel expenses, meals or entertainment. Do the restrictions apply to both the providing and receiving of such benefits?

The German Criminal Code forbids the provision and acceptance of any kind of advantage (material or non-material) to or by public officials. This includes the provision of gifts, travel expenses, meals or entertainment.

28 Gifts and gratuities

Are certain types of gifts and gratuities permissible under your domestic bribery laws and, if so, what types?

The German law does not make an exception for specific types of gifts or gratuities. An exemption will only be made in cases where the provision and acceptance of the advantage is socially accepted or falls within the scope of sections 331(3) or section 333(3).

29 Private commercial bribery

Does your country also prohibit private commercial bribery?

Sections 299 and 300 of the German Criminal Code prohibit the taking and giving of bribes in commercial practice.

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30 Penalties and enforcement

What are the sanctions for individuals and companies violating the domestic bribery rules?

For each act of bribery an individual faces a prison sentence up to three years or a fine. Especially serious cases may be penalised by imprisonment of up to five (private commercial bribery) or up to 10 years (bribery of a public official).

Companies can be held civilly liable for a violation of the anti-bribery rules committed by their representatives, or if individuals with management functions intentionally or negligently omit necessary supervisory measures designed to prevent criminal activities, under the Administrative Offences Act (sections 30 and 130). Fines can be up to €10 million for each offence. Alternatively, anything that has been acquired by the company in connection with a violation of the rules in sections 299 to 301 or 331 to 335a by one of its employees can be confiscated in accordance with section 73(3) of the German Criminal Code. In addition to these sanctions, German authorities exclude companies found guilty of corruption in Germany and abroad from bidding on public tenders.

31 Facilitating payments

Have the domestic bribery laws been enforced with respect to facilitating or 'grease' payments?

Yes, absolutely.

32 Recent decisions and investigations

Identify and summarise recent landmark decisions and investigations involving domestic bribery laws, including any investigations or decisions involving foreign companies.

Often these cases do not go to court but get laid off before an indictment. Exemplary for this is the *Bernie Ecclestone* case. He paid €150 million and was not prosecuted. The reason for this lies within the difficulties a prosecution will always have proving the necessary mens rea under German Law. There is always a risk for a prosecution to just be wrong. Anti-corruption laws are simple at first glance but very difficult in detail.

Greece

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1 International anti-corruption conventions

To which international anti-corruption conventions is your country a signatory?

Greece is a signatory to:

- the UN Convention against Corruption (Law No. 3666/2008);
- the Council of Europe Criminal Law Convention on Corruption and Additional Protocol (Law No. 3560/2007);
- the EU Convention on the Protection of the European Communities' Financial Interests (Law No. 2803/2000);
- the EU Convention against Corruption involving Officials of the European Communities or Officials of Member States of the European Union (Official Journal C195 of 25 June 1997) (Law No. 2802/2000); and
- the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Law No. 2656/1998).

2 Foreign and domestic bribery laws

Identify and describe your national laws and regulations prohibiting bribery of foreign public officials (foreign bribery laws) and domestic public officials (domestic bribery laws).

Foreign bribery

Provisions on bribery of foreign public officials first came into force in 1998, with the ratification of the OECD Convention. This was a stand-alone provision. In 2007, through Law No. 3560/2007, which ratified the Criminal Law Convention on Corruption and Additional Protocol (with further amendments in 2008), a series of amendments were made to the Greek Criminal Code in relation to the basic structure of the provisions on bribery. According to the latest legislation (Law No. 4254/2014), all provisions of the Greek Criminal Code on bribery are applicable to foreign public officials. A general provision was added in article 263A of the Greek Criminal Code (GCC) to include officers of international, European and transnational bodies, organisations, in accordance with the conventions to which Greece is a party and has ratified with the above-mentioned laws.

Domestic bribery

The Greek Criminal Code includes a special section on criminal acts by public officials, with bribery being one of them (articles 235, 236 and 237 GCC). There is also a special provision in Law No. 1608/1950 for acts of bribery resulting in financial loss of the Greek state. The difference in acts of bribery resulting to financial loss of the Greek state is heavier sentencing provisions.

The main provisions of the Greek Criminal Code are:

- article 235, which punishes passive bribery;
- article 236, which punishes active bribery;
- article 237, which punished passive bribery and active bribery involving members of the judiciary;
- article 237A, which punishes trading in influence;
- article 237B, which punishes bribery in the private sector;
- article 159, which punishes passive bribery of political officers; and
- article 159A, which punishes active bribery of political officers.

Foreign bribery

3 Legal framework

Describe the elements of the law prohibiting bribery of a foreign public official.

Articles 235 (passive bribery) and 236 (active bribery) of the GCC are directly applicable to foreign public officials. Article 235 (passive bribery) is not applicable to acts within the scope of OECD Convention, which provides only for acts of active bribery.

Article 235 (passive bribery) describes as punishable the act of requesting or receiving, directly or indirectly through third persons in favour of oneself or others, of benefits of any nature or accepting a promise of such benefits in order to act or omit to act in the future or already finished, with regard to public duties or contrary to these duties.

Article 236 (active bribery) describes as punishable the act of offering, promising or giving to a public official, directly or indirectly through third parties in favour of oneself or others, benefits of any nature in order (for the public official) to act or omit to act in the future or a past act or omission to act with regard to public duties or contrary to these duties.

Article 237 of the GCC (bribery of a judge) as described above is also applicable to members of the European Court of Justice and the European Court of Auditors.

Article 159 of the GCC (bribery of political officials) is also applicable to members of the European Council or the European Parliament.

4 Definition of a foreign public official

How does your law define a foreign public official?

A public official, according to article 13(a) of the GCC, is the person to whom duties or service is granted (even temporarily) by the state, municipal or other state-controlled legal entities. This definition is supplemented with article 263A of the GCC, which contains a detailed (and broad in its scope) list of individuals who are perceived as public officials.

Article 263A (paragraph 1d) provides that public officers are also individuals that hold office permanently or temporarily under any capacity or status in: bodies or organisations of the EU, including the Commission, the European Court of Justice and the European Court of Auditors.

Article 263A (paragraph 2) provides that articles 235 and 236 of the GCC (passive and active bribery) are applicable to:

- officers or other employees of any international or transnational organisation to which Greece participates as well as any individual with power to act on behalf of such an organisation;
- members of parliamentary assemblies of international or transnational organisations of which Greece is a member;
- those who exercise judicial, or arbitration powers with international courts to which Greece participates;
- any person in public office or service for foreign countries, including judges, jurors and arbitrators; and
- members of parliaments or assemblies of local governments of other countries.

5 Travel and entertainment restrictions

To what extent do your anti-bribery laws restrict providing foreign officials with gifts, travel expenses, meals or entertainment?

Despite the wording of the relevant law, which is broad and may include all of the above, anti-bribery legislation does not apply to symbolic gifts or gifts of courtesy. The difference lies primarily with the scope of the gift and the openness of offering such a gift. However, one could not exclude the application of regulations and laws on corruption in cases of systematic use of such gifts (travel expenses, meals, entertainment) in the general context of seeking to influence a public official.

6 Facilitating payments

Do the laws and regulations permit facilitating or 'grease' payments?

Past legislation, active for more than 40 years, permitted specific types of companies (mainly in the field of exports or press) to register payments in their financial records without reference to invoices or specific transactions (approximately 3 per cent of annual gross income). This was more of a privilege for these companies to facilitate payments without having the obligation to keep supporting documentation (eg, invoices with description of supplied service) or justify the need for such expenses. This option is no longer available (starting from 1 January 2004), and all payments and expenses must be duly justified. If not duly registered, such payments would fall under the category of receiving or giving a gift or benefits indirectly through third persons. In addition, this type of payment might be questionable with regard to regulations of taxation and criminal provisions of same (especially in relation to article 19 of Law No. 2523/1997, registration of a fictitious or false transaction in tax records).

In addition, rules and regulations for money laundering may apply if payments are connected to questionable conduct, for example, proceeds of a criminal act.

7 Payments through intermediaries or third parties

In what circumstances do the laws prohibit payments through intermediaries or third parties to foreign public officials?

The broad wording of articles 235 and 236 of GCC (passive and active bribery) cover gifts or financial benefits in a direct or indirect way given in favour of the perpetrator or others. In addition, both provisions make special reference to intermediaries to a bribe. In this view, intermediaries or third parties may be held criminally liable if these transactions are carried out within the context of corruption. It is noted that payments through intermediaries are also questionable in respect to proper bookkeeping and taxation law.

8 Individual and corporate liability

Can both individuals and companies be held liable for bribery of a foreign official?

Greek law provides that only individuals may be held liable for a criminal act, thus being subject to classic penal punishments (eg, imprisonment). Since 1998, after the passing of Law No. 2656/1998 (OECD Convention), there has been a specific provision for penalties to legal entities benefiting from acts of bribery of foreign public officials in the form of administrative fines. A company (legal entity) bears liability for acts of bribery and corruption in the form of administrative penalties. Article 51 of Law No. 3691/2008 (against money-laundering) provides for the liability of legal entities if the acts of active and passive bribery of public officials, political officials or judges were committed in the legal entities' favour by individuals empowered to act on their behalf (as managers or directors) or to make decisions in relation to the company's activities, etc, and provide for a series of administrative penalties (eg, fines, prohibition of business activities, ban from public tenders, etc). This provision is applicable to perpetrators, accessories and instigators alike.

9 Successor liability

Can a successor entity be held liable for bribery of foreign officials by the target entity that occurred prior to the merger or acquisition?

Liability of a successor entity could arise in cases where individuals managing the target entity are held criminally liable for acts of corruption and the target entity has benefitted from these acts. Given the fact that the sanctions imposed against an entity are of an administrative nature (fines, suspension of activities, ban from public tenders), it is highly likely that these sanctions will be imposed against the successor entity as well. It is noted that in respect to the administrative sanctions, the procedure followed resembles the procedure of imposing tax-related fines and sanctions. For these purposes, a legal entity is considered as a whole (ie, the successor has all liabilities and rights of the target entity).

10 Civil and criminal enforcement

Is there civil and criminal enforcement of your country's foreign bribery laws?

After ratification of the Civil Law Convention on Corruption in 2001 (Law No. 2957/2001), there are also provisions related to Greek civil law, such as the right to seek compensation, the right to seek annulment of an agreement that has been the result of an act of bribery and protection of civil servants from disciplinary punishments because they reported corruption practices to higher officials.

11 Agency enforcement

What government agencies enforce the foreign bribery laws and regulations?

Law No. 4022/2011 provided for a special investigation body (by investigating judges with the first instance court, Athens) responsible for acts of corruption. In 2013, pursuant to Law No. 4139/2013, a separate Prosecutor's Office was founded for dealing with acts of corruption and to coordinate the investigations conducted by the special investigation judges under Law No. 4022/2011. The Prosecutor's Office against Corruption supervises all preliminary inquiries related to corruption acts and main investigations according to the provisions of Law No. 4022/2011. These legal changes provide for speedier investigation of such crimes, speedier referral to trial, instant freezing of assets and full support by all other agencies in terms of gathering and processing evidence. Law No. 4022/2011 applies to serious crimes (felonies) committed by ministers and deputy ministers, members of parliament, deputy officials, public servants, employees with state controlled institutions, etc. The Prosecutor's Office against Financial and Economic Crimes (previously established by Law No. 3943/2011) is functioning now more in the sphere of tax-related offences and money laundering.

The Prosecutor's Office against Corruption (as well as the investigating judges under Law No. 4022/2011) have unrestricted access to privileged information such as bank records, tax records, stock exchange records, public services records, etc. They can also issue orders for lifting of bank secrecy for a limited period of time, seize assets, etc.

In cases where there are indications of money-laundering, a parallel investigation may be opened by the prosecuting authorities following information and feedback by the Hellenic Financial Intelligence Unit (the FIU). By Law No. 3932/2011, the FIU is responsible for collecting all information that may be used by the authorities in prosecuting money laundering, terrorism and organised crime financing. Tax and bank privilege does not apply to information requested by the FIU taskforce, which may also request foreign authorities to disclose such information. All evidence gathered is then forwarded to the Prosecutor's Office for further processing. Following the latest legislative amendments, the FIU does not proceed with separate investigations but is entitled to conduct investigating actions in cases of urgency or when there is need to seize or confiscate assets.

12 Leniency

Is there a mechanism for companies to disclose violations in exchange for lesser penalties?

Article 263B of the Greek Criminal Code provides for leniency measures applicable to perpetrators of bribery (either passive or active). If individuals who have participated in active bribery report the criminal conduct of the (bribed) official to the authorities and make substantial disclosures as to the official's criminal acts, they are eligible either to receive a lesser sentence (which could be as low as one to three years, instead of imprisonment of five to 10 years), or to be granted a suspension of criminal proceedings against them by virtue of a decision of the indicting court or be granted suspension of their sentence.

There is no general provision for leniency measures applicable to companies or legal entities in respect to acts of corruption. It is possible, however, in view of the ability of the authorities to choose which administrative penalties will be imposed (see question 15), to apply the minimum fine and no other penalties.

13 Dispute resolution

Can enforcement matters be resolved through plea agreements, settlement agreements, prosecutorial discretion or similar means without a trial?

Plea agreements and settlement agreements are generally not provided under Greek law. Plea agreements and settlement agreements are provided for property-related crimes, such as misappropriation of property, but not for the acts of bribery. Corruption cases with a substantial factual basis are referred to trial, following the procedure of filing of charges, investigation and indictment. Tax-related aspects of bribery cases may be resolved through settlement agreements. It is noted that it is not unusual in cases of corruption to have parallel charges of money laundering or tax offences. On such occasions, not all charges may be dismissed or resolved through settlement agreements with the prosecuting authorities.

For acts of corruption there are provisions for lesser sentences or even suspension of criminal proceedings against individuals involved in acts of corruption who give substantial information on acts committed by higher-ranking officials, members of the government or judges (see also question 12).

14 Patterns in enforcement

Describe any recent shifts in the patterns of enforcement of the foreign bribery rules.

There are no remarkable shifts to report in this respect.

15 Prosecution of foreign companies

In what circumstances can foreign companies be prosecuted for foreign bribery?

Foreign companies as such cannot be criminally prosecuted for foreign bribery. As already mentioned (see question 8), criminal liability lies with individuals and all provisions in relation to companies deal with administrative measures and penalties, which require some type of business establishment in the country. Prosecution of individuals working with foreign companies may be sought after in cases that have a link with Greek public officials (eg, foreign company bribing Greek officials) or intermediaries – acting in Greece – that facilitated bribes to foreign or domestic public officials.

16 Sanctions

What are the sanctions for individuals and companies violating the foreign bribery rules?

The basic sanction for individuals in respect to passive bribery is imprisonment (maximum five years) and a fine ranging from €5,000 to €50,000. If the perpetrator is committing such acts by profession or repeatedly or the gift or benefit is of a high value, the act is a felony punishable with imprisonment for up to 10 years (minimum sentence five years) and a fine ranging from €10,000 to €100,000.

If the act is committed contrary to one's duties, there is provision for a prison sentence up to 10 years and a fine ranging from €15,000 to €150,000 and if such acts are committed by profession or repeatedly or the gift or benefit is of a high value, the prison sentence is up 15 years and the fine ranges from €15,000 to €150,000.

As regards the act of active bribery, the basic sanction is imprisonment (maximum five years) and a fine ranging from €5,000 to €50,000. If the bribed official acted contrary to his or her duties the perpetration is the act is a felony punishable with imprisonment for up to 10 years (minimum sentence five years) and a fine ranging from €10,000 to €100,000.

Assets that have been acquired or gained through bribery acts are seized according to article 238 of the GCC.

The authorities may impose to legal entities not covered by special provisions of anti-money laundering legislation the following sanctions:

- fines ranging from €20,000 to €2 million;
- permanent suspension of business activities or temporary suspension of such for a time period of one month to two years;
- prohibition of specific business activities (eg, share capital increase) for a time period of one month to two years; or
- permanent or temporary ban (one month to two years) from public tenders or state funding.

Recent legislation (Law 4412/2016), which entered into force in August 2016, has integrated the EU Directive on public procurement, and repealing (2014/24/EU), which provides for exclusion of legal entities from procurements and public tenders, among others, if individuals with power to represent the entity (managers, directors, etc) are convicted with a final judgment for acts of corruption.

For legal entities covered by anti-money laundering legislation (eg, financial institutions) the law provides for stricter monetary sanctions ranging from €50,000 to €5 million.

The Administration has the power to impose any of the above measures or all of them.

17 Recent decisions and investigations

Identify and summarise recent landmark decisions or investigations involving foreign bribery.

A number of serious cases are still under investigation and a number of others have been opened by the special investigators under Law No. 4022/2011. There are pending investigations on bribes of public officials in the health system (for buying hospital supplies from specific suppliers), a large-scale investigation conducted by several agencies in relation to national defence spending (involving ex-ministers and deputy executives of the Ministry of Defence), investigations into misconduct of public officials in the energy sector in relation to public procurements of infrastructure projects and energy production, etc. Some of these cases are of transnational interest, especially in the field of money laundering and asset-tracing and freezing. Evidence gathered during the course of investigations with regard to Greece's defence programmes was used for opening proceedings to other countries (eg, Germany and Switzerland) in respect to acts of corruption and money laundering.

Financial record keeping

18 Laws and regulations

What legal rules require accurate corporate books and records, effective internal company controls, periodic financial statements or external auditing?

The Code of Registration of Tax Records, the Code of Taxation and the regulation on money laundering (last amended by Law No. 3691/2008) contain the relevant rules. Corporate books and records must be kept in a legally defined way. There are certain provisions about what may be regarded as a questionable transaction and that may be registered in the accounts. Financial statements are filed with the Revenue Service annually. Statements of value added tax are filed monthly (for large corporations). Internal auditors co-sign the annual financial statements, which are verified by an external auditor (who bears the responsibility for the accuracy of filed statements).

Continuous amendments of the relevant tax legislation aim at minimising deficiencies in accounting registration and improper registration of transactions. This is done by giving accountants responsibility

Update and trends

The Prosecutor's Office against Corruption has been very active and has opened numerous investigations for corruption acts involving public officials. It is awarded extensive powers by law (in gathering information and securing assets), which enables it to look for evidence of misconduct in order to prosecute individuals. It is a fact, however, that sometimes there is excessive and disproportionate use of instruments provided by law, such us freezing of assets even in early stages of investigation. Given that such investigations are targeted against individuals, there is no record yet of the treatment of entities involved at a later stage (ie, after prosecution and referral to trial). It is expected that lack of provisions for applying leniency to entities that cooperate or self-report incidents of corruption will be a challenge the judicial authorities will face in the coming years.

for accurate registration of available documentation and tax information in respect to business transactions. New legislation is currently under discussion on ways to simplify revenue procedures and intensify cross-checking of data from various sources (eg, bank accounts, expenditure and acquired assets).

19 Disclosure of violations or irregularities

To what extent must companies disclose violations of anti-bribery laws or associated accounting irregularities?

Anti-bribery laws do not explicitly demand disclosure of violations. In the context of money-laundering regulations, compliance and internal audit control, there are obligations to expose and report irregularities related to financial records or suspicious transactions. In this respect, individuals who are obliged by law to contribute to transparency and corporate ethics are faced with certain dilemmas when coming across a possible case of bribery. Leniency measures are meant to facilitate disclosure of violations or irregularities. Leniency measures apply in principle to individuals who expose corruption practices and relate to their status as defendants in criminal cases. Corporations may still be liable from a tax point of view; however, they are entitled to initiate procedures for amicable (tax) settlement, which can significantly reduce any fines imposed.

20 Prosecution under financial record keeping legislation

Are such laws used to prosecute domestic or foreign bribery?

Financial records are used as means to prove the money trail that usually goes with a case of bribery. Discrepancies in financial records or payments without apparent reason may be used as first indications in tracing bribes. The search and cross-checking of transactions during a financial record audit may facilitate collection of evidence from other jurisdictions and disclosure of related assets. All this evidence may contribute to substantiating a case of bribery (domestic or foreign). If this is the case, the financial record case (tax offence) will be prosecuted in parallel with a criminal case of corruption.

21 Sanctions for accounting violations

What are the sanctions for violations of the accounting rules associated with the payment of bribes?

Bribes – if registered in a misleading way in financial records – would fall under the category of fictitious transactions (from a tax point of view) and money laundering (from a criminal law point of view). Sanctions for the tax violation include fines and imprisonment up to 10 years (for amounts over €150,000). When the fictitious transaction is of a value higher than €235,000, the company is forced to stop its activities for up to a month. If the fines are of high value, pending resolution of the taxation dispute, the state may also freeze part or all assets of the company to secure future payment of the fine imposed.

Apart from the criminal sanctions against individuals, legal entities face serious consequences in the context of administrative proceedings. Administrative Law provides for heavy fines and freezing of accounts or other property in order to secure their payment.

22 Tax-deductibility of domestic or foreign bribes

Do your country's tax laws prohibit the deductibility of domestic or foreign bribes?

Foreign bribes are prohibited transactions and, as such, cannot be registered in the books of a company. The registration of payments that do not refer to straightforward transactions in the company books could be perceived as the registration of fictitious transactions (ie, transactions that do not correspond – partly or completely – to a sincere and straightforward transaction and are criminally punishable). In addition, there are provisions for administrative fines (up to three times the value of the registered transactions) and the filing of criminal charges that may result in imprisonment (for deductible expenses, see question 6 for tax policies prior to 2003).

Domestic bribery

23 Legal framework

Describe the individual elements of the law prohibiting bribery of a domestic public official.

Article 235 (passive bribery) describes as punishable the act of requesting or receiving, directly or indirectly through third persons in favour of oneself or others, of benefits of any nature or accepting a promise of such benefits in order to act or omit to act in the future or already finished, with regard to public duties or contrary to these duties.

Article 236 (active bribery) describes as punishable the act of offering, promising or giving to a public official, directly or indirectly through third persons in favour of oneself or others, benefits of any nature in order (for the public official) to act or omit to act in the future or already finished, with regard to public duties or contrary to these duties.

Article 237 of the GCC (bribery of a judge) describes the punishable act as a request or receipt of gifts or benefits, directly or indirectly through third persons in favour of oneself or others, of benefits of any nature or accepting a promise of such benefits in order to act or omit to act in the future or already finished with regard to justice administration or dispute resolution.

Article 237A (trading in influence) describes as punishable the act of requesting or receiving, directly or indirectly through third persons in favour of oneself or others, of benefits of any nature or accepting a promise of such benefits as an exchange for exerting improper influence over officials described in articles 159, 235 and 236 of the GCC.

Article 159 of the GCC (bribery of political officials) describes as punishable the act of the act of requesting or receiving, directly or indirectly through third persons in favour of oneself or others, of benefits of any nature or accepting a promise of such benefits in order to act or omit to act in the future (or an act or omission to act in the past), with regard to public duties or contrary to these duties. This provision is applicable to the prime minister, members of the cabinet, deputy members of the cabinet, mayors, etc.

24 Prohibitions

Does the law prohibit both the paying and receiving of a bribe?

Both passive and active bribery are prohibited by articles 235 and 236 of the GCC respectively.

25 Public officials

How does your law define a public official and does that definition include employees of state-owned or state-controlled companies?

A public official, according to article 13(a) of the GCC, is the person to whom duties or service is granted (even temporarily) by the state, municipal or other state-controlled legal entities. This definition is supplemented by article 263A of the GCC, which has broadened the meaning of public officials to include:

- those serving or having office in state-controlled legal entities or even state-controlled commercial companies providing power, telecommunication and other services of public interest;
- employees of banks with a seat in the country or individuals who work for legal entities acting as private companies but have been established by the state or a state-owned company; or

- people working with private entities if these entities have been awarded state funding or subsidies.

26 Public official participation in commercial activities

Can a public official participate in commercial activities while serving as a public official?

As a rule, public officials are not allowed to participate in commercial activities. This general restriction has some variations depending on the position of the official, but public officials serving the state administration sensu stricto are not allowed to conduct commercial activities.

27 Travel and entertainment

Describe any restrictions on providing domestic officials with gifts, travel expenses, meals or entertainment. Do the restrictions apply to both the providing and receiving of such benefits?

Unified practice (see question 5).

28 Gifts and gratuities

Are certain types of gifts and gratuities permissible under your domestic bribery laws and, if so, what types?

As in the case of foreign officials, symbolic gifts or gifts of courtesy do not qualify as benefits of bribery. In any event, evaluation of the gift is done on an ad hoc basis, in light of the circumstances of each specific case.

29 Private commercial bribery

Does your country also prohibit private commercial bribery?

Article 237B of the GCC provides for punishment of bribery in private commercial and business activities. The basic elements of this type of bribery include benefits or promises to deliver benefits, or advantages to individuals working with companies in the private sector for violating the rules and obligations of their work.

30 Penalties and enforcement

What are the sanctions for individuals and companies violating the domestic bribery rules?

As already mentioned (see question 2) legal provisions for active and active bribery are applicable to domestic and foreign public officials alike.

The basic sanction for individuals in respect to passive bribery is imprisonment (maximum five years) and a fine ranging from €5,000 to €50,000. If the perpetrator is committing such acts by profession or repeatedly or the gift or benefit is of a high value, the act is a felony punishable with imprisonment for up to 10 years (minimum sentence five years) and a fine ranging from €10,000 to €100,000.

If the act is committed in breach of one's duties, there is provision for a prison sentence up to 10 years and a fine ranging from €15,000 to €150,000, and if such acts are committed by profession or repeatedly or the gift or benefit is of a high value, the prison sentence is up 15 years and the fine ranges from €15,000 to €150,000.

As regards the act of active bribery, the basic sanction is imprisonment (maximum five years) and a fine ranging from €5,000 to €50,000. If the bribed official acted in breach of his or her duties the perpetration of the act is a felony punishable with imprisonment for up to 10 years (minimum sentence five years) and a fine ranging from €10,000 to €100,000.

Assets that have been acquired or gained through bribery acts are seized according to article 238 of the GCC.

It is noted that if bribery acts result in financial loss of the Greek state exceeding €150,000, Law No. 1608/1950 is applied. Sentences for this offence are imprisonment up to 20 years, and, if the gifts or financial loss are unusually high or other aggravated circumstances apply, a life sentence may be imposed. Despite these harsh sanctions, convicted individuals may benefit from generous rules on the conversion of prison terms to fines, the suspension of same, early conditional release, etc.

31 Facilitating payments

Have the domestic bribery laws been enforced with respect to facilitating or 'grease' payments?

There has been an increase in efforts to detect facilitating or 'grease' payments using anti-bribery laws and the application of stricter taxation rules. Facilitating or grease payments are prohibited; their exposure is usually the result of cross-checking of tax, financial and other data related to such transactions.

32 Recent decisions and investigations

Identify and summarise recent landmark decisions and investigations involving domestic bribery laws, including any investigations or decisions involving foreign companies.

Three major trials have opened following investigations by the investigating judges on alleged bribes to public officials in order to secure awards of multimillion-euro agreements with the Hellenic Republic. These trials refer to known multinational companies (Siemens, HDW/Ferrostaal, STN ATLAS) that have reportedly been systematically giving money to public officials for securing contracts with the Hellenic Republic. Investigations are still open against former government officials in relation to facilitating payments (in the defence sector) and involvement in tax fraud schemes through real estate deals.

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1 International anti-corruption conventions

To which international anti-corruption conventions is your country a signatory?

India signed the United Nations Convention against Corruption (UNCAC) on 9 December 2005 and ratified it on 1 May 2011. Under Indian law, while the central government is competent to enter into treaty obligations to the extent that such treaty obligations affect any justiciable rights of Indian nationals, it would require an act of the legislature for such obligations to be binding upon Indian nationals. Additionally, India also ratified the United Nations Convention on Transnational Organised Crime (UNTOC) which also mandates the criminalisation of corruption and the bribing of public officials.

India is also a member of the trilateral India–Brazil–South Africa Cooperation Agreement (the IBSA) to foster cooperation in different public-policy sectors, including 'ethics and corruption combat' and 'social responsibility and transparency'. Cooperation mechanisms under the IBSA include seminars, meetings, knowledge-sharing, training of civil servants of one country by another country, cooperation between training institutions and the establishment of institutions, projects and other joint mechanisms. The Corruption Prevention and Strategic Information Secretariat has been established under the IBSA to act as a nodal point for topics related to anti-corruption policies.

In June 2010 India became a member of the Financial Action Task Force, a 36-member intergovernmental body that aims to develop national and international policies to prevent money laundering and terrorism financing arising, inter alia, out of bribery.

2 Foreign and domestic bribery laws

Identify and describe your national laws and regulations prohibiting bribery of foreign public officials (foreign bribery laws) and domestic public officials (domestic bribery laws).

The Prevention of Corruption Act 1988

The Prevention of Corruption Act 1988 (PCA) is the primary law relating to the prevention of corruption and matters connected therewith. The PCA criminalises the receipt of illegal gratification by 'public servants' and the payment of such gratification by other persons. The term 'public servant' has been defined broadly, and includes any person in the service or pay of the government, local authority, statutory corporation, government company, or other body owned or controlled or aided by the government, as well as judges, arbitrators and employees of institutions receiving state financial assistance. The Supreme Court of India has recently held that employees of banks would also be considered 'public servants' under the PCA (including employees of private banks).

The amplitude of the offences under the PCA is very wide. The PCA addresses, inter alia, gratification received through intermediaries, gifts and other non-pecuniary gratifications, and certain conduct described as 'criminal misconduct' by public servants (including the possession of assets disproportionate to their income). The PCA also provides for the establishment of special courts to try offences under the PCA, and offences under the PCA are generally investigated by the Central Bureau of Investigation (the CBI). An attempt to give or receive bribe is sufficient to attract liability under the PCA, and actual payment or receipt of bribes is not necessary. The PCA provides that, where the receipt of gratification or a valuable thing by a public servant is established, it is presumed that the receipt was pursuant to an offence and the accused must then prove otherwise. Though the Supreme Court of India has observed that the PCA is social legislation intended to curb the illegal activities of public servants and therefore should be construed liberally, so as to advance its object, and not in favour of the accused (*State of Madhya Pradesh v Ram Singh* (2000) 5 Supreme Court Cases 88), it has also laid down that conviction of an accused under the PCA for acceptance of illegal gratification cannot be founded on the basis of inference; the offence should be proved against the accused beyond all reasonable doubt, either by way of direct evidence or even by circumstantial evidence. If such causal link of the chain of events is not established pointing towards the guilt of accused, then the Supreme Court has held that a conviction may not be sustainable (*Banarsi Dass v Respondent: State of Haryana*, 2010 (2) ACR 1344 (SC)).

The PCA provides for immunity for a person accused of abetting offences under the PCA, if such person makes a statement in proceedings initiated against a public servant. However, courts have held that such immunity is available only when the bribe giver was unwilling to pay the bribe, approaches the authorities and pays the bribe in order to entrap the public servant.

The applicability of the PCA extends to the whole of India except the state of Jammu and Kashmir and also to all Indian citizens outside India. The substantive provisions of the PCA, read in conjunction with the statement of its extent make it clear that this statute is intended to apply to situations where an Indian 'public servant' accepts illegal gratification from any person, whether in India or abroad. The PCA does not apply to the payment of illegal gratifications to foreign officials.

Certain proposed amendments to the PCA by way of a bill titled Prevention of Corruption (Amendment) Bill 2013 (PCA Amendment Bill) have received cabinet approval and await consideration by Parliament.

The PCA Amendment Bill seeks to amend section 19 of the PCA in order to safeguard former public servants against vexatious litigation by providing that proceedings against them require prior sanction from certain named authorities. This bill also provides that property acquired by public servants through corrupt means must be forfeited to the government, and prescribes a procedure for attaching such properties before the court passes judgment. In the context of penalties, it proposes to relate the quantum of fines to the pecuniary resources of the accused or the value of property for which the accused is unable to account satisfactorily. Some other changes proposed in the PCA Amendment Bill are as follows:

- introduction of specific provisions criminalising giving or offering a bribe to a public servant;
- introduction of specific provisions relating to bribery of public officials by commercial organisations and liability of officials of such commercial organisations for such acts;
- introduction of a defence to prosecution if commercial organisations can demonstrate that an offence was committed without their knowledge, consent or neglect and they had exercised all due diligence to prevent it; and
- deletion of immunity for persons abetting offences under the PCA.

Service Rules

In addition to the PCA, most government officials are bound during the tenure of their service by service rules related to their conduct and

discipline (the Service Rules). The primary Service Rules applicable to different classes of officials of the central government of India are:

- the Central Civil Services (Conduct) Rules 1964;
- the All India Services (Conduct) Rules 1968; and
- the Indian Foreign Service (Conduct and Discipline) Rules 1961.

These Service Rules, inter alia, prohibit government officials from receiving gifts, lavish hospitality, free transport, boarding or other pecuniary advantages that exceed certain specified thresholds, from persons other than near relatives or personal friends, without the sanction of the government. Further, even gifts received from near relatives or friends (with whom such official has no business dealings) that exceed specified thresholds in value are required to be reported. The Service Rules also prohibit public servants engaging in any trade, business, other employment, and certain other commercial activities. A violation of these Service Rules may result in the initiation of disciplinary action that may extend to the termination of service of the concerned official. Such departmental disciplinary proceedings are independent of prosecutions initiated under the PCA. It is important to note that unlike the Service Rules, the PCA does not provide for any de minimis threshold for gifts, meals entertainment or hospitality to Indian public servants.

Separately, under the Indian Penal Code, 1860, an officer is criminally liable if he engages in any kind of trade, business, profession or occupation if he is expressly prohibited from doing so. However, this excludes persons employed by government on a contract or temporary basis such as, senior doctors consulting at government hospitals, lawyers engaged by the state, etc.

Foreign Contribution Regulation Act 2010

The Foreign Contribution Regulation Act 2010 (the FCRA) consolidates the law regulating the acceptance and utilisation of foreign contribution or foreign hospitality by certain individuals or associations or companies and prohibits the acceptance of contributions from foreign sources or the acceptance of foreign hospitality by persons including members of legislatures, office bearers of political parties, judges, government servants or employees of government corporations, except with the prior permission of the central government. The definition of the term 'foreign source' under the FCRA is wide and includes any foreign company, or any other foreign entity, a multinational corporation, a foreign trust or foundation, and a citizen of a foreign country. The FCRA is administered by a department within the Union Ministry of Home Affairs of the government of India. The Foreign Contribution Regulation Rules 2011 were established by the central government under section 48 of the FCRA, with effect from 1 May 2011.

An amendment has been proposed to the definition of 'foreign source' by the Finance Bill, 2016 to clarify that companies with foreign shareholding in line with permissible limits under applicable foreign exchange regulations will not be considered a foreign source.

Central Vigilance Commission Act 2003

The central government has constituted the Central Vigilance Commission (the CVC) pursuant to the Central Vigilance Commission Act 2003. The CVC is the primary agency to inquire or cause inquiry to be conducted into offences alleged to have been committed under the PCA. It is also responsible for advising, planning, executing, reviewing and reforming vigilance operations in central government organisations. The CVC is required to operate impartially and free of executive control.

Lok ayuktas

In addition to the CVC, several state governments have established statutory functionaries known as *lok ayuktas* who are responsible for investigating complaints against the functioning of the state government machinery, including complaints related to bribery and corruption punishable under the PCA. Both the CVC and the offices of the *lok ayuktas* are assisted in the investigation of matters and the enforcement of the PCA by the police.

Right to Information Act 2005

The Right to Information Act 2005 (the RTI Act) is a law aiming, inter alia, at transparent governance and prevention of corruption. It prescribes a procedure by which an Indian citizen can apply for and obtain information held by any public authority, subject to certain defined exceptions in respect of national interest, legislative privilege and right to privacy. The term 'public authority' is widely defined to mean any authority, body or institution of self-government created under statute or by government order, and includes entities owned, controlled or substantially financed, directly or indirectly, by the government.

All public authorities are required, in terms of the RTI Act, to make public a variety of information including statements of what information and documents they hold, their budget and their rules and regulations. They are also required to publish all relevant facts while formulating important policies or announcing decisions that affect the public and to provide reasons for their decisions to the persons affected. The RTI Act sets up a structure comprising information officers to be appointed by each public authority. Citizens may apply to these officers for information, for a fee. The information officers are required to provide requested information within set timelines, ranging from 48 hours (if the life and liberty of any person are involved) to 30 days.

The RTI Act has created information commissions at the central and state levels to enquire into complaints from citizens relating to requesting or obtaining access to records, including refusal of access by the public authority, failure to respond within the prescribed time and demands for unreasonable fees. The information commissions are empowered to direct public authorities to comply with the RTI Act, award compensation to the complainant and penalise any information officer with fine of up to 25,000 Indian rupees or by recommending disciplinary action against him or her.

The RTI Act has displayed itself as a powerful tool against corruption, as witnessed by a report issued by PricewaterhouseCoopers in June 2009, which notes the success of RTI applications in, for instance, stopping corruption in procurement by a government company in Bihar (see question 25 for a definition of 'government company' in this context).

Whistle Blowers Protection Act, 2011

The Whistle Blowers Protection Act, 2011 is legislation that aims to establish a mechanism to safeguard persons who make a complaint regarding an act of corruption or wilful misuse of power by a public authority. The identity of the complainant is mandatorily protected under the statute and any disclosure to the contrary is punishable with imprisonment as well as a fine. Once a public interest disclosure is made to the competent authority established under the statute, the authority has the power to conduct an inquiry and initiate proceedings accordingly. The Whistle Blowers Protection (Amendment) Bill, 2015 was passed by the lower house of Parliament, and is pending the approval of the upper house of Parliament, and seeks to prohibit the reporting of a corruption-related disclosure if it falls into certain categories of information such as:

- economic, scientific interests and the security of India;
- cabinet proceedings;
- intellectual property; and
- that received in a fiduciary capacity, etc.

Companies Act, 2013 (the 2013 Act)

The 2013 Act (a majority of which was notified on 1 April 2014) also contains provisions to prevent corruption and fraud in companies.

Section 177 of the 2013 Act requires every listed company to establish a vigilance mechanism for directors and employees to report genuine concerns and to provide for adequate safeguard mechanism against victimisation of persons who use such a mechanism. Additionally, auditors, cost accountants and company secretaries are mandatorily required to report any suspected frauds to the central government if they, in the course of the performance of their duties, are of the belief that an offence is being committed against the company by its directors or employees. 'Fraud' is defined widely under the 2013 Act and could include acts of private bribery. Commission of fraud is a criminal offence under the 2013 Act, which is punishable with imprisonment ranging from six months to 10 years or a fine, or both.

The 2013 Act imposes an obligation on the directors of companies to devise proper systems to ensure compliance with the provisions of all applicable laws and that such systems are adequate and operating effectively. The 2013 Act also obligates companies to maintain books and financial statements in accordance with prescribed accounting standards. There are fines and imprisonment mandated for violation of the aforesaid provisions. See question 18 for further details in this regard.

It may be noted that the provisions of the 2013 Act would be applicable to government companies (see question 25 for a definition of 'government company').

Lokpal and Lokayuktas Act, 2013
This legislation that was notified on 16 January 2014 provides for the establishment of the *lokpal* for the Union and the *lok ayuktas* for the states where *lok ayuktas* (discussed above) had not already been established, with the aim of creating a corruption ombudsman that acts independently from the executive branch of the government. These bodies have been empowered to investigate allegations of corruption against public functionaries, including offences under the PCA. The jurisdiction of the *lokpal* includes the prime minister, ministers, members of parliament and other public servants. Additionally, the legislation imposes an additional obligation on all public servants to furnish information relating to assets of which he or she, his or her spouse and dependent children are, jointly or severally, owners or beneficiaries to the competent authority under the act within 30 days of making an oath to enter office and an annual return of assets and liabilities. However, the provisions of this legislation are yet to be enforced in a meaningful way, and no *lokpal* has been appointed as yet.

Foreign bribery

3 Legal framework

Describe the elements of the law prohibiting bribery of a 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, which sought to criminalise bribery of foreign officials has not received parliamentary approval and has since lapsed.

4 Definition of a foreign public official

How does your law define a foreign public official?

There are presently no Indian laws that apply to bribery of foreign public officials (see question 3).

5 Travel and entertainment restrictions

To what extent do your anti-bribery laws restrict providing foreign officials with gifts, travel expenses, meals or entertainment?

There are no Indian laws that restrict providing foreign officials with gifts, travel expenses, meals or entertainment (see question 3). However, companies in India may have internal codes of conduct and policies which may impose restrictions on providing gifts, travel expenses, meals or entertainment to foreign public officials.

6 Facilitating payments

Do the laws and regulations permit facilitating or 'grease' payments?

There are currently no Indian laws that apply to bribery of foreign public officials. The bill that sought to criminalise the bribery of foreign officials (see question 3) has lapsed, but is proposed to be introduced again in the next parliamentary session. The prohibition on facilitation or grease payments to Indian public officials is addressed in questions 23 and 32.

7 Payments through intermediaries or third parties

In what circumstances do the laws prohibit payments through intermediaries or third parties to foreign public officials?

There are no Indian laws that apply to bribery of foreign public officials (see question 3). The prohibition on payments to Indian public officials through intermediaries is addressed in question 2.

8 Individual and corporate liability

Can both individuals and companies be held liable for bribery of a foreign official?

There are no Indian laws that apply to bribery of foreign public officials (see question 3). The question of corporate criminal liability in respect of bribes paid to Indian public officials is addressed in question 30.

9 Successor liability

Can a successor entity be held liable for bribery of foreign officials by the target entity that occurred prior to the merger or acquisition?

There are no Indian laws that apply to bribery of foreign public officials (see question 3).

10 Civil and criminal enforcement

Is there civil and criminal enforcement of your country's foreign bribery laws?

There are no Indian laws that apply to bribery of foreign public officials (see question 3).

11 Agency enforcement

What government agencies enforce the foreign bribery laws and regulations?

There are no Indian laws that apply to bribery of foreign public officials (see question 3). Agencies responsible for the enforcement of domestic anti-corruption laws are described in question 2.

12 Leniency

Is there a mechanism for companies to disclose violations in exchange for lesser penalties?

There are no Indian laws that apply to bribery of foreign public officials (see question 3). Provisions of Indian laws relating to disclosure, grant of immunity or pardon to approvers in consideration of their testimony are discussed in question 19.

13 Dispute resolution

Can enforcement matters be resolved through plea agreements, settlement agreements, prosecutorial discretion or similar means without a trial?

There are no Indian laws that apply to bribery of foreign public officials (see question 3). In the context of domestic prosecutions, persons accused of offences which are not punishable by death or by imprisonment for a term exceeding seven years may apply for a plea bargain in accordance with the procedure prescribed by sections 265A to 265C of the Code of Criminal Procedure 1973 (the CrPC). However, the option to apply for a plea bargain is not available in cases where a person is accused of an offence that is notified by the central government as one that affects the socioeconomic condition of the country or is committed against a woman or a child below the age of 14 years. Though the Supreme Court of India has held the PCA to be a social legislation (*State of Madhya Pradesh v Ram Singh*, cited above), the central government has not notified offences under the PCA as affecting the socioeconomic condition of the country. Therefore, the option of applying for a plea bargain may be available to persons accused of offences under the PCA.

Furthermore, section 320 of the CrPC provides for the compounding of certain specific offences contained in the IPC at the instance of the court or the victim of the offence. The composition of any offence under section 320 of the CrPC has the effect of an acquittal of the accused. However, there is no provision for the compounding of offences under the PCA.

14 Patterns in enforcement

Describe any recent shifts in the patterns of enforcement of the foreign bribery rules.

There are currently no Indian laws that apply to bribery of foreign public officials (see question 3).

15 Prosecution of foreign companies

In what circumstances can foreign companies be prosecuted for foreign bribery?

There are no Indian laws that apply to bribery of foreign public officials (see question 3).

16 Sanctions

What are the sanctions for individuals and companies violating the foreign bribery rules?

There are no Indian laws that apply to bribery of foreign public officials (see question 3).

17 Recent decisions and investigations

Identify and summarise recent landmark decisions or investigations involving foreign bribery.

There are currently no Indian laws that apply to bribery of foreign public officials (see question 3).

Financial record keeping

18 Laws and regulations

What legal rules require accurate corporate books and records, effective internal company controls, periodic financial statements or external auditing?

Indian companies are required to maintain their books of accounts and other business records for a definite period of time under various laws, including:

- the 2013 Act;
- the Income Tax Act 1961 (Income Tax Act) and other applicable tax statutes;
- applicable regulations notified by regulators such as the Securities and the Exchange Board of India or the Reserve Bank of India; and
- the Prevention of Money Laundering Act 2002 (PML Act).

Companies Act

The 2013 Act has introduced several stipulations on good governance, record keeping and preventing fraud and corruption. As per section 134 of the 2013 Act, every balance sheet and profit and loss account of a company (other than a banking company) is required to be signed, on behalf of its board of directors, by the two directors of the company including the managing director and the company secretary. The section further requires the board of directors of every company to prepare, and lay before the general meeting of its shareholders, as an attachment to its balance sheet and external auditors report, a directors' report with respect to the state of the company's affairs. The directors' report must contain a 'directors' responsibility statement', stating, inter alia, that the directors have:

- selected and applied accounting policies, and made prudent judgements, to give a true and fair view of the company's affairs;
- taken proper and sufficient care for the maintenance of adequate accounting records in accordance with the provisions of the 2013 Act for preventing and detecting fraud and other irregularities; and
- devised proper systems to ensure compliance with the provisions of all applicable laws.

This report is required to be signed by the chairman of the board, and if he is not authorised to do so, by at least two directors, including the managing director.

Further, under section 206 of the 2013 Act, if the registrar of companies (the Registrar) is of the opinion that the information or books and papers disclosed by the company do not represent a full and fair statement, the Registrar may call upon the company to produce further books and documents for his or her inspection and if satisfied that there is a case, may carry out an inquiry into the affairs of the company. Further, the central government, if satisfied that the circumstances warrant it, may order for the inspection of books and papers by an inspector appointed by it.

The central government, under section 210 of the 2013 Act, can initiate an investigation of the affairs of the company on the direction of a court. Under section 219 of the 2013 Act, the inspector may also investigate the company's subsidiary or holding company, or a company that had been a subsidiary of its holding company, or a holding company of its subsidiary, at the relevant time. Under the 2013 Act, such companies could include companies incorporated outside India. Any failure to disclose books and records to the inspector for the sake of the investigation is punishable. The inspector may also seize any document with the consent of a magistrate.

Section 182 of the 2013 Act, inter alia, restricts the ability of companies to make direct or indirect contributions to a political party, or to any person for a political purpose. Section 182 of the Companies Act further requires all companies to disclose the amounts and the recipients of such contributions in their profit and loss accounts. A contravention of this section is punishable with imprisonment and a fine.

Section 447 of the 2013 Act defines 'fraud' in a broad manner, to include any act, omission, concealment of any fact or abuse of position committed by any person or any other person with their 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. Persons convicted of fraud are subject to severe penal consequences and imprisonment ranging from six months to 10 years or a fine, or both. Further, when a person (including a director) is found making false statements or knowingly omitting a material fact in a return, report, certificate, financial statement or prospectus, he or she is liable for the same punishment as prescribed for fraud.

The 2013 Act has several additional provisions in this regard relating to the appointment of auditors and their relationship with the company.

PML Act

The PML Act criminalises money laundering. Money laundering is defined as the direct or indirect attempts to indulge, or knowingly assist, or knowingly becoming a party to, or actual involvement in the process or activity connected with the 'proceeds of crime' (including its concealment, possession, acquisition or use) and projection or claiming of such property as untainted property. It further identifies offences under sections 7 to 10 of the PCA as offences whose proceeds are treated as 'proceeds of crime'. The term 'proceeds of crime' refers to any property derived or obtained, directly or indirectly, by a person as a result of certain identified crimes, that are considered as predicate offences for the application of the PML Act.

Further, the PML Act defines two categories of acts as 'offences with cross-border implications'. The first category covers acts committed outside India that are offences both under Indian law and local law, and whose proceeds are remitted to India. The second category covers offences committed in India whose proceeds are transferred or are attempted to be transferred abroad. The PML Act also incorporates the concept of 'corresponding law' to link the provisions of the PML Act with the laws of foreign countries. The PML Act also casts obligations upon banking companies, financial institutions and entities such as brokers, money-changers and casino operators, defined as 'intermediaries', to maintain records of transactions and of their clients' identities, and furnish such records to an officer appointed by the central government for this purpose. The PML Act allows, even at a preliminary stage of investigation or proceedings, for the provisional attachment of properties in the possession of persons accused of money laundering, as well as others who are knowingly parties to the activities connected with the proceeds of crime under the PML Act, provided certain conditions are satisfied.

Indian regulators, such as the Reserve Bank of India and the Securities Exchange Board of India have also issued guidelines to entities regulated by them (such as banks, financial institutions and market intermediaries), specifying 'Know Your Customer' requirements and other anti-money-laundering measures. These guidelines include norms governing establishment of customer identity, risk-based categorisation of customers, client due diligence (including enhanced

measures for high-risk customers), procedures for conducting various types of transactions (including cross-border transactions) and reporting of transactions to the Financial Intelligence Unit.

Serious Fraud Investigation Office

The Ministry of Company Affairs (the MCA) has set up an investigating authority under the Companies Act. The Serious Fraud Investigation Office (the SFIO), which is invested with the powers of detecting, investigating and prosecuting white-collar crimes and frauds with multidisciplinary ramifications or public interest elements where improvements in the system, laws and procedures are possible. The SFIO has statutory recognition and is vested with the powers of the magistrate under section 211 of the 2013 Act.

While the SFIO primarily investigates matters received from the MCA, it also has the authority to take up cases on its own. These investigations are to be carried out pursuant to section 212 of the 2013 Act. The SFIO also takes up investigation of cases of fraud referred to it by the central government or if a company passes a special resolution stating that the affairs of the company are required to be investigated. To date, the SFIO has been involved in matters relating to stock market frauds.

In addition to the above statutes, companies may be guided by applicable accounting and company secretarial standards with respect to their accounting and record retention policies. It must be noted that although none of these laws and standards is intended exclusively to check illegal gratification to public servants, records maintained under these laws and regulations may be summoned by a competent authority or by a court to be used as evidence for or during an investigation into a charge under the PCA. Further, misstatement of books and records in an attempt to cover up, disguise or conceal illicit payments as legitimate expenses may result in contravention of these provisions, and attract the applicable penalties.

19 Disclosure of violations or irregularities

To what extent must companies disclose violations of anti-bribery laws or associated accounting irregularities?

There is no express obligation under Indian law to disclose offences under the PCA. However, a reporting obligation cast upon statutory functionaries of bodies corporate such as auditors may be triggered if an act qualifies for reporting under the 2013 Act (for example, commission of a fraud on the company).

Witnesses to offences under the PCA are not considered accomplices merely because they did nothing to prevent or disclose the offence, unless they were under a legal obligation to do so. The PCA or any other criminal legislation does not expressly make it mandatory for a person to disclose the commission of an offence under the PCA. It is pertinent to point out in this context that section 39 of the CrPC casts an obligation on every person aware of the commission of or of the intent to commit certain specified offences to report such commission to the police or to a magistrate. Given that Indian courts have recently taken an expansive view of anti-corruption provisions (for example, extending the provisions of the PCA to employees of banks), it remains to be seen whether Indian courts will extend the reporting obligations under the CrPC to offences under the PCA.

If the non-disclosure, on the facts of a particular case, amounts to an illegal omission under any other law, or is of such a nature that the court may infer a degree of participation in the offence or abetment, then such a person could be prosecuted for abetment under section 12 of the PCA. There may, however, be limited advantages accruing to persons making disclosures of offences under the PCA, as described below.

Under section 24 of the PCA, immunity has been granted to a person against a prosecution under section 12 of PCA if the person has made a statement in the course of any proceeding initiated against a public servant under sections 7 to 11, 13 or 15 of the PCA, 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. In this regard, note that 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 under section 24 of the PCA. The court held that the immunity would be available where the bribe-giver was unwilling to pay illegal gratification to a public servant and approaches the appropriate law enforcement agency and pays a bribe in order to entrap the public servant.

Under sections 306 to 308 of the CrPC a court may in certain cases pardon a person accused of an offence on condition that such person makes a full and true disclosure of the circumstances related to the commission of the offence and agrees to tender evidence to that effect at the trial of the offence.

Section 245B of the Income Tax Act provides for the setting up of the Settlement Commission. A person may at any stage of a case under the Income Tax Act make an application for the settlement of cases pending against him in the prescribed form if:

- the person has furnished the returns of income which he is required to furnish under any of the provisions of the Income Tax Act; and
- the additional amount of income tax payable on the income disclosed in the application exceeds 100,000 rupees.

The Settlement Commission may, if it is satisfied that any person who made the application for settlement under section 245C of the Income Tax Act has cooperated with the Settlement Commission and has made a full and true disclosure of his income and the manner in which such income has been derived, grant immunity from prosecution for any offence under the Income Tax Act or under the IPC or any other central acts. Such immunity, however, would not be granted by the Settlement Commission in cases where prosecution has been instituted under the relevant central legislation before the date of the application under section 245C of the Income Tax Act. Typically the Settlement Commission would not grant immunity in relation to prosecutions initiated under the central legislation that do not have any material connection or bearing on tax evasion.

India has also signed an Inter-Governmental Agreement with the United States to implement the Foreign Account Tax Compliance Act (FATCA) in India, which allows the automatic exchange of information between the two countries and to combat tax evasion by nationals and companies in both the countries. The Central Board of Direct Taxation has recently notified guidelines to banks and financial institutions to collect additional details from United States nationals and withhold tax on qualifying payments.

20 Prosecution under financial record keeping legislation

Are such laws used to prosecute domestic or foreign bribery?

There are no Indian laws relating to foreign bribery. With the exception of reliance on records maintained in accordance with these laws in course of prosecutions under the PCA, historically these laws have not been used to prosecute domestic bribery. The reliance on such records in the prosecution of domestic bribery is discussed in question 18. The focus on eliminating corruption in India and the introduction of stringent provisions relating to 'fraud', tax evasion and money laundering in recent years are indicative of a growing trend towards the use of financial offences to address corruption. In our view, these provisions will become increasingly important facets of the Indian anti-corruption regime, and we expect regulators to place greater reliance on such provisions in the future.

21 Sanctions for accounting violations

What are the sanctions for violations of the accounting rules associated with the payment of bribes?

As previously described, the PCA and other laws relating to the payment of bribes do not themselves cast any accounting or bookkeeping obligations on companies. However, the statutes discussed in question 21 penalise violation of the accounting and disclosure requirements set out by them.

Companies Act

In terms of section 217(8) of the 2013 Act, the failure by officers of a company to produce the books or furnish any requisite information to the inspector despite being required to do so by a competent court or investigating authority is punishable by imprisonment for a term of six months or a fine, which may extend to 100,000 rupees or both, with an additional fine of 2,000 rupees for each day the violation continues.

Contravention of section 134 of the 2013 Act (relating to the financial statements), is punishable with a fine on the company that shall not

be less than 50,000 rupees but which may extend to 2.5 million rupees. Further, every officer of the company who is in default shall be punishable with imprisonment for a term that may extend to three years or with fine that shall not be less than 50,000 rupees but which may extend to 500,000 rupees or with both.

Under section 224 of the 2013 Act if it appears to the central government that any person in relation to the company has been guilty of any offence for which he or she is criminally liable, the central government may prosecute such person. Contributions by a company in contravention of section 182 of the 2013 Act are punishable, in the case of the company, with fine of up to five times the amount so contributed, and in the case of officers in default, with imprisonment for up to six months, as well as a fine.

Section 448 of the 2013 Act deals with penalties for false statements. Under this section, where any person knowingly makes a materially false statement or knowingly omits a material fact from a return, report, certificate, balance sheet, prospectus, statement or other document required under the act, he shall be punishable with imprisonment for a term that may extend to 10 years, and shall also be liable to pay a fine which shall be not less than the amount involved in the fraud and may extend to three times the amount involved. This is not a compoundable offence.

Income Tax Act

Section 277 of the Income Tax Act states that any person who makes a statement in any verification under the Income Tax Act, or delivers an account or statement which is false, and which he or she either knows or believes to be false, or does not believe to be true, shall be penalised with: rigorous imprisonment for a term from six months to seven years, and a fine, if the amount of tax which would have been evaded if the statement or account had been accepted as true, exceeds 100,000 rupees; and rigorous imprisonment for a term from three months to three years and a fine, in any other case.

In terms of section 277A of the Income Tax Act, any person who with intent to enable any other person to evade any tax, makes or causes to be made a false entry or statement in any books of accounts or such other document, is liable to be punished with rigorous imprisonment for a term of three months to three years and with a fine.

The Income Tax Act further provides in section 278B(2) that where an offence committed by a company and is proved to have been committed with the consent, connivance or neglect of any director, then such director shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished.

PML Act

In terms of section 4 of the PML Act, money laundering is punishable with rigorous imprisonment for a term of three to seven years and a fine of up to 500,000 rupees.

22 Tax-deductibility of domestic or foreign bribes

Do your country's tax laws prohibit the deductibility of domestic or foreign bribes?

In terms of Indian income tax laws, expenses incurred for any purpose that is an offence or that is prohibited by law are not considered to be incurred for the purpose of the business and are not tax-deductible. Accordingly, payments for unlawful purposes such as protection money, extortion, bribes are not permitted to be tax-deductible expenditure.

Domestic bribery

23 Legal framework

Describe the individual elements of the law prohibiting bribery of a domestic public official.

Section 7 of the PCA provides that if, inter alia, a public servant accepts or obtains or agrees to accept or attempts to obtain from any person, for himself or for any other person, any gratification (other than legal remuneration), as a motive for 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 specified in the section, he or she would be punished with imprisonment for no less than six months but may extend to five years, along with a fine (see question 1 for the definition of 'public servant').

The term 'gratification' is not restricted to pecuniary gratifications or to gratifications estimable in money. The Supreme Court of India has given the term its dictionary meaning of satisfaction of an 'appetite' or 'desire' (*State of Assam v Krishna Rao*, AIR 1973 Supreme Court 28). Therefore, strictly speaking, the term can cover an insignificant amount paid to influence the public servant, as long as it is not within the legal remuneration of the public servant. It has been laid down by the Supreme Court of India that the quantum of amount paid as gratification is immaterial and that conviction will ultimately depend upon the conduct of the delinquent public official and the proof established by the prosecution regarding the demand and acceptance of such illegal gratification (*AB Bhaskara Rao v Inspector of Police*, CBI, Visakhapatnam 2011 (4) KLT(SN) 35). Judicial precedents have also held that 'speed' payments made to public servants to get lawful things done promptly are covered within the purview of section 7 of the PCA (*Som Prakash v State of Delhi*, AIR 1974 Supreme Court 989). Therefore, facilitation or 'grease' payments made to public servants would not pass muster under the PCA.

Further, section 11 of the PCA deals with scenarios where the public servant receives any valuable thing (without consideration, or for a consideration, which he or she knows to be inadequate), from any person whom he or she knows to have been, or to be, or to be likely to be concerned in any proceedings or business transacted or to be transacted by such public servant or having any connection with the official functions of himself (or herself or of any public servant to whom he or she is subordinate, or from any person whom he or she knows to be interested in or related to the person so concerned). Such an offence would be punishable with imprisonment for a term that shall not be less than six months but may extend to five years, along with a fine.

In addition, in terms of section 13 of the PCA, any public servant who habitually accepts gratification or any valuable thing without consideration as set out above, or who dishonestly or fraudulently misappropriates any property entrusted to him or her or under his or her control as a public servant or allows any other person to do so, or who by corrupt or illegal means, or by abusing his or her position as a public servant obtains for himself, herself or any other person any valuable thing or pecuniary advantage, or who while holding office as a public servant and without any public interest obtains for any person any valuable thing or pecuniary advantage, or who, or any person on his behalf, is in possession or has at any time during the period of his or her office been in possession of pecuniary resources or property disproportionate to his or her known sources of income for which he or she cannot satisfactorily account, would be liable for criminal misconduct.

Sections 8 and 9 of the PCA also criminalise acts of persons, who although not public servants themselves, accept, or agree to accept or attempt to obtain any gratification from another person as a motive or reward to influence a public servant in the discharge of his functions. It is not necessary for the public servant to have been identified or for the gratification to have been passed on to the public servant in order to constitute an offence under sections 8 or 9.

The PCA Amendment Bill was tabled in 2013 to amend several provisions of the PCA. The PCA Amendment Bill seeks to, inter alia, widen the scope of some of the offences punishable under the PCA and make the penal provisions more stringent, make it an offence for a commercial organisation to bribe a public servant and prescribe vicarious liability provisions for offences by companies, as well as provide for the prosecution of directors, managers, secretaries and other officers of companies.

24 Prohibitions

Does the law prohibit both the paying and receiving of a bribe?

Both the payment and the receiving of bribes are prohibited by law.

Section 12 of the PCA punishes the payer of the illegal gratification as an 'abettor' in respect of offences under sections 7 and 11 of the PCA. The PCA Amendment Bill seeks to introduce the act of bribing a public official as a separate offence. Currently, the offence of abetment under section 12 is an independent, distinct and substantive offence. In this regard it is important to note that the mens rea or mental state of the bribe giver is important, and it is irrelevant that the public servant had no authority to commit the particular offence, or refused to be tempted. The mere offer with the object to offer gratification is considered

Update and trends

Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015
The Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015, levies a tax on any undisclosed asset or income held abroad by a person who is ordinarily resident in India and penalises the non-disclosure or inaccurate disclosure of foreign income and assets, wilful attempt to evade tax and failure to furnish returns of abetment with a fine or imprisonment ranging from three months to 10 years, or both. For any offence by a company under this Act, every person responsible to the company is liable for punishment; unless it can be proven that the offence was committed without his or her knowledge. However, it is pertinent to mention that the Act provided for a short period of leniency before it came into force, during which the citizens could declare their undisclosed foreign assets by paying tax and penalties and avoid the more stringent liability as prescribed under the Act.

Demonetisation
On 8 November 2016, the government, with the aim of eliminating fake currency and imposing penalties upon persons holding unaccounted for cash, announced its decision to demonetise Indian currency notes of 500 rupee and 1,000 rupee denominations. This move has been carried out as a first step towards wiping out black money and regulating illegal financial transactions. The impact of this move, however, remains to be seen.

sufficient to aggravate the offence, even if no money or other compensation is produced (*Padam Sen v State*, AIR 1959 Allahabad 707). It is also pertinent to note that whether or not the offence is committed in consequence of the abetment is irrelevant. A bribe offered to avoid harassment is not to be considered as sufficient to reduce the sentence.

Sections 107 to 116 of the IPC provide what constitutes the offence of abetment, the key element of which is described as being 'instigation'. While on the one hand the law requires an element of mens rea, and the mere association of a person with an accused, in the absence of any further material or instigation, is normally not sufficient to continue abetment, an omission can qualify as an abetment if the omission itself is considered illegal. It is also significant to note that abetment of an abetment is also an offence under section 108 of the IPC.

Section 20(2) of the PCA provides that in the case of an offence under section 12 of the PCA, if it is proved that any gratification was given or offered to be given or attempted to be given, it shall be presumed that such person gave or attempted to give such gratification for the purposes mentioned in section 7 of the PCA. Therefore, in a trial under section 12 of the PCA, if it can be proved that gratification was given, attempted to be given or offered, there would be a presumption that such gratification was given, attempted to be given or offered for the purposes as set out in section 7 of the PCA. This section therefore alters the normal rule of criminal law that the prosecution has to prove its case beyond reasonable doubt. The accused can shift the burden of proof to the prosecution by showing a preponderance of probability in his or her favour. The court is empowered to decline to draw such a presumption if the gratification offered, in its opinion, is extremely trivial, which would negate the drawing of such an inference. This was recently reiterated by the Supreme Court, which held that if the circumstances provided in the PCA are satisfied, the burden of proof shifts to the accused to prove that he or she is not guilty (*Meghmala v G Narasimha Reddy* (2010) 8 SCC 383). The Supreme Court has reiterated that the burden to displace the statutory presumption rests with the accused by bringing on record evidence, either direct or circumstantial to establish with reasonable probability that the money was accepted by him other than as a motive or reward as referred to in section 7 of the PCA (*State of Punjab v Madan Mohan Lal Verma* AIR 2013 SC3368).

The Supreme Court has interpreted section 20 of the PCA to hold that the law gives absolute discretion to the court to presume the existence of any fact that it thinks likely to have happened. In that process the court may have regard to the common course of natural events, human conduct or public or private business in relation to the facts of the particular case (*State of Andhra Pradesh v C Uma Maheshwara Rao*, AIR 2004 Supreme Court 2042). A challenge to the constitutional validity of section 20 was rejected by the Supreme Court in *Veeraswami v Union of India* (1991) 3 Supreme Court Cases 655.

Although the PCA does not expressly provide for the punishment of persons abetting 'criminal misconduct' by a public servant, the Supreme Court of India has held that the PCA applies to any person who has aided and abetted a public servant in possessing property that cannot be satisfactorily accounted for by him or her, is disproportionate with his or her lawful income and in respect of which the public servant is said to have committed criminal misconduct (*Nallammal and Another v State* (represented by the inspector of police) (1999) 6 Supreme Court Cases 559).

25 Public officials

How does your law define a public official and does that definition include employees of state-owned or state-controlled companies?

As discussed in response to question 1, the PCA provides a wide definition of 'public servant', which includes persons in the service or pay of a corporation established by or under a central, provincial or state act, or an authority or a body owned, controlled or aided by the government or a government company. 'Government company' here means any company in which at least 51 per cent of the paid-up share capital is held by the central government or any state governments (or both), as well as the subsidiaries of such a company.

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

The above inclusive definition of 'public servant' should be seen in the context of the role played by government-owned companies, commonly known as public sector units, or PSUs, in the Indian economy. Until India adopted progressive privatisation as a policy in 1991, several key sectors of its economy were dominated or monopolised by PSUs. Various decisions were taken at the PSU level rather than by the government. The prevention of corruption among PSUs and their employees was therefore a critical concern.

26 Public official participation in commercial activities

Can a public official participate in commercial activities while serving as a public official?

Participation by public servants in commercial activities while in service is regulated by the terms of the Service Rules applicable to them. For instance, in the case of officials of the central government bound by the Central Civil Services (Conduct) Rules 1964 and the All India Services (Conduct) Rules 1968, there is an express prohibition on public servants engaging in any trade, business, or other employment, holding an elective office, canvassing for a candidate for an elective office or in support of any business, participating, except in discharge of his or her official duties, in the registration, promotion or management of any bank, company or cooperative society for commercial purposes, and participating in any sponsored private media programme. Prior approval of the central government is required for undertaking any such activity. These Service Rules do, however, carve out limited exceptions with respect to participation in honorary social or charitable work, work of literary, artistic or scientific character, amateur sports or in the formation of associations for these purposes.

These Service Rules also prohibit speculation by public servants in any stock, share or other investments. This prohibition does not extend to occasional investments in securities made through registered brokers in accordance with applicable laws.

Section 168 of the IPC makes it a criminal offence for a public servant to engage in any kind of trade, business, profession or occupation if he or she is prohibited from doing so by virtue of being a public servant.

27 Travel and entertainment

Describe any restrictions on providing domestic officials with gifts, travel expenses, meals or entertainment. Do the restrictions apply to both the providing and receiving of such benefits?

As already described, the provisions of the PCA and the Service Rules specifically prohibit the provision and receipt of gifts and other non-pecuniary benefits including free transport, boarding and hospitality

from persons other than close relatives or personal friends and in connection with the official duties of the public servant.

In this regard it is interesting to note that the Service Rules make an exception for the receipt by officials of 'casual meals' or 'casual gifts' or gifts worth up to a specified de minimis amount, however, the PCA does not provide for such an exception. Accordingly, in a prosecution for abetment under the PCA for providing such benefits to a public servant, courts would apply an intention or mens rea test and the monetary worth of the benefit provided, even if insignificant, would not weigh in favour of the alleged abettor.

Further, companies typically have internal policies governing offering of gifts and non-pecuniary benefits to public servants.

28 Gifts and gratuities

Are certain types of gifts and gratuities permissible under your domestic bribery laws and, if so, what types?

See question 27.

29 Private commercial bribery

Does your country also prohibit private commercial bribery?

In India, there is no specific law that covers 'private commercial bribery'. Laws like the PCA are only confined to bribery by 'public servants'. However, as stated above, companies typically prohibit such bribes through internal codes of conduct. Additionally, private commercial bribery may constitute 'fraud' under the 2013 Act, and if such payments are concealed as legitimate expenses, this may result in contravention of provisions relating to maintenance of books and records.

30 Penalties and enforcement

What are the sanctions for individuals and companies violating the domestic bribery rules?

Both companies and individuals can be held liable for violation of the PCA.

Offences by public servants or abettors under sections 7 to 12 of the PCA are punishable by imprisonment, the term of which may vary from six months to five years. Criminal misconduct by public servants is punishable under section 13 of the PCA by imprisonment, the term of which may vary from one year to seven years. Further, section 14 of the PCA provides for the punishment of habitual offenders of offences punishable under sections 8, 9 and 12 of the PCA by imprisonment, the term of which may vary from two to seven years. In addition, the PCA provides for the imposition of a fine in respect of all offences of which no limits are prescribed.

The PCA does not have a provision that specifically sets out what would happen in the case where offences are committed by a company. Certain pieces of legislation contain a specific provision relating to 'offences by a company'. Therefore, in the absence of such a specific provision in the PCA, the normal rule in relation to the criminal liability of companies (as set out below) is applicable following rulings of the Supreme Court. The Supreme Court of India, relying on its earlier decision in *Standard Chartered v Directorate of Enforcement*, AIR 2005 Supreme Court 2622, held that a corporation can be prosecuted for an offence under the PCA and, while the company cannot be imprisoned, it can be fined and convicted of an offence under the PCA (*CBI v Blue Sky Tie Up Private Limited*, Crim Appeal No. 950/2004). With regard to the liability of senior management and directors of a company for offences committed by the company, the Supreme Court of India, in *Sunil Bharti Mittal v Central Bureau of Investigation*, held that there is no vicarious criminal liability unless a statute specifically provides so,

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and that accordingly, the acts of a company cannot be attributed and imputed to persons (including directors) merely on the premise that such persons represent the 'directing mind and will' of the company. The Court also stated that vicarious liability of the directors for criminal acts of a company cannot be imputed automatically, and an individual can be made accused (along with the company) only if there is sufficient evidence of his or her active role coupled with criminal intent. Accordingly, it is arguable that directors who had the knowledge of an offence and neglected to take steps to prevent its commission, could be held liable under the PCA.

31 Facilitating payments

Have the domestic bribery laws been enforced with respect to facilitating or 'grease' payments?

Payments made to get even lawful things done promptly are covered by section 7 of the PCA and such laws have been enforced with respect to facilitation or grease payments. The Supreme Court of India has held 'we have little hesitation in taking the view that 'speed money' is the key to getting lawful things done in good time and 'operation signature' be it on a gate pass or a proforma, 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 98 9). Thus 'facilitation payments' fall foul of the PCA.

32 Recent decisions and investigations

Identify and summarise recent landmark decisions and investigations involving domestic bribery laws, including any investigations or decisions involving foreign companies.

A recent high-profile case involved an investigation into a defence deal for purchase of helicopters from AgustaWestland. It has been alleged that officials of the Indian Air Force (including its former chief, Air Chief Marshall S P Tyagi) received kickbacks from the deal. Investigations have also led to certain high-profile politicians being named in connection with this case. Tyagi and certain associates were arrested in December 2016 by the CBI in connection with the allegations in this case.

Another sector that has been under the scanner recently has been the banking sector. The CBI also recently arrested the former chairman and managing director of the United Bank of India (a public sector bank), for having obtained amounts for herself or a private firm owned by her husband and son, in return for the bank providing credit facilities to certain borrowers.

Indonesia

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1 International anti-corruption conventions

To which international anti-corruption conventions is your country a signatory?

Indonesia is a signatory to the United Nations Convention Against Corruption 2003 (UNCAC). The convention was signed on 31 October 2003 and ratified by the Indonesian parliament, in Law No. 7 of 2006 regarding Ratification of UNCAC on 18 April 2006.

Other than UNCAC, Indonesia is also a signatory to the United Nations Convention against Transnational Organized Crime, 2000 (UNTOC). This convention was ratified by the Indonesian parliament in 2009 in Law No. 5 of 2009 regarding Ratification of UNTOC, which was supplemented by Law No. 14 of 2009 on the Ratification of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime; and Law No. 15 of 2009 on the Ratification of the Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime.

With regard to anti-corruption, Indonesia has mutual cooperation arrangements with several neighbouring countries, such as:

- South Korea, via a 2006 Memorandum of Understanding (MoU) with the Korean Independent Commission Against Corruption on Mutual Cooperation on Combating Corruption;
- People's Republic of China, via an MoU with its Ministry of Supervision;
- Vietnam, via an MoU on Cooperation with its Government Inspectorate; and
- India, via a 2013 MoU with its Central Vigilance Commission for International Cooperation on Combating Corruption.

2 Foreign and domestic bribery laws

Identify and describe your national laws and regulations prohibiting bribery of foreign public officials (foreign bribery laws) and domestic public officials (domestic bribery laws).

Indonesia has several relevant anti-corruption laws and regulations, such as:

- Law No. 11 of 1980 on Bribery (Anti-Bribery Law);
- Law No. 28 of 1999 on State Management that is Clean and Free from Corruption, Collusion and Nepotism (Good Governance Law);
- Law No. 31 of 1999 on Corruption Eradication (last amended by Law No. 20 of 2001) (Anti-Corruption Law);
- Law No. 30 of 2002 on the Corruption Eradication Commission (the KPK);
- Law No. 46 of 2009 on the Corruption Court;
- Law No. 8 of 2010 on the Prevention and Eradication of Money Laundering; and
- other regulations and codes of conduct applicable to state apparatus, government officials or civil servants that prohibit the receiving or requesting of gifts or payment for their personal benefit.

Nowadays, prosecutors tend to rely on the Anti-Corruption Law when dealing with bribery, even though the Anti-Bribery Law has not been annulled. Under the Anti-Corruption Law, any person (including a person outside Indonesia) who bribes or facilitates the corruption of an Indonesian official may be guilty of corruption. Further, Indonesian civil servants who are found to accept bribes (including outside Indonesia) for projects related to or in Indonesia may be deemed to have committed an offence. To the extent that a person outside of Indonesia was suspected of breaking the Anti-Corruption Law, the KPK would then rely on any mutual legal assistance agreements executed between Indonesia and the relevant country.

The president recently issued a regulation to establish a special task force to eradicate illegal payments or bribery within governmental bodies. The main duties of the special task force include carrying out on-the-spot arrest, providing recommendations to the relevant ministries or governmental agencies on how to impose sanctions on the perpetrators in accordance with the laws and regulations and giving recommendations on the establishment of a special task force unit in each governmental agency.

Indonesian law does not expressly regulate the bribery of non-Indonesian or foreign public officials.

Foreign bribery

3 Legal framework

Describe the elements of the law prohibiting bribery of a foreign public official.

Unlike the US or UK, Indonesia does not have and has not adopted any foreign corruption or bribery practice legislation. The anti-corruption and anti-bribery regulations in Indonesia do not expressly regulate the bribery of a foreign public official. A foreign public official does not fall into any of the categories of 'state official' as defined in the Anti-Corruption Law.

4 Definition of a foreign public official

How does your law define a foreign public official?

Indonesian anti-corruption laws and regulations do not contain a definition of a foreign public official. These laws and regulations only define Indonesian public officials (as discussed further below).

5 Travel and entertainment restrictions

To what extent do your anti-bribery laws restrict providing foreign officials with gifts, travel expenses, meals or entertainment?

There is no express restriction under Indonesian anti-corruption laws and regulations on providing foreign officials with gifts, travel expenses, meals or entertainment. Indonesian laws and regulations only set out restrictions in relation to local public officials.

6 Facilitating payments

Do the laws and regulations permit facilitating or 'grease' payments?

Indonesian laws and regulations do not permit facilitation or 'grease' payments to domestic officials. The government has put serious effort into reducing the incidence of facilitation payments and other similar illegal payments by issuing the presidential regulation as referred to in question 2.

A special task force comprising several ministries and a public prosecutor has been established to oversee the matter and to assist each governmental agency in having its own special task force unit. However, the law has not established any specific prohibitions with regard to foreign public officials.

7 Payments through intermediaries or third parties

In what circumstances do the laws prohibit payments through intermediaries or third parties to foreign public officials?

There are no regulations that specifically prohibit or penalise payments from intermediaries to foreign public officials. The Anti-Corruption Law only recognises an offence carried out by a third party that attempts to assist or conspire to commit a corruption offence with local public officials.

8 Individual and corporate liability

Can both individuals and companies be held liable for bribery of a foreign official?

Neither individuals nor companies can be held liable for bribery of a foreign public official.

9 Successor liability

Can a successor entity be held liable for bribery of foreign officials by the target entity that occurred prior to the merger or acquisition?

The Anti-Corruption Law does not expressly regulate the bribery of foreign officials, as it generally targets acts of corruption committed by Indonesian public officials only.

However, the Anti-Corruption Law does provide that if an act of corruption is committed by or on behalf of a corporation, criminal sanctions may be imposed on that corporation or its board of management. Therefore, if a merger or an acquisition involves a corporation that has committed an act of bribery, a successor entity may be investigated in relation to the act of bribery committed by its predecessor. If it is determined the successor was involved in this act, the successor may be held liable.

10 Civil and criminal enforcement

Is there civil and criminal enforcement of your country's foreign bribery laws?

Indonesia does not have enforcement of any foreign bribery laws or regulations.

11 Agency enforcement

What government agencies enforce the foreign bribery laws and regulations?

As Indonesia does not have any foreign bribery laws or regulations, the KPK does not have any jurisdiction in relation to bribery of foreign officials.

12 Leniency

Is there a mechanism for companies to disclose violations in exchange for lesser penalties?

Indonesian Anti-Bribery Law and the Anti-Corruption Law do not expressly allow lesser penalties for companies that voluntarily disclose violations. Such companies would remain subject to the full investigation and penalties under the Anti-Bribery Law and the Anti-Corruption Law.

However, Indonesian courts may exercise a general discretion to consider mitigating factors, such as cooperation with relevant government agencies, when determining penalties.

13 Dispute resolution

Can enforcement matters be resolved through plea agreements, settlement agreements, prosecutorial discretion or similar means without a trial?

Indonesian laws and regulations do not expressly allow any formal plea agreements, settlement agreements or prosecutorial discretion as a means to avoid trial. All sanctions must be imposed following a full trial.

14 Patterns in enforcement

Describe any recent shifts in the patterns of enforcement of the foreign bribery rules.

As far as we are aware, there are no current plans to introduce any foreign bribery rules in Indonesia.

15 Prosecution of foreign companies

In what circumstances can foreign companies be prosecuted for foreign bribery?

Foreign companies cannot be prosecuted in Indonesia for foreign bribery. A company may only be prosecuted in Indonesia if it violates the Anti-Corruption Law or the Anti-Bribery Law in relation to domestic officials.

16 Sanctions

What are the sanctions for individuals and companies violating the foreign bribery rules?

As Indonesia does not have regulations that cover bribery of foreign officials, there are no sanctions under the Indonesian laws and regulations for the violation of foreign bribery rules.

17 Recent decisions and investigations

Identify and summarise recent landmark decisions or investigations involving foreign bribery.

We are not aware of any investigations carried out by the KPK that involved the bribery of foreign officials or any Indonesian court cases that related to the bribery of foreign officials.

Financial record keeping

18 Laws and regulations

What legal rules require accurate corporate books and records, effective internal company controls, periodic financial statements or external auditing?

Companies in Indonesia (domestic or foreign investment companies) are required to maintain their financial records as set out under the following regulations:

- Law No. 8 of 1997 on Corporate Documents (Corporate Documents Law);
- Law No. 16 of 2000 on Tax (and its amendment) (Tax Law); and
- Law No. 40 of 2007 on Limited Liability Companies (Company Law).

In essence, the laws require a company to prepare and maintain various records (including financial reports). The records must:

- provide information in respect of the company's transactions;
- be supported with relevant supporting documents as evidence of the relevant transactions;
- be signed by a director of the company;
- be prepared in accordance with financial accounting standards;
- be prepared within six months of the end of the relevant fiscal year; and
- be maintained and kept for a period of at least 10 years after the end of the relevant fiscal year.

The Corporate Document Law provides that any corporation must prepare records that include an annual report, financial report and daily transaction journal.

The Tax Law provides that any company that carries out any business activity must maintain records that provide the information necessary to calculate its taxable income. The records (including corporate books and records) must be prepared truthfully and completely.

Under the Company Law, the board of directors must prepare and maintain annual accounts of the company, including a financial statement and other relevant records. The financial statement must be prepared in accordance with the relevant Financial Accounting Standard and for certain types of companies, the company financial records must be audited by a registered public accountant.

19 Disclosure of violations or irregularities

To what extent must companies disclose violations of anti-bribery laws or associated accounting irregularities?

The relevant regulations do not contain any express obligations on a company to disclose violations of anti-bribery laws or associated accounting irregularities.

External auditors have an obligation to disclose anything contained in the audit report, including any irregular payments (article 25(2)b in conjunction with article 30(1)j of Law No. 5 of 2011 on Public Accountants, to be read with article 110.2 of the Accountant's Professional Code of Conduct, Indonesian Accountants Institute 2008).

However, under the Indonesian Criminal Procedures Law, in certain criminal cases (ie, corruption), the investigator (the Attorney General's Office or KPK) is authorised to search and confiscate a company's financial records, including supporting documents.

In relation to state-owned companies, the *badan pemeriksa keuangan* (state auditor) may investigate a state-owned company's financial records to obtain information on whether there are irregular payments that might have caused losses to the state.

20 Prosecution under financial record keeping legislation

Are such laws used to prosecute domestic or foreign bribery?

Legislation in respect of financial reporting as mentioned above is not generally used to prosecute either domestic or foreign bribery. Any act of bribery generally falls within the remit of the Anti-Corruption Law.

If there is an allegation that a company is involved in corruption, any misleading information or incorrect record on the company's transactions provided in its financial record may lead to further investigation or could be used as evidence by the investigator.

The financial report is usually used as supporting evidence in an anti-corruption case.

21 Sanctions for accounting violations

What are the sanctions for violations of the accounting rules associated with the payment of bribes?

There are no specific sanctions for violations of the accounting rules associated with the payment of bribes. If the bribes involve a local public official, they would be subject to the Anti-Corruption Law.

22 Tax-deductibility of domestic or foreign bribes

Do your country's tax laws prohibit the deductibility of domestic or foreign bribes?

As bribery is prohibited under prevailing laws and regulations, the tax law does not make provision for any deductibility for bribery.

However, it is technically possible for a company that engages in bribery to treat such bribes as a 'cost' that can be accrued in its records and may be used to reduce its tax liability.

However, under the Public Accountants Law, a public accountant who manipulates or assists in manipulating data or provides misleading data, will be subject to administrative or criminal sanctions, or both (fines or imprisonment).

Domestic bribery

23 Legal framework

Describe the individual elements of the law prohibiting bribery of a domestic public official.

Under the Anti-Bribery Law and Anti-Corruption Law the main elements of bribery of a domestic public official are:

- giving or promising something to a public official or state apparatus; with the aim of persuading the official to do something or not do something which would then violate his or her obligations; or because of or in relation to something in violation of his or her obligation, whether or not it is done because of his or her position;
- providing a gratuity to a civil servant or public official in relation to his or her position and contrary to his or her official duties and obligations;
- a gratuity would include the giving of money, goods, discounts, commissions, non-interest-bearing loans, travel tickets, accommodation facilities, free medical care and other facilities, whether these are given in Indonesia or abroad, by electronic or non-electronic means;
- any form of illegal act of making a profit for an official, another person or a corporation, which can possibly incur losses to state finances or the economy; or
- under a Government Regulation regarding Rules of Public Officer Discipline (Disciplinary Regulation), a public official is prohibited from accepting any gift in any form from anyone and the giving of this gift by the person is known or should have been known to be related to or with the civil servant's position or duty.

The Anti-Corruption Law provides that any gift given to a public official in relation to his or her duties and responsibilities that is not disclosed to the KPK by the relevant official will be deemed to be bribery. The KPK has the discretion to allow an official to receive a gift provided that the official discloses it (after the KPK declares such gift is not a bribe).

24 Prohibitions

Does the law prohibit both the paying and receiving of a bribe?

Yes, the Anti-Bribery Law and Anti-Corruption Law prohibit the acts of paying and receiving of a bribe.

25 Public officials

How does your law define a public official and does that definition include employees of state-owned or state-controlled companies?

'Public official' or 'civil servant' has several definitions under the laws and regulations. The definitions can overlap and the usage would be interpreted on a case-by-case basis.

The Civil Servants Law defines civil servants as Indonesian citizens who are hired to fulfil a duty of an office of the state or are given other stately duties and are salaried in accordance with the prevailing laws and regulations. This comprises central and regional government officials, members of the armed forces and members of the police.

The Indonesian Criminal Code defines civil servants as all persons who have been elected or who, by reason other than as a result of election, are members of a legislative body, a government body or a body of the peoples' representatives formed by or on behalf of the government. The Criminal Code also states that judges, chairpersons and members of religious councils, and any person who joins the armed forces will also be viewed as a civil servant.

The Anti-Corruption Law defines a civil servant as:

- a civil servant as meant in the Civil Servants Law;
- a civil servant as meant in the Indonesian Criminal Code;
- a person who receives a salary or wage from the finances of the state or the regions;
- a person who receives a salary or wage from a corporation that receives support from the finances of the state or the regions (ie, a state-owned enterprise); or
- a person who receives a salary or wage from another corporation that uses capital or facilities from the state or the public.

Update and trends

Special task force on eradication of illegal payments

On 20 October 2016, Presidential Decree No. 87 of 2016 concerning the Task Force on Eradication of Illegal Payments was signed. This regulation was issued in consideration of the rampant practice of extortion that does great harm to society, the nation and the state. According to this regulation, the task force (the Task Force) has the task of combatting illegal extortion effectively and efficiently to optimise the utilisation of government personnel, work units and infrastructure, in the ministries, agencies and at the local government level.

The Task Force is responsible for, among other things, establishing a framework for prevention and eradication of illegal payments, collecting data and information from ministries or government agencies and other parties related to the usage of information technology in relation to illegal payments, coordinating, planning and carrying out operations in respect of combatting illegal payments by catching the perpetrators on the spot, providing recommendations to the ministries, agencies and heads of local governments to impose sanctions on the perpetrators in accordance with the provisions of the laws and regulations, etc.

To ensure the operation of the Task Force, the organisational structure of the Task Force consists of several governmental agencies, such as the Coordinating Minister for Politics, Law and Security, the inspector general of police, the Ministry of Home Affairs, attorney general, the Centre for Transaction Reports and Analysis (PPATK), the ombudsman, the State Intelligence Agency and military police.

The regulation further encourages each governmental agency to form its own unit for eradication of illegal payments. The effectiveness of the Task Force remains to be seen. As the Task Force reports to the president, it is hoped that it will do its best to achieve its objectives of eradicating illegal payments, including by working closely with the KPK, during the president's term.

The KPK has announced its points of focus for the 2017 framework. The first point concerns the field of national food supply, including exports and imports of rice and livestock. The second point concerns the forestry and natural resources business sectors. Another key point of focus that the KPK is vigorously building up will be corporate crime and environmental issues. Even though the Anti-Corruption Law recognises such matters, implementing regulations and enforcement practices against the companies must be developed. This notion has arisen from environmental pollution crimes committed by several companies in Indonesia. The KPK noticed that there were companies that had been found guilty, but no apparent enforcement was carried out in respect of the relevant final and binding decisions. The KPK's suspicions were thus raised that possible corrupt practices were being carried out in the field.

Employees of a state-owned or state-controlled company would be deemed to be civil servants as they receive a salary or wage from a corporation that receives support from the state or regional finances or uses capital or facilities from the state or the public.

Further, the Good Governance Law defines a member of the 'state apparatus' as an official who performs the duties of government (executive), legislature or judiciary, and any other official who has duties in relation to state operations (such as ambassadors, governors, regents, etc).

26 Public official participation in commercial activities

Can a public official participate in commercial activities while serving as a public official?

In the absence of a permit from its supervisor, generally a public official may not participate in commercial activities while serving as a public official.

In addition to the above, under the Disciplinary Regulation, public officials are prohibited from working in foreign companies, foreign consultancy companies or foreign non-governmental organisations. Public officials are also prohibited from engaging in activities together with their superiors, peers, subordinates, or other persons inside and outside their work environment for the purpose of personal, group, or other benefits, directly or indirectly detrimental to the country.

27 Travel and entertainment

Describe any restrictions on providing domestic officials with gifts, travel expenses, meals or entertainment. Do the restrictions apply to both the providing and receiving of such benefits?

The Anti-Corruption Law recognises the definition of 'gratuity' as a gift to civil servants or state apparatus in the widest sense of the term, including the giving of money, goods, discounts, commission, non-interest-bearing loans, travel tickets, accommodation facilities, free medical care and other facilities.

The restriction applies to both the providing and receiving of such benefits.

28 Gifts and gratuities

Are certain types of gifts and gratuities permissible under your domestic bribery laws and, if so, what types?

Gifts that do not have any relation to the civil servant's or member of state apparatus' duties and responsibilities are acceptable, provided that the civil servant obtains permission from the KPK to accept or retain the gift. Even birthday or wedding gifts given to civil servants must be reported to the KPK.

29 Private commercial bribery

Does your country also prohibit private commercial bribery?

There is no formal regulation for private commercial bribery under Indonesian law. The measures covered under the Anti-Corruption Law would only apply to private commercial bribery where there is a loss incurred by state finances or the economy.

30 Penalties and enforcement

What are the sanctions for individuals and companies violating the domestic bribery rules?

Where corruption is found under the Anti-Corruption Law, the court may order: fines of between 50 million rupiah and 1 billion rupiah, and imprisonment for up to 20 years or life imprisonment; under certain special circumstances, life imprisonment or the death penalty can be imposed.

Corporate bodies (eg, companies, unincorporated associations, partnerships, etc) may also be prosecuted for corruption offences. In the event that the corruption is committed by or on behalf of a corporation, the prosecution and punishment may be made against the corporation or its management. The primary punishment that can be pronounced against a corporation is only fines, but the maximum punishment is increased by one-third for corporations.

Based on the elucidation of the Anti-Corruption Law, 'management' means the organ of a corporation that performs the management of the corporation in accordance with its articles of association, including those who actually have authority and participate in making the corporation's policies or decisions that led to the relevant alleged criminal actions. This could mean the senior management of the company, members of the board of directors or board of commissioners or (in some rare cases) the company's shareholders. In reality, the definition of 'management' will be treated on a case-by-case basis, based on the relevant facts and the specific corporate governance and decision-making process of the relevant company. However, typically, 'management' would be limited to the company's senior managers and its board of directors.

There are also additional penalties as set out under the Anti-Corruption Law, namely:

- confiscation of tangible or intangible moveable goods or immoveable goods that are used for or obtained from corruption, including a company owned by the defendant in which the corruption is committed, and also goods that replace the relevant goods as mentioned above;
- payment of compensation, the maximum amount of which is the same as for any property gained from corruption;
- permanent or temporary closure of the company for a maximum period of one year; and

- revocation of all or part of certain rights or nullification of all or part of any benefit that has been or may be given by the government to the defendant.

31 Facilitating payments

Have the domestic bribery laws been enforced with respect to facilitating or 'grease' payments?

Although the Anti-Corruption Law does not specifically cover facilitation payments, it contains wide elements that may cover facilitation payments as a form of offence.

There are a number of cases where the KPK has investigated and prosecuted bribery cases that involved facilitation and or 'grease' payments.

The Anti-Corruption Law essentially penalises the act of giving or promising something to a civil servant or a state apparatus: with the aim of persuading him or her to do something or to refrain from doing something that would violate his obligations, or because of or in relation to something in violation of his or her obligations, whether or not it is done because of his position; and providing a 'gratuity' to a civil servant or public official in relation to his or her position in return for a favour.

32 Recent decisions and investigations

Identify and summarise recent landmark decisions and investigations involving domestic bribery laws, including any investigations or decisions involving foreign companies.

Recent decisions of the court demonstrate that the government is showing its commitment to fighting corruption and becoming more intolerant of it. Such developments offer the promise of greater certainty, fairness and transparency in legal disputes involving corruption in Indonesia. The KPK is also actively seeking to combat corruption. This commitment is underscored by the identities of the officials who have been charged, which range from state prosecutors, parliament members, regional government heads to even the chairman of the Constitutional Court.

In a recent statement by the president, in 2015, Indonesia was ranked 88th in the Corruption Perception Index. As of the end of 2016, it is recorded that there were 122 members of the House of Representatives, 25 former ministers or chairmen of governmental agencies, four former ambassadors, 17 former governors, 51 mayors, 130 governmental officers and 14 former judges found guilty of corruption and sentenced to prison. The Indonesian government has pledged not to stop combatting corruption in every sector.

Last year, the Indonesian Military Court sentenced to life imprisonment a brigadier general of the Indonesian National Army, Teddy Hernayadi. The officer was proven to have embezzled US$12 million for procurement of weapons for the army. This is the first time that the Military Court gave a life imprisonment sentence and the third time an Indonesian court sentenced a public official to life imprisonment after the (former) chief justices of the Constitutional Court in 2015, Akil Mochtar and Andrian Wowuruntu, for a corruption case that involved one of the biggest state-owned banks in Indonesia several years ago. The Coordinating Ministry for Politics, Law and Human Rights supports the court's action and believes that the 'shock therapy' will help the military to reform.

Former Chairman of the Regional House of Representatives, Irman Gusman, is being prosecuted for bribery of 100 million rupiah. The allegation is that Irman received bribes from a director of a local company, CV Semesta Berjaya, because of his assistance that enabled the company to receive a quota of imported sugar from Bulog (the government logistics body) and distribute the sugar in West Sumatra. Irman is alleged to have used his influence with the chair of Bulog, leading to being given a particular quota to the said company. The case is ongoing.

The KPK named Eddy Sindoro, a former director of Lippo Group, a criminal fugitive in relation to alleged corruption involving a court registrar of the Supreme Court to 'manage' and 'secure' some cases related to the affiliates of Lippo Group with the court, such as the *Across Asia Limited* case. Lippo Group is a publicly listed company that operates internationally, providing property development and management services. It is one of the largest real estate development companies in Indonesia run by the Riady family. The examination of the case at the court is ongoing.

The Jakarta Police have also named three officials of the Ministry of Transportation as suspects in an investigation into the alleged extortion of illegal fees for permits at the Directorate of Sea Transportation, following a sting operation at their offices on 11 October 2016. The three suspects are civil servants Abdul Rasyid and Endang Sudarmono, meter readers at the shipping and registration measurement unit, and Meizy, the head of the shipping and registration measurement section. The suspects are believed to have collected fees illegally to issue measurement letters and seafarer identity documents. At least six people were arrested with more than 90 million rupiah in unreported cash and 1 billion rupiah in receipts in their possession during the sting operation. The latest news on 12 October 2016 stated that the three who have not been named as suspects are still being questioned as witnesses after claims that they were forced to pay illegal fees to the suspects. The case is ongoing.

Cases that have recently developed

The KPK has named Emirsyah Satar, a former president director of the state-owned airline, PT Garuda Indonesia, a suspect in a bribery case related to procurement of aircraft and engines. The allegation is related to the purchase of about 50 aircraft and engines from Airbus SAS and Rolls-Royce Holdings Plc. This case relates to and follows up the bribery and corruption case of Rolls-Royce Plc in the United Kingdom in which the company has been found to have given bribes and kickbacks to win international aircraft engine contracts. In investigating this case, the KPK will cooperate with the UK's Serious Fraud Office and Singapore's Corrupt Practices Investigation Bureau.

The KPK has declared a Constitutional Court judge, Patrialis Akbar, who is also a former minister of Law and Human Rights, a

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suspect in a bribery case related to a judicial review of law on husbandry that was under Constitutional Court review. Patrialis had allegedly received bribes of US$20,000 and S$200,000 from other suspects who are businessmen owning livestock importing companies, to render a court decision that favored their companies. In relation to this case, the Constitutional Court has established an Honorary Board of the Constitutional Court that will investigate Patrialis on a possible breach of the ethics code, as Patrialis had allegedly provided a draft of the Constitutional Court decision in respect of the case to the other suspects. Patrialis is the second Constitutional Court judge to be arrested for bribery.

Ireland

Carina Lawlor
Matheson

1 International anti-corruption conventions

To which international anti-corruption conventions is your country a signatory?

Ireland has signed and ratified the following international anti-corruption conventions:

- the EU Convention on the Protection of the European Communities Financial Interests (and Protocols) – entered into force on 17 October 2002;
- the OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions – entered into force on 21 November 2003;
- the Council of Europe Criminal Law Convention on Corruption – entered into force on 1 February 2004;
- the Convention of the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union – entered into force on 28 September 2005;
- Additional Protocol to the Council of Europe Criminal Law Convention on Corruption – entered into force on 1 November 2005;
- the UN Convention against Transnational Organized Crime – entered into force on 17 July 2010; and
- the UN Convention against Corruption – entered into force on 9 December 2011.

Ireland signed the Council of Europe Civil Law Convention on Corruption on 4 November 1999 but has not yet ratified it.

2 Foreign and domestic bribery laws

Identify and describe your national laws and regulations prohibiting bribery of foreign public officials (foreign bribery laws) and domestic public officials (domestic bribery laws).

Anti-corruption legislation in Ireland generally prohibits bribery of both public officials and private individuals committed in Ireland and, in certain circumstances (ie, where the donor has a connection with Ireland), committed abroad. In contrast with other jurisdictions, the offences provided for under Irish legislation do not generally distinguish between the bribery of persons working in a public or private body. The only exception is the presumption of corruption, detailed below, which only applies to public officials.

Irish laws prohibiting bribery are a combination of common law and statutory law dating back to the late 19th century and are spread across a number of pieces of legislation as set out below. Draft terms for a new Criminal Justice (Corruption) Bill were published in June 2012, which, when enacted, will replace the principal pieces of anti-corruption legislation with one consolidated piece of legislation. The Criminal Justice (Corruption) Bill is on the Irish government's 2017 legislative programme.

Common law

At common law, the offences of bribery and attempted bribery are punishable by imprisonment or a fine, or both. It is an offence to offer an undue reward to, or receive an undue reward from, a public official in order to influence that person in the exercise of his or her duties in that office contrary to the rules of honesty and integrity.

The common law bribery and attempted bribery offences have not been judicially considered in recent times and prosecuting authorities mainly rely on the statutory law offences.

Statutory law

The principal statutory sources of bribery law in Ireland are:

- the Public Bodies Corrupt Practices Act 1889, as amended by the Prevention of Corruption Act 1916 and the Ethics in Public Office Act 1995 (the Public Bodies Act); and
- the Prevention of Corruption Act 1906, as amended by the Prevention of Corruption (Amendment) Act 2001 and the Prevention of Corruption (Amendment) Act 2010 (the Prevention of Corruption Act).

There is a degree of overlap between the offences under the Public Bodies Act and the Prevention of Corruption Act.

The Public Bodies Act

The principal offences under the Public Bodies Act deal with corruption in Irish public office and apply in situations where a corrupt payment is being made to, or for the benefit of, an office-holder, their special adviser, a director, or an employee of an Irish public body. In these cases, it is an offence for a person to:

- corruptly,
- give, promise or offer, solicit, receive or agree to receive,
- for himself, or for any other person,
- any gift, fee, loan, reward or advantage whatsoever as an inducement to, or reward for,
- one of the specified public officials above, doing or refraining from doing,
- anything in which the public body is concerned.

The term 'corruptly' is not defined in the Public Bodies Act.

The Prevention of Corruption Act

The Prevention of Corruption Act prohibits three offences, the first of which is corruptly accepting a gift. It is an offence for an agent or any other person to:

- corruptly,
- accept, agree to accept, or agree to obtain,
- a gift, consideration or advantage,
- for himself or any other person,
- as an inducement, reward or on account of the agent doing any act, or making any omission,
- in relation to the agent's office or position, or his principal's affairs or business.

The second offence is corruptly giving a gift. In this case, it is an offence for a person to:

- corruptly,
- give, agree to give or offer,
- a gift, consideration or advantage,
- to an agent or any other person,
- as an inducement to, or reward for, or otherwise on account of the agent doing any act, or making any omission,
- in relation to his office or his principal's affairs or business.

The third offence is making a false statement. A person will be guilty of an offence if they knowingly give to any agent, or an agent knowingly uses with intent to deceive his or her principal, any receipt, account or other document which contains any statement which is false or erroneous or defective in any way, and which to that person's knowledge is intended to mislead the principal.

A definition of 'corruptly' was introduced in 2011 as 'acting with an improper purpose personally or by influencing another person, whether by means of making a false or misleading statement, by means of withholding, concealing, altering or destroying a document or other information, or by any other means'. The phrase 'improper purpose' is not defined.

The term 'agent' is broader than the common-law understanding of agent and includes domestic and foreign nationals employed by or acting on behalf of both private and public bodies, as follows:

(i) an employee or person acting for another;
(ii) an office holder or director in a public body or any other person employed by or acting on behalf of the public administration of the Irish state;
(iii) a member of the Irish parliament or an Irish elected member of the European Parliament;
(iv) the Attorney General, the Comptroller and Auditor General, and the Director of Public Prosecutions;
(v) a judge of the Irish courts;
(vi) a member of government, or regional or national parliament of any other state;
(vii) any member of the European Parliament, the Court of Auditors of the European Communities, or the European Commission;
(viii) a public prosecutor or judge in any other state;
(ix) a judge of any court established under an international agreement to which Ireland is a party;
(x) a member of an international organisation to which Ireland is a party;
(xi) any person employed by or acting on behalf of the public administration of any state; or
(xii) any member or person employed by an international organisation to which Ireland is not a party.

The Prevention of Corruption Act also includes a discrete offence relating to corruption in office which prohibits a public official carrying out a particular act with a view to later receiving a gift, consideration or advantage for themselves or someone else. 'Public official' in this context includes only the domestic public officials set out at (ii) to (v) in the definition of 'agent' above and so does not apply to foreign public officials.

As stated above, draft legislation has been published that proposes to remove, reinstate and broaden the Prevention of Corruption Act. This is considered in more detail in 'Update and trends'.

Other legislation

The Criminal Justice (Theft and Fraud Offences) Act 2001 (the Theft and Fraud Act) enshrines in Irish law the offences of active and passive corruption as set out in the First Protocol to the EU Convention of the Protection of European Communities Financial Interests. While in many ways similar to the offences outlined above, these apply solely to active and passive corruption of officials of the European Communities or member states that damages the EU's financial interests.

The Ethics Act

The Ethics in Public Office Act 1995 (as amended) (the Ethics Act) places obligations on Irish public office holders and other senior members of the Irish public service, to report and surrender gifts and payments above €650. The Ethics Act aims to combat corruption in office by requiring public declarations of financial interests, as well as prohibiting the receipt of gifts, whether or not they are given by the donor with the intention of procuring a certain result or course of action.

Presumptions of corruption

Various presumptions of corruption arise under the Public Bodies Act, the Prevention of Corruption Act and the National Asset Management Agency Act 2009. These include where:

- a payment was made by a person, or agent of a person, who is seeking to obtain a contract from a government minister or a public body;
- an undisclosed political donation above a certain threshold is made to certain specified persons and the donor had an interest in the donee carrying out or refraining from doing any act related to their office or position;
- a public official is suspected of committing an offence under the Prevention of Corruption Act and the person who gave the gift or advantage had an interest in the public official granting or refusing a licence or authorisation, making a decision relating to the acquisition or sale of property, or exercising any function under the Planning and Development Act 2000; or
- a gift, consideration or advantage is conferred upon a person performing functions for the National Asset Management Agency (NAMA) by a person whose debts have been assumed by NAMA.

The constitutionality of the presumption of corruption was recently upheld by the Irish Court of Appeal. See further question 32.

Foreign bribery

3 Legal framework

Describe the elements of the law prohibiting bribery of a foreign public official.

Bribery of a foreign public official arises in the context of the Prevention of Corruption Act and the Theft and Fraud Act, as described above.

Bribery occurring outside of Ireland will only be prosecuted in Ireland if it is carried out by Irish persons or entities or takes place at least partially in Ireland. If an Irish person does something outside Ireland, which, if done within Ireland, would constitute a corruption offence, that person is liable as if the offence had been committed in Ireland. This provision is not reliant on an equivalent offence existing under the laws of the foreign jurisdiction and only applies to certain specified Irish persons including:

- Irish citizens;
- persons who are ordinarily resident in Ireland;
- companies registered under the Irish Companies Acts;
- any other body corporate established under Irish law; or
- certain defined public officials.

In addition, a person may be tried in Ireland for an offence under either the Public Bodies Act or the Prevention of Corruption Act if any of the acts constituting the offence were partly committed in the state and partly committed outside Ireland.

Theft and Fraud Act

The Theft and Fraud Act also contains provision for extraterritorial effect where:

- the offender is an Irish citizen or an official working for an EU institution that has its headquarters in Ireland; or
- active corruption is committed against an official who is an Irish citizen or directed against an Irish citizen who is a member of the European Commission or Parliament, the Court of Justice of the European Communities or the Court of Auditors of the European Communities.

4 Definition of a foreign public official

How does your law define a foreign public official?

Prevention of Corruption Act

The definition of foreign public official is contained within the definition of 'agent' contained in the Prevention of Corruption Act, as set out in question 2, specifically those at (vi) to (xii). In particular, (xi) refers to any other person employed by or acting on behalf of the public administration of any other state.

Theft and Fraud Act

The definition of 'official' under the Theft and Fraud Act is much broader than in the Prevention of Corruption Act and captures both 'Community officials', to include officials, contracted employees and secondees of the European Communities, and 'national officials', which is defined by reference to the definition of national official in

each individual member state of the European Communities. However, the elements of the corruption offences under the Theft and Fraud Act are narrower than those in the Prevention of Corruption Act, as set out in question 2.

Other legislation
The Public Bodies Act does not apply in respect of foreign public officials, as it is directed at the bribery of domestic public officials.

5 Travel and entertainment restrictions

To what extent do your anti-bribery laws restrict providing foreign officials with gifts, travel expenses, meals or entertainment?

The Prevention of Corruption Act and the Theft and Fraud Act do not take the value or type of gift, consideration or advantage into account when determining if an offence has been committed. Such gifts will fall within the scope of the legislation if provided 'corruptly'.

6 Facilitating payments

Do the laws and regulations permit facilitating or 'grease' payments?

A 'facilitation payment' is generally understood to be a payment made to expedite or to secure the performance of a routine governmental action. There is no distinction drawn in Irish law between facilitation payments and other types of corrupt payments. As such, a facilitation payment will be illegal if it fulfils the elements of the relevant offences.

7 Payments through intermediaries or third parties

In what circumstances do the laws prohibit payments through intermediaries or third parties to foreign public officials?

The offences under the Public Bodies Act, Prevention of Corruption Act and the Theft and Fraud Act clearly envisage the payment, or receipt, of corrupt payments through intermediaries. It is therefore immaterial whether the payment is made to an intermediary provided the payment ultimately made to a foreign or domestic public official fulfils the other elements of the relevant corruption offence.

8 Individual and corporate liability

Can both individuals and companies be held liable for bribery of a foreign official?

Statutory law
The Interpretation Act 2005 provides that in all Irish legislation, references to 'persons' include references to companies and corporate entities.

In addition, under the Prevention of Corruption Act, an officer of a company that commits an offence under that legislation will also be guilty of an offence, if the offence is proved to have been committed with the consent, connivance or approval of the officer, or is attributable to the neglect of the company's officers. However, to date, there are no recorded prosecutions of companies or their officers under Irish anti-corruption legislation.

The draft scheme of the proposed Corruption Bill contains a number of measures relating to the liability of companies for the bribery of an official and this is discussed further in 'Update and trends'.

Common law
A company can itself be found liable under common law for the criminal acts carried out by its officers and employees by way of vicarious liability. Vicarious liability deems the company liable for the acts of its employees but those acts remain the acts of the employees and not of the company. The company can also be directly liable where crimes of the company's controlling officers are viewed as those of the company. This 'identification' doctrine has been accepted by the Irish courts in a civil context, although there are no reported decisions of the Irish courts in a criminal context.

9 Successor liability

Can a successor entity be held liable for bribery of foreign officials by the target entity that occurred prior to the merger or acquisition?

Depending on the nature of the transaction, a successor entity can be held liable for a prior offence committed by the target entity of bribery of foreign officials. For instance, where the transaction is by way of a merger by share purchase, the successor entity will be liable. Where there is no merger or the acquisition is by way of asset purchase (whereby it is open to the successor entity to choose the assets of the target entity that are to be acquired), this can allow the successor entity to avoid taking on any liabilities of the target entity, such as potential or existing legal actions arising from an alleged breach of bribery laws.

10 Civil and criminal enforcement

Is there civil and criminal enforcement of your country's foreign bribery laws?

The Irish legislation set out in question 2 provides for criminal enforcement of Ireland's bribery laws as well as civil recovery. There have been no cases against Irish nationals or companies for bribing foreign public officials.

11 Agency enforcement

What government agencies enforce the foreign bribery laws and regulations?

The following bodies can investigate alleged offences under Irish bribery law, relating to both foreign and domestic public officials:

- Garda National Economic Crime Bureau (this is an office of the Irish police force);
- the Revenue Commissioners;
- the Criminal Assets Bureau; and
- the Office of the Director of Corporate Enforcement.

The prosecution of offences is carried out by the Director of Public Prosecutions (DPP).

The Standards in Public Office Commission (the SIPO Commission) is responsible for the investigation of breaches of the Ethics Act. Following an investigation, if it is of the opinion that an office holder or public servant the subject of the investigation has committed an offence, the SIPO Commission may make a report to the DPP.

12 Leniency

Is there a mechanism for companies to disclose violations in exchange for lesser penalties?

There are no specific provisions to allow companies to disclose violations of Irish bribery law in exchange for lesser penalties. Should a company cooperate with an investigation, such cooperation may be taken into account during sentencing.

13 Dispute resolution

Can enforcement matters be resolved through plea agreements, settlement agreements, prosecutorial discretion or similar means without a trial?

While cooperation with investigating authorities can be taken into account as a mitigating factor by a court during sentencing, plea bargaining with prosecutors or the court is not permitted and would be constitutionally suspect. This is because, under the Irish Constitution, justice must be administered in public and the courts have exclusive jurisdiction over sentencing matters.

The DPP has limited discretion under the Criminal Procedure Act 1967 to direct that a matter be disposed of summarily in the district court (the court of most limited jurisdiction) where the accused pleads guilty. This would result in a lower penalty being imposed.

14 Patterns in enforcement

Describe any recent shifts in the patterns of enforcement of the foreign bribery rules.

In summary, there has been no enforcement of Irish foreign bribery rules as yet. See further question 10.

15 Prosecution of foreign companies

In what circumstances can foreign companies be prosecuted for foreign bribery?

Irish bribery law does not explicitly provide for the prosecution of foreign companies for bribery outside the Irish state. Instead, the Prevention of Corruption Act is based on the concept of territoriality – acts committed outside Ireland can only be prosecuted if certain connections to Ireland can be shown, such as the offence having involved the bribery of an Irish official, or the person carrying out the bribe being an Irish citizen or company.

16 Sanctions

What are the sanctions for individuals and companies violating the foreign bribery rules?

Criminal sanctions

Prevention of Corruption Act

Offences under the Prevention of Corruption Act are triable both summarily and on indictment. A person guilty of either a corruption offence or the discrete offence of corruption in office, under the Prevention of Corruption Act, is liable to a small fine or imprisonment or both. At the upper limit, a person convicted under the Prevention of Corruption Act is liable to an unlimited fine or imprisonment for a term not exceeding 10 years or both.

An employer summarily convicted of an offence under the whistle-blower protection in the Prevention of Corruption Act can be fined up to €5,000 and imprisoned for up to 12 months. Upon conviction on indictment, an employer can be fined up to €250,000 and imprisoned for up to three years.

Theft and Fraud Act

Any person or official who is convicted on indictment of committing either active or passive corruption under the Theft and Fraud Act can be subject to an unlimited fine or imprisonment for a term of up to five years, or both.

An auditor who fails to report an indication of corruption under the Theft and Fraud Act to the Irish police will be guilty of an offence and will be liable on summary conviction to a fine of €2,500 or imprisonment to a term not exceeding 12 months.

Seizure of proceeds of crime

The DPP can obtain an order of forfeiture of a gift or consideration under the Criminal Justice Act 1994, where a judge of the Circuit Court is satisfied that the gift or consideration is corruptly given or received. An order for forfeiture is not dependent upon criminal proceedings being brought but it must be shown that, on the balance of probabilities, the gift or consideration has been corruptly received.

Under the Prevention of Corruption Act, a member of the Irish police may seize any gift or consideration that they suspect to be a gift or consideration within the meaning of the Prevention of Corruption Act. The gift or consideration can only be detained for 48 hours unless a circuit court order is obtained that extended detention is necessary to properly investigate a corruption offence. A gift or consideration that is so seized may be ultimately forfeited if a circuit court judge is satisfied that, on the balance of probabilities, the gift or consideration was given in the context of a corruption offence.

The Proceeds of Crime Acts 1996–2016 also contain wide-ranging powers for the Criminal Assets Bureau to seize the proceeds of crime. 'Proceeds of crime' are defined as any property obtained or received by or as a result of, or in connection with, the commission of an offence, and include the proceeds of corruption.

Civil

An employer may have a civil cause of action to recover damages from an employee who has committed an act of bribery and has caused loss to the business. A person who obtains a benefit by reason of a fiduciary relationship (which can include employer–employee and principal–agent relationships) may also be required to account on trust for the unauthorised profit made by him.

The European Union (Award of Public Authority Contracts) Regulations 2016 prohibit a natural or legal person from participating in the procurement procedure for public contracts where that person has been convicted of certain offences, including a corruption offence. The Office of Public Procurement has also issued guidance on the ethical requirements on those involved in the public procurement process.

Where a breach of Irish bribery law is committed by a company in connection with a project funded by the World Bank and other international financial institutions, such companies may be debarred from bidding on contracts funded by the World Bank, International Monetary Fund and other international financial institutions, and publicly named.

17 Recent decisions and investigations

Identify and summarise recent landmark decisions or investigations involving foreign bribery.

See question 10.

Financial record keeping

18 Laws and regulations

What legal rules require accurate corporate books and records, effective internal company controls, periodic financial statements or external auditing?

Accurate corporate books and records

Irish-incorporated companies are required to keep proper books of account under sections 281 to 285 of the Companies Act 2014. The books must:

- correctly record and explain the transactions of the company;
- at any time enable the assets, liabilities, financial position and profit or loss of the company to be determined with reasonable accuracy;
- enable the directors to ensure that any financial statements of the company and any director report required to be prepared under the Companies Act 2014 comply with the requirements of the Companies Act 2014 and international accounting standards; and
- enable those financial statements of the company so prepared to be audited.

A company that fails to comply with these requirements is guilty of an offence. In addition, a director of a company who fails to take all reasonable steps to secure compliance by the company with these requirements, or has by his or her own intentional act been the cause of any default by the company under any of them, may be held criminally liable.

Section 877 of the Companies Act 2014 sets out that it is an offence for an officer of a company to destroy, mutilate or falsify any book or document affecting or relating to the property or affairs of the company.

Section 10 of the Theft and Fraud Act sets out the offence of false accounting whereby a person who, with the intention of making a gain for themselves or another or of causing a loss to another, provides false information in relation to a document made or required for any accounting purpose, is guilty of an offence.

Effective internal company controls

The Companies Act 2014 contains a number of provisions relating to internal company controls. These relate to confirmation of compliance with 'relevant obligations' under company and tax law. It is also a requirement that 'large companies' have audit committees.

The Irish Stock Exchange has determined that companies on the exchange must comply with the UK Financial Reporting Council's Combined Code on Corporate Governance or explain non-compliance in their annual report.

In addition, in respect of credit institutions and insurance undertakings, the Corporate Governance Requirements for Credit Institutions 2015 and the Corporate Governance Requirements for Insurance Undertakings 2015, as issued by the Central Bank, set out the minimum statutory requirements for the governance of such institutions.

Periodic financial statements
The annual accounts of a company must be provided to its members at least 21 days before the company's annual general meeting. These consist broadly of a profit and loss account, a balance sheet, a cash flow statement, notes to financial statements and a directors' report.

External auditing
Section 380 of the Companies Act 2014 requires that Irish companies appoint an external auditor, whose duty it is to examine the company's accounts and prepare a report that accurately reflects the company's financial position. Section 387 of the Companies Act 2014 gives auditors the right to seek access to company documents and to compel information and explanations from company officers and employees.

19 Disclosure of violations or irregularities

To what extent must companies disclose violations of anti-bribery laws or associated accounting irregularities?

Reporting obligations
The Criminal Justice Act 2011 gives the Irish police increased powers to compel a person or company by court order to produce documents or evidence which relates to corruption offences.

The Criminal Justice Act 2011 also introduced a positive obligation to report to the Irish police information that a person or company knows or believes might be of material assistance in preventing the commission of certain corruption offences, to include bribery and corruption offences, or securing the arrest, prosecution or conviction of another person for such an offence.

Under the Theft and Fraud Act, auditors are required to report to the Irish police any indications of bribery of an EU public official. In addition, the Companies Act 2014 contain a requirement that auditors report to the Office of the Director of Corporate Enforcement any instances of suspected indictable offences under the Companies Acts, committed by a company, its officers or agents.

Whistle-blower protection
A provision for whistle-blower protection was inserted into the Prevention of Corruption Act in 2010. This protects individuals who report suspected violations of the Prevention of Corruption Act and prohibits an employer from penalising the reporting employee.

Additional whistle-blower protection was introduced in the Criminal Justice Act 2011 along much the same terms as those inserted in 2010 to the Prevention of Corruption Act, and applies to those offences covered by the Prevention of Corruption Act.

The Protected Disclosures Act 2014, which applies to all 'workers', including employees, contractors and trainees, provides similar protections to that under the Irish anti-corruption legislation, although the motivation for making the disclosure is irrelevant as to whether it is a 'protected' disclosure.

20 Prosecution under financial record keeping legislation

Are such laws used to prosecute domestic or foreign bribery?

Legislation related to financial record keeping is not used to prosecute domestic or foreign bribery. However, in situations where offences under the financial record keeping legislation have occurred, bribery may also have taken place and such offences could be prosecuted.

21 Sanctions for accounting violations

What are the sanctions for violations of the accounting rules associated with the payment of bribes?

There are no accounting rules associated with the payment of bribes. However, where a bribe has been given or received, an offence may have occurred under sections 281 to 285 of the Companies Act 2014, as outlined in questions 18 and 20.

A person found guilty of contravening sections 281 to 285 or section 877 of the Companies Act 2014 is liable on summary conviction to a fine not exceeding €5,000 or imprisonment to a term not exceeding 12 months, or both. Conviction on indictment can lead to a fine of up to €50,000 or imprisonment for up to five years, or both. Where the contravention of any of sections 281 to 285 fulfils any of the following conditions:

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- arose in relation to a company that was subsequently unable to pay its debts and the contravention has contributed to that inability or has resulted in substantial uncertainty as to the assets and liabilities of the company or has substantially impeded the orderly winding up of the company;
- persisted for a continuous period of three years or more; or
- involved the failure to correctly record and explain one or more transactions of the company, the aggregate value of which exceed €1 million or 10 per cent of the net assets of the company

then a person found guilty under any of those sections may be liable to a fine not exceeding €5,000 or imprisonment for up to 12 months, or both, on summary conviction. Conviction on indictment in those circumstances can lead to a fine of up to €500,000 or imprisonment for up to 10 years, or both.

A person found guilty of contravening section 10 of the Theft and Fraud Act is liable on summary conviction to a fine not exceeding €2,500 or imprisonment for a term up to 12 months, or both, and, on conviction on indictment, a fine or imprisonment for up to 10 years, or both.

22 Tax-deductibility of domestic or foreign bribes

Do your country's tax laws prohibit the deductibility of domestic or foreign bribes?

Yes. Section 83A of the Taxes Consolidation Act 1997, which deals with expenditure involving crime, provides that no deduction shall be made in computing the taxable income of a trade for any expenditure which constitutes a criminal offence. The section also prohibits an expense deduction for any payment made outside the state where the making of a corresponding payment in the state would constitute a criminal offence.

Domestic bribery

23 Legal framework

Describe the individual elements of the law prohibiting bribery of a domestic public official.

See question 2. The Public Bodies Act, the Prevention of Corruption Act, the Theft and Fraud Act and the Ethics Act all apply to the bribing of a domestic public official.

24 Prohibitions

Does the law prohibit both the paying and receiving of a bribe?

Yes. See question 2.

25 Public officials

How does your law define a public official and does that definition include employees of state-owned or state-controlled companies?

Prevention of Corruption Act
There is a non-exhaustive list of public officials set out in section 1 of the Prevention of Corruption Act. See question 2.

Public Bodies Act
The Public Bodies Act define a public official as being a person who is an office holder, director or employee of, a public body. 'Public body' itself is extensively defined as meaning any county, town or city council, any board, commissioners or other body which has power to act under any legislation relating to local government or the public health or otherwise to administer money raised by taxes.

Ethics Act
The Ethics Act, by its nature, applies only in respect of public officials. It has no single definition of public officials, but rather divides public

officials into categories, to which differing rules apply. For example, an 'office-holder' faces more stringent oversight than a 'public servant'.

An 'office-holder' under the Ethics Act generally means a minister in the Irish government and certain other members of the Irish parliament. The term 'public servant' encompasses a wide number of persons, and essentially covers all civil servants above the grade of principal officer in the civil service, as well as statutory commissioners and officers, ombudsmen and employees of state-owned and state-controlled companies.

Theft and Fraud Act

The Theft and Fraud Act defines public officials as either:

- an official of the European Community, itself defined as including an official or contracted employee of the European Communities or a secondee to the European Communities; or
- a national official, including any national official of another member state; this is generally understood as being a national official as defined by the national law of the member state in which the official resides.

26 Public official participation in commercial activities

Can a public official participate in commercial activities while serving as a public official?

Public servants and elected members of the Irish parliament may participate in commercial activities but are required to disclose the following interests under the Ethics Act:

- occupational income above a certain threshold, other than that received as an office-holder or member;
- shares;
- directorships;
- land and buildings above a certain value;
- remunerated position as a lobbyist; or
- contracts with the Irish state above a certain value.

In addition, an office-holder is required to disclose any interests of the office holder's spouse, civil partner, child, or child of a spouse or civil partner, which could materially influence the performance of the office-holder's function. Furthermore, if the office holder or a person connected to the office-holder has a material interest in the performance of a function of his office, there is a requirement to furnish a statement of the nature of the interest.

27 Travel and entertainment

Describe any restrictions on providing domestic officials with gifts, travel expenses, meals or entertainment. Do the restrictions apply to both the providing and receiving of such benefits?

Irish anti-corruption legislation does not take the type of gift, consideration or advantage into account when determining if an offence has been committed but focuses on whether the elements of the particular offence have been established, including whether the gift has been given corruptly.

28 Gifts and gratuities

Are certain types of gifts and gratuities permissible under your domestic bribery laws and, if so, what types?

A gift or gratuity that is not given 'corruptly' will fall outside the scope of the Public Bodies Act and Prevention of Corruption Act and will therefore be permissible.

In respect of disclosure of gifts by public officials, section 15 of the Ethics Act provides that gifts to office-holders that exceed €650 are deemed to be a gift given to the Irish state and must be declared by the recipient as soon as possible after receipt. The Guidelines for Office-Holders require office holders to surrender such gifts. These provisions do not apply to a gift given by a friend, relative or civil partner for personal reasons or given pursuant to another office, a capacity or position (other than that of office holder).

The SIPO Commission has also published Guidelines for Public Servants that cover a wider range of persons than 'office-holder', who would commonly be considered 'public officials'. These guidelines require that gifts in excess of €650 be disclosed by the recipient, but do not require their surrender.

29 Private commercial bribery

Does your country also prohibit private commercial bribery?

Yes. There is no distinction drawn for the purposes of the commission of corruption offences in the Prevention of Corruption Act between persons employed by public and private organisations. However, the presumptions of corruption detailed in question 2 apply only to public officials.

30 Penalties and enforcement

What are the sanctions for individuals and companies violating the domestic bribery rules?

The Prevention of Corruption Act sets out the sanctions applicable to individuals and companies in respect of violations of domestic bribery rules. The Public Bodies Act sets out the sanctions applicable to public officials who are guilty of corruption in Irish public office.

Prevention of Corruption Act and Theft and Fraud Act

The sanctions for domestic bribery under these Acts are the same as those set out in question 16 in respect of foreign bribery.

Public Bodies Act

Offences under the Public Bodies Act are triable both summarily and on indictment. An individual convicted under the Public Bodies Act is liable to a fine or a term of imprisonment.

The court can also direct the convicted person to pay to his or her employer the amount or value of any gift, loan, fee or reward received

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by him or her. An employee or officer of a public body may also be liable to forfeit his or her right and claim to any compensation or pension to which he or she would otherwise have been entitled.

31 Facilitating payments

Have the domestic bribery laws been enforced with respect to facilitating or 'grease' payments?

See question 6.

32 Recent decisions and investigations

Identify and summarise recent landmark decisions and investigations involving domestic bribery laws, including any investigations or decisions involving foreign companies.

In *The People (DPP) v Fred Forsey* [2016] IECA 233, the Irish Court of Appeal upheld the constitutionality of the presumption of corruption that applies to public officials (see further question 2). This case concerned an appeal by a public official against his conviction for corruption offences under the Prevention of Corruption Act, for which he had been sentenced to six years' imprisonment. The court upheld the constitutionality of the conviction, which had been grounded on the presumption of corruption applicable to public officials. The public official concerned was found to have accepted payments from an applicant for planning permission before then attempting to influence fellow councillors to grant the application.

To date, a limited amount of domestic bribery law enforcement has taken place. This has focused on domestic public bribery of Irish public officials and public employees for corruption. The Group of States against Corruption (GRECO) published its fourth evaluation report on corruption prevention in Ireland on 21 November 2014. While GRECO praised the transparency of the Irish legislative process and the independence of the judiciary and prosecution service, it highlighted concerns regarding corruption in Ireland and made various recommendations to safeguard against corruption. Similarly, Transparency International's eleventh annual enforcement review of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the Convention) published on 20 August 2015 ranked Ireland as conducting 'little or no enforcement' of the Convention.

On 27 January 2016, Transparency International published a further report, the 2015 edition of its Corruption Perceptions Index. The Corruption Perceptions Index measures the perceived levels of public sector corruption in 168 countries. Although Ireland fell one place on the index as compared with its 2014 ranking, from 17 to 18, there was a slight improvement in Ireland's overall score from 74 to 75 out of 100. According to the index, Ireland continues to be perceived as one of the least corrupt countries in the world.

Italy

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1 International anti-corruption conventions

To which international anti-corruption conventions is your country a signatory?

Italy is a signatory to the following European and international conventions related to anti-corruption.

European Union
The Convention on the Fight against Corruption Involving Officials of the European Community or Officials of the Member States of the European Union, Brussels, 26 May 1997 (ratified by Law No. 300/2000, entered into force on 26 October 2000).

Council of Europe
The Criminal Law Convention on Corruption, Strasbourg, 27 January 1999 (ratified by Law No. 110/2012, entered into force on 27 July 2012).

The Civil Law Convention on Corruption, Strasbourg, 4 November 1999 (ratified by Law No. 112/2012, entered into force on 28 July 2012).

International
The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Paris, 17 December 1997 (ratified by Law No. 300/2000, entered into force on 26 October 2000).

The UN Convention against Transnational Organized Crime, New York, 15 November 2000 (ratified by Law No. 146/2006, entered into force on 12 April 2006).

The UN Convention against Corruption, New York, 31 October 2003 (ratified by Law No. 116/2009, entered into force on 15 August 2009).

2 Foreign and domestic bribery laws

Identify and describe your national laws and regulations prohibiting bribery of foreign public officials (foreign bribery laws) and domestic public officials (domestic bribery laws).

Both domestic and foreign bribery are prohibited as criminal offences under the Italian Criminal Code of 1930 (the ICC). On 28 November 2012, by Law No. 190/2012, a significant reform of the Italian anti-corruption system entered into force, introducing, inter alia, new bribery offences, increasing the punishments for existing offences and, more generally, extending the sphere of responsibility for private parties involved in bribery. Additional amendments, providing in particular for increase of punishments, entered into force on 14 June 2015, by Law No. 69/2015.

Domestic bribery laws
The bribery offences relating to domestic public officials are provided for by articles 318 to 322 ICC, and by the new article 346-bis ICC; their sanctions, with some exceptions, generally apply either to the public official or to the private briber (article 321 ICC). In particular, the ICC provides for the following forms of domestic bribery, the essence of which is the unlawful agreement between the public official and the briber:

- 'proper bribery', which occurs when the public official, in exchange for performing (or having performed) an act conflicting with the duties of his or her office, or in exchange for omitting or delaying (or having omitted or delayed) an act of his or her office, receives money or other things of value, or accepts a promise of such things (article 319 ICC);
- 'bribery for the performance of the function', which occurs when the public official, in connection with the performance of his or her functions or powers, unduly receives, for his or her benefit or for that of a third party, money or other things of value, or accepts the promise of them (article 318 ICC). It should be noted that Law No. 190/2012 has significantly extended the reach of this offence, which now relates to the receipt of money or other items of value by the public official, either in exchange for the carrying out of a specific act not conflicting with his or her public official duties (as it was also in the previous version), or for generally placing the public office at the disposal of the briber, even in the absence of a specific public act being exchanged with the briber;
- 'bribery in judicial acts', which occurs when the conduct mentioned under the first two points above is taken for favouring or damaging a party in a civil, criminal or administrative proceeding (article 319-ter ICC);
- the new offence of 'unlawful inducement to give or promise anything of value' introduced by Law No. 190/2012, which punishes both the public official and the private briber, where the public official, by abusing of his or her quality or powers, induces someone to unlawfully give or promise to him or her or to a third party money or anything of value (article 319-quater ICC). It should be noted that, under the previous regime, only the public official was responsible for the aforementioned conduct in relation to the differing offence of 'extortion committed by a public official' (article 317 ICC), while the private party was considered the victim of the crime. In the new system, the offence of 'extortion committed by a public official' (article 317 ICC) only applies to residual cases where the private party is 'forced' by the public official to give or promise a bribe; in relation to such cases, the private party is still considered the victim of the crime, and the offence entails the exclusive criminal liability of the public official; and
- the new offence of 'trafficking of unlawful influence', introduced by Law No. 190/2012, which punishes anyone not involved in cases of 'proper bribery' and 'bribery in judicial acts' who, by exploiting existing relations with a public official, unduly makes someone giving or promising him or her or others money or other patrimonial advantage as the price for his or her unlawful intermediation with the public official, or as consideration for carrying out an act conflicting with the office's duties, or for the omission or delay of an office's act. Criminal responsibility also equally applies to the private party who unduly gives or promises money or other patrimonial advantage (article 346-bis ICC).

These bribery offences apply not only in relation to 'public officials' but also, with some exceptions, to 'persons in charge of a public service' (article 320 ICC; for the distinction between the two categories, see question 4). If the private party makes an undue offer or promise that is not accepted by the public official, or if the public official solicits an undue promise or payment that is not carried out by the private party, the less serious offence of 'instigation to bribery' occurs (article 322 ICC).

Foreign bribery laws
The bribery offences relating to foreign public officials are provided for by article 322-bis ICC, introduced by Law No. 300/2000, which implemented into the Italian legal system both the EU Anti-Corruption Convention of Brussels of 1997 (on European Officials), and the OECD Anti-Bribery Convention of Paris of 1997 (on Foreign Officials). Therefore, as of 2000, the scope of bribery offences has been significantly extended, in such a way to include bribery of public officials of the EU institutions and of the EU member states and, under certain conditions, also of public officials of foreign states and of international organisations (such as the UN, OECD, European Council, etc).

Foreign bribery

3 Legal framework

Describe the elements of the law prohibiting bribery of a foreign public official.

EU officials
As far as bribery relating to public officials of the EU institutions and of EU member states is concerned, article 322-bis (paragraphs 1 and 2) ICC extends to such public officials, and to the private briber, the same bribery offences originally provided for domestic public officials (see question 2), and in particular:

- 'proper bribery', which occurs when the public official, in exchange for performing (or having performed) an act conflicting with the duties of his or her office, or in exchange for omitting or delaying (or having omitted or delayed) an act of his or her office, receives money or other things of value, or accepts a promise of such things (article 319 ICC);
- 'bribery for the performance of the function', which occurs when the public official, in connection with the performance of his or her functions or powers, unduly receives for him or her, or for a third party, money or other items of value or accepts the promise of them (article 318 ICC);
- 'bribery in judicial acts', which occurs when the conduct mentioned under the first two points above is taken for favouring or damaging a party in a civil, criminal or administrative proceeding (article 319-ter ICC);
- 'unlawful inducement to give or promise anything of value', which occurs when the public official, by abusing of his or her quality or powers, induces someone to unlawfully give or promise to him or her or to a third party money or anything of value (article 319-quater ICC); and
- 'instigation to bribery', which occurs when the private party makes an undue offer or promise that is not accepted by the public official, or when the public official solicits an undue promise or payment that is not carried out by the private party (article 322 ICC).

Foreign and international officials
With respect to bribery relating to public officials of foreign states and of international organisations (such as the UN, OECD, European Council, etc), article 322-bis (paragraph 2) ICC extends to these situations the application of the mentioned domestic bribery offences, but with the following two significant limitations:

- only active corruption is punished (namely, only the private briber, on the assumption that the foreign public officials will be punished according to the laws of the relevant jurisdiction); and
- on the condition that the act is committed to obtain an undue advantage in international economic transactions or with the purpose of obtaining or maintaining an economic or financial activity (the conduct prohibited by the last part of this limitation was recently added by Law No. 116/2009, which has implemented the UN Convention against Corruption of 2003).

Jurisdiction
As of 2000, pursuant to article 322-bis ICC, the reach of bribery offences has been significantly broadened, because it is now immaterial if the functions of the official who receives or is offered a consideration have no connection to Italy. However, in relation to the mentioned offences, Italy has not established a general 'extraterritorial' jurisdiction. In fact, the governing principle on the point has remained the territoriality one, according to which Italian courts have jurisdiction only on bribery offences that are considered committed within the Italian territory: namely, when at least a segment of the prohibited conduct (ie, the decision to pay a bribe abroad), or its event, take place in Italy. This principle suffers a derogation in favour of the 'extraterritorial' jurisdiction only to a very limited extent, and under stringent requirements (presence in Italy of the suspect, request of the Italian Minister of Justice, unsuccessful extradition proceedings, etc; see articles 9 to 10 ICC).

Mental element
The mental element required for bribery offences is always intent (including, for the private briber, knowledge and will to carry out an undue payment to a public official).

4 Definition of a foreign public official

How does your law define a foreign public official?

Officials of EU institutions
With respect to the officials of the EU institutions, Italian law provides for an express listing of the relevant categories (including members of the European Commission, Parliament, Court of Justice, and officials of related institutions; article 322-bis, paragraph 1, ICC).

Officials of EU and foreign states, and of international organisations
As far as the officials of EU states, foreign states and international organisations are concerned, Italian law makes express reference to the persons who, within these states and organisations, 'perform functions or activities equivalent to the ones of public officials and of persons in charge of a public service' (article 322-bis, paragraphs 1 and 2, ICC). In other words, Italian criminal law extends to them the same definitions already provided for domestic officials, according to which:

- 'public officials' are such persons 'who perform a public function, either legislative or judicial or administrative' (for the same criminal law purposes, 'an administrative function is public if regulated by the rules of public law and by acts of a public authority and characterised by the forming and manifestation of the public administration's will or by a procedure involving authority's powers or powers to certify'; article 357, paragraphs 1 and 2, ICC); and
- 'persons in charge of a public service' are 'those who, under any title, perform a public service' (for the same criminal law purposes, 'a public service should be considered an activity governed by the same forms as the public function, but characterised by the lack of its typical powers, and with the exclusion of the carrying out of simple ordinary tasks and merely material work'; article 358, paragraphs 1 and 2, ICC).

In accordance with the above definitions, 'public officials' includes judges and their consultants, witnesses (from the moment the judge authorises their summons), notaries public, police officers, etc. On the contrary, 'persons in charge of a public service' includes state or public administration employees lacking the typical powers of a public authority (ie, electricity and gas men, etc).

Employees of state-owned or state-controlled companies are not expressly included within the legal definition, but they implicitly fall within the relevant 'public' categories on condition that the activity effectively carried out is governed by public law or has a public nature.

5 Travel and entertainment restrictions

To what extent do your anti-bribery laws restrict providing foreign officials with gifts, travel expenses, meals or entertainment?

Italian criminal law provisions do not expressly restrict the giving of gifts, travel expenses, meals or entertainment either to domestic or foreign officials. However, all these advantages could represent the 'undue consideration' for a public official prohibited by Italian law (falling within the concept of 'other things of value' provided for in relation to bribery offences). In particular, with respect to the offence of 'bribery for the performance of the function' (which also includes the carrying out by the public official of an act not conflicting with the duties of the office; see questions 2 and 3), the past consolidated case law excluded tout court criminal relevance with respect to gifts of objective 'small value', and that could be considered 'commercial courtesy' in the concrete case. On the contrary, in relation to 'proper bribery' (ie,

to perform an act conflicting with the duties of the office), the very strict interpretation of the case law is that the 'small value' of the gift never excludes, as such, the criminal responsibility. The crucial criterion for affirming or excluding criminal liability is therefore the relation of do ut des between the gift (or other advantage) and the 'act' of the public official (ie, to what extent the gift represents a consideration for the carrying out of the mentioned 'act').

Furthermore, it should be noted that some Italian non-criminal regulations restrict providing Italian officials with gifts, etc. As of 1 January 2008, Italian government members and their relatives are prohibited from keeping in their personal possession 'entertainment gifts', received in official occasions, of a value higher than €300 (Prime Ministerial Decree of 20 December 2007). Along the same lines, employees of the Italian public administration are prohibited from accepting gifts from persons who could benefit from their decisions, with the exception of gifts of courtesy of small value (Decree of 28 November 2000), and the same prohibition is generally contained in the ethical codes implemented by the various state-owned or state-controlled companies.

According to Law No. 190/2012, the Italian government issued a new code of conduct for employees in public administration, which entered into force on 19 June 2013, specifically aimed at preventing corruption and at ensuring compliance with the public officials' duties of impartiality and exclusive devotion to the public interest. Pursuant to this code of conduct, the limit on the permissible value of 'gifts of courtesy of small value' is equivalent to a maximum of €150.

6 Facilitating payments

Do the laws and regulations permit facilitating or 'grease' payments?

No, they are prohibited by Italian law.

7 Payments through intermediaries or third parties

In what circumstances do the laws prohibit payments through intermediaries or third parties to foreign public officials?

Payments amounting to bribery offences (described in questions 2 and 3) are prohibited whether they are carried out directly or indirectly, through intermediaries or third parties. In the event of payments made through intermediaries, Italian prosecutors should prove, and Italian courts should assess, that the payment to the intermediary was made with the knowledge and intent to subsequently bribing the foreign public official.

8 Individual and corporate liability

Can both individuals and companies be held liable for bribery of a foreign official?

Yes, both individuals and companies can be held liable for bribery of a foreign official. With respect to the responsibility of individuals, see question 3. As far as the responsibility of corporations is concerned, as of 2001 prosecutions can be brought against them (both Italian and foreign corporations) also for bribery offences (article 25 of Legislative Decree No. 231/2001). In order for a corporation to be held responsible, it is necessary that a bribery offence is committed in the interest or for the benefit of the corporation by its managers or employees. The corporation's responsibility is qualified as an administrative offence, but the matter is dealt with by a criminal court in accordance with the rules of criminal procedure, in proceedings that are usually joined with the criminal proceedings against the corporations' officers or employees.

Where the bribery offence is committed by an 'employee', the corporation can avoid liability by proving that it had implemented effective 'compliance programmes' designed to prevent the commission of that type of offence (article 7 of Legislative Decree No. 231/2001). Where the bribery offence is committed by 'senior managers', the implementation of effective 'compliance programmes' does not suffice, and the responsibility is avoidable only by proving that the perpetrator acted in 'fraudulent breach' of corporate compliance controls (article 6 of Legislative Decree No. 231/2001).

9 Successor liability

Can a successor entity be held liable for bribery of foreign officials by the target entity that occurred prior to the merger or acquisition?

Yes, this is expressly provided for by Legislative Decree No. 231/2001 (articles 28–29).

10 Civil and criminal enforcement

Is there civil and criminal enforcement of your country's foreign bribery laws?

Yes. Criminal enforcement in particular has significantly increased in recent years; on this point, see questions 14 to 17. As far as civil enforcement is concerned, as explained in question 1, Italy has ratified the Council of Europe Civil Law Convention on Corruption of 4 November 1999, which entered into force in the Italian system on 28 July 2012. Therefore, the current Italian legislation on this point (especially on the aspects of civil liability and compensation of damage deriving from corruption) can be considered to be in full compliance with international standards.

11 Agency enforcement

What government agencies enforce the foreign bribery laws and regulations?

Bribery laws are enforced by public prosecutors, who in the Italian legal system are not a government agency but magistrates who, as judges, are independent from the executive power.

In 2004 a new body called the Anti-Corruption High Commission was set up, provided with rather limited powers such as making inquiries on the causes of corruption, and making studies on the adequacy of the Italian system to fight against corruption. In 2008, the functions of the high commission were transferred to the Anti-Corruption and Transparency Service, an internal body within the Ministry for the Public Function.

Law Decree No. 90 of 24 June 2014, has attributed significant new powers to the National Anti-Corruption Authority (the ANAC), in an effort to counteract bribery conduct by providing effective coordination and exchange of information between that body and the various Prosecutor's Offices investigating cases of corruption, as well as providing the ANAC with effective powers of supervision over relevant public tenders.

12 Leniency

Is there a mechanism for companies to disclose violations in exchange for lesser penalties?

There is no formal mechanism as such. However, a certain degree of cooperation with the prosecuting authorities before trial (in terms of removal of the officers or members of the body allegedly responsible for the unlawful conduct, implementation of compliance programmes aimed at preventing the same type of offences, compensation for damage, etc) can have a significant impact in reducing the pretrial and final sanctions to be applied to the corporation.

13 Dispute resolution

Can enforcement matters be resolved through plea agreements, settlement agreements, prosecutorial discretion or similar means without a trial?

According to Italian law, criminal action is compulsory and not discretional, and it cannot be dropped by the public prosecutor (unless he or she assesses that no crime was ever committed, and then requests accordingly a dismissal from the competent judge).

Deferred prosecution or non-prosecution agreements are not provided for by the Italian system.

Under certain conditions, plea bargaining with prosecuting authorities is recognised by Italian law. It has to be approved by the competent judge, the punishment agreed upon cannot be more than five years' imprisonment, and it is substantially considered as a conviction sentence (article 444 of the Italian Code of Criminal Procedure).

A similar mechanism to plea bargaining is available for corporations, in relation to criminal offences for which the corporate managers or employees would be entitled to plea bargaining (article 63 Legislative Decree No. 231/2001).Furthermore, under certain conditions, a civil settlement with the person injured, aimed at compensating damage, can qualify as a 'mitigating circumstance' to reduce the criminal sentence.

14 Patterns in enforcement

Describe any recent shifts in the patterns of enforcement of the foreign bribery rules.

The most significant shift is the one reported in questions 2 and 3, concerning the implementation into the Italian legal system, by Law No. 300/2000 (article 322-bis ICC), of both the EU Anti-Corruption Convention of Brussels of 1997 and the OECD Anti-Bribery Convention of Paris of 1997. As explained, since then the scope of bribery offences has been significantly extended.

Another relevant development is the one reported in question 8, consisting of the extension to Italian and foreign corporations, as of 2001, of the responsibility for bribery offences relating to domestic and foreign officials (article 25 of Legislative Decree No. 231/2001).

Finally, the latest recent developments are the implementation, by Law No. 116/2009, of the 2003 UN Convention against Corruption, with the consequent broadening of the reach of foreign bribery offences (see question 3); and the ratification in June 2012 of both the Council of Europe Civil and Criminal Conventions on Corruption of 1999 (see question 1).

15 Prosecution of foreign companies

In what circumstances can foreign companies be prosecuted for foreign bribery?

As reported in question 3, although since 2000 the scope of bribery offences has been extended in order to include the bribery of foreign officials, Italy has not established in that respect a general 'extraterritorial' jurisdiction. The governing principle on the point has remained the territoriality one, according to which Italian courts have jurisdiction only on bribery offences that are considered to have been committed within the Italian territory, namely, when at least a segment of the prohibited conduct (ie, the decision to pay a bribe abroad), or its event, take place in Italy. This principle suffers a derogation in favour of the 'extraterritorial' jurisdiction only to a very limited extent, and under stringent requirements (presence in Italy of the suspect, request of the Italian Minister of Justice, unsuccessful extradition proceedings, etc; see articles 9 to 10 ICC).

In accordance with the mentioned territoriality principle, therefore, foreign corporations can be prosecuted in Italy for foreign bribery on condition that at least a segment of the prohibited conduct takes place in Italy; and, in addition, that all other requirements for the corporation's responsibility are fulfilled. In essence, as reported in question 8, the bribery offence must have been committed in the interest or for the benefit of the corporation by its managers or employees, and that effective 'compliance programmes' were not implemented at the time of the offence.

With respect to the very limited extent of the Italian 'extraterritorial' jurisdiction concerning corporations, Italian law provides that it does apply only to corporations having their main seat in Italy, and on condition that the bribery offence is not prosecuted by the state where it was committed (article 4 of Legislative Decree No. 231/2001).

16 Sanctions

What are the sanctions for individuals and companies violating the foreign bribery rules?

With respect to individuals, sentences for bribery offences (domestic and foreign ones) vary depending on the nature of the offence. In particular:

- for 'proper bribery' (act conflicting with the duties of the office), punishment is imprisonment of six to 10 years, and it can be increased owing to 'aggravating circumstances';
- for 'bribery for the performance of the function', punishment is imprisonment of one to six years, and it can be increased because of 'aggravating circumstances';
- for 'bribery in judicial acts', punishment is imprisonment of six to 12 years, and it can be increased because of 'aggravating circumstances';
- for 'unlawful inducement to give or promise anything of value', punishment is imprisonment of six to 10 years and six months for the public official, and up to three years for the private briber, and they can be increased because of 'aggravating circumstances'; and
- for 'instigation to bribery' (see question 3), the punishments provided for 'proper' bribery and for 'bribery for the performance of the function' apply, reduced by one-third.

In addition, in the event of conviction, confiscation of the 'profit' or of the 'price' of the bribery offence has to be applied (even 'for equivalent', on assets of the offender for a value corresponding to the profit or price of the offence; article 322-ter ICC).

As far as corporations are concerned, they are subject to sanctions consisting of fines, disqualifications and confiscation. Disqualifications can be particularly damaging, because they can include the suspension or revocation of government concessions, debarment, exclusion from government financing and even prohibition from carrying on business activity (articles 9 to 13 of Legislative Decree No. 231/2001). Such sanctions can also be applied at a pretrial stage, as interim coercive measures. In the event of conviction, confiscation of the 'profit' or of the 'price' of the offence has to be applied, even by confiscating 'for equivalent' the assets of the corporation (article 19 of Legislative Decree No. 231/2001). At a pretrial stage, prosecutors can request the competent judge to grant freezing of the 'profit' or 'price' of the bribery offence (article 45 of Legislative Decree No. 231/2001).

17 Recent decisions and investigations

Identify and summarise recent landmark decisions or investigations involving foreign bribery.

In relation to foreign bribery offences, several investigations and prosecutions have been conducted by the Italian authorities in recent years, the most significant of which are the following.

The Oil-for-Food programme

With respect to the mismanagement of the Oil-for-Food programme, on 10 March 2009 the Milan court of first instance sentenced to two years' imprisonment three Italian individuals acting, directly or indirectly, for an Italian oil company, for the charge of foreign bribery, under the assumption that they paid bribes to officials of a state-owned Iraqi company. On 15 April 2010, the Milan Court of Appeal acquitted all co-defendants owing to the charges being time-barred.

Nigeria Bonny Island

The *Nigeria Bonny Island* case concerns an investigation conducted by the Milan Prosecutor's Office against the companies ENI SpA and Saipem SpA in relation to the offence of foreign bribery allegedly committed by the companies' officers (in the frame of the international consortium Tskj, involving the US company KBR-Halliburton, the Japanese Igc and the French Technip), and allegedly consisting of significant payments made to Nigerian public officials in the period 1994 to 2004 in order to win gas supply contracts. On 17 November 2009 the Milan judge for the preliminary investigations rejected the prosecutors' application for applying to ENI SpA and Saipem SpA the pretrial 'interim measure' of prohibition to enter into contracts with the Nigerian National Petroleum Corporation, owing to lack of Italian jurisdiction. The case against ENI SpA was subsequently dismissed, and on 5 April 2012, the case against five officers of Saipem SpA was also dismissed because of the time bar. However, in July 2013 the company Saipem SpA was sentenced by the Milan court of first instance to a fine of €600,000 and confiscation of €24.5 million, pursuant to Legislative Decree No. 231/2001. In February 2015, the conviction of Saipem SpA was confirmed by the Milan Court of Appeal, and in February 2016 the Court of Cassation issued the final judgment of conviction against Saipem SpA.

Finmeccanica–AgustaWestland

The *Finmeccanica–AgustaWestland* case concerns a prosecution conducted by the Prosecutor's Office of Busto Arsizio (an area close to Milan) against the companies Finmeccanica and AgustaWestland and their top managers in relation to the offence of foreign bribery allegedly

committed in 2010 in connection with the supply to the Indian government of 12 helicopters. In 2014, the prosecutors discontinued the investigations against Finmeccanica in the light of the assessment that the company was not involved in the alleged wrongdoing and had implemented adequate compliance programmes to prevent corruption offences. In the same period, AgustaWestland SpA and AgustaWestland International Ltd entered into a plea-bargaining with the Prosecutor's Office. On 9 October 2014, the court of first instance of Busto Arsizio acquitted the top managers of both companies from the charge of foreign corruption, and sentenced them to two years' imprisonment for the different charge of tax fraud. In April 2016, the Milan Court of Appeal overturned the acquittal of the two managers and sentenced them to respectively four years, and four years and six months' imprisonment. In December 2016, the Court of Cassation annulled the aforementioned conviction, and ordered the case to be retried before the Milan Court of Appeal. This activity is expected to take place in the course of 2017.

New investigations and prosecutions

New investigations and prosecutions for alleged foreign bribery are currently pending against the companies ENI, Saipem and AgustaWestland, and their managers, in relation to the adjudication of licences or public tenders in Nigeria and Algeria. In particular:

- with respect to Nigeria, on November 2013, the Milan Prosecution's Office started a new criminal investigation against the company ENI SpA, its top managers, the former Minister of Petroleum of Nigeria and some Italian and foreign individuals, in relation to the alleged offence of bribery of Nigerian public officials, in relation to the granting in 2011 by the Nigerian government to the subsidiaries of ENI and Shell of the oil-prospecting licence of an oil field located in the offshore territorial waters of Nigeria. The prosecutors concluded the investigations in December 2016, also adding the company Shell and some of its managers to the list of suspects. The prosecutions against at least some of the suspects are expected to take place in the course of 2017;
- with respect to Algeria, the Milan Prosecution's Office started in the past years a criminal investigation against the companies ENI SpA and its subsidiary Saipem SpA, some of their top managers and foreign agents, in relation to the alleged offence of bribery of Algerian public officials, with respect to the adjudication of seven tenders in Algeria in the period 2007–2010. On 2 October 2015, the preliminary hearing Milan judge acquitted ENI and its top managers on all charges and committed to trial Saipem SpA and its top managers, and the foreign agents, for international corruption and tax fraud. The acquittal of ENI and its managers was subsequently annulled by the Court of Cassation in February 2016, and on 27 July 2016, they were all committed to trial. The trial is currently pending before the Milan court of first instance; and
- with respect to Algeria, in 2015 the Prosecutor's Office of Varese started a new investigation against AgustaWestland, and its managers, in relation to the offences of international corruption and tax fraud, allegedly committed in the period 2009–2011, in connection with the awarding to AgustaWestland of a public tender for the supply of helicopters to the Algerian government. The case is still at the investigation stage.

Financial record keeping

18 Laws and regulations

What legal rules require accurate corporate books and records, effective internal company controls, periodic financial statements or external auditing?

The relevant provisions on all mentioned points are contained in the Italian Civil Code of 1942. With respect to balance sheets of limited liability companies, article 2423 of the Italian Civil Code provides that the balance sheet has to be drawn up with transparency and has to represent in a true and fair view the governance and financial situation of the company and the economic result of the financial period. Articles 2423-bis to 2429 of the Italian Civil Code provide for the criteria to be followed for the drafting of the balance sheet, and for the tasks to be accomplished by the board of directors and by the internal auditors on the point.

The duty to appoint internal auditors, and their tasks, are provided for by article 2397 et seq of the Italian Civil Code. In particular, according to article 2403 of the Italian Civil Code, the internal auditors control the compliance with the law, the by-laws and with the principles of fair administration, and they in particular control the adequacy of the organisational, administrative and accounting structure adopted by the company and its concrete functioning. The duty to appoint an auditing firm for the controls on the accounting is provided for by article 2409-bis ff of the Italian Civil Code.

With respect to listed companies, Italian law provides for more stringent internal and external company controls.

19 Disclosure of violations or irregularities

To what extent must companies disclose violations of anti-bribery laws or associated accounting irregularities?

Companies have no obligation to disclose violations of anti-bribery laws or associated accounting irregularities. Internal and external auditors have a duty to signal the relevant violations, and they are responsible for damages in the event of non-compliance. More stringent obligations are provided in relation to listed companies.

20 Prosecution under financial record keeping legislation

Are such laws used to prosecute domestic or foreign bribery?

In the 1990s investigations of companies' accounts were largely used as a tool to discover bribery payments, and the offence of false accounting was often brought jointly with one of domestic bribery. Legislative Decree No. 61/2002 has amended the definition of false accounting offences, largely reducing their sphere of application. Law No. 69/2015, entered into force on 14 June 2015, has again broadened the definition and reach of these offences, so that their use has to be expected in the future. Currently, in any case, the most used offence in combination with the one of foreign bribery is the one of tax fraud.

21 Sanctions for accounting violations

What are the sanctions for violations of the accounting rules associated with the payment of bribes?

If the payment of bribes does amount to a false accounting offence, Italian law provides, with respect to listed companies, a penalty of imprisonment for between three and eight years (article 2622 of the Italian Civil Code) and, with respect to non-listed companies, imprisonment for one to five years (article 2621 of the Italian Civil Code).

22 Tax-deductibility of domestic or foreign bribes

Do your country's tax laws prohibit the deductibility of domestic or foreign bribes?

Yes, absolutely.

Domestic bribery

23 Legal framework

Describe the individual elements of the law prohibiting bribery of a domestic public official.

See question 2.

24 Prohibitions

Does the law prohibit both the paying and receiving of a bribe?

Yes. See question 2.

25 Public officials

How does your law define a public official and does that definition include employees of state-owned or state-controlled companies?

See the definition of 'public official' and 'person in charge of a public service' in question 4. With respect to employees of state-owned or state-controlled companies, they are not expressly included within the legal definition, but they implicitly fall within the relevant 'public' categories on the condition that the activity effectively carried out is governed by public law or has a public nature.

26 Public official participation in commercial activities

Can a public official participate in commercial activities while serving as a public official?

In principle, public officials cannot participate in commercial activities, as expressly stated in relation to state employees by Legislative Decree No. 3/1957 (article 60). However, owing to the lack of comprehensive regulation some exceptions do exist.

27 Travel and entertainment

Describe any restrictions on providing domestic officials with gifts, travel expenses, meals or entertainment. Do the restrictions apply to both the providing and receiving of such benefits?

See question 5.

28 Gifts and gratuities

Are certain types of gifts and gratuities permissible under your domestic bribery laws and, if so, what types?

See question 5.

29 Private commercial bribery

Does your country also prohibit private commercial bribery?

Until 2002, bribery offences were only applicable to the bribery of 'public officials' or 'persons in charge of a public service'. In 2002, an offence related to the corruption of private corporate officers has been introduced by article 2635 of the Italian Civil Code, punishable by imprisonment for up to three years, for both the briber and the corporate officer, on the condition that the corporation suffers damage from it and that the bribe is given or offered to its directors, general managers, internal auditors, liquidators or external auditors. Law No. 190/2012 has extended the reach of the offence to bribery of managers in charge of the accounting books and to bribery of ordinary employees, who are subject to the direction or supervision of the top managers; in this latter case, punishment is imprisonment up to one year and six months. A precondition for prosecuting the offence is a criminal complaint filed by the victim, unless the crime generates a distortion of competition in the acquisition of goods or services. The punishments are doubled in relation to corporations listed in Italy or in the European Union.

30 Penalties and enforcement

What are the sanctions for individuals and companies violating the domestic bribery rules?

See question 16.

31 Facilitating payments

Have the domestic bribery laws been enforced with respect to facilitating or 'grease' payments?

As explained in questions 5 and 6, facilitating or 'grease' payments are prohibited by Italian law.

32 Recent decisions and investigations

Identify and summarise recent landmark decisions and investigations involving domestic bribery laws, including any investigations or decisions involving foreign companies.

In relation to domestic bribery offences, several investigations and prosecutions have been conducted by Italian authorities in recent years, also involving foreign companies. The following cases can be mentioned.

The Enipower case
This case concerns an investigation started in 2003 by the Milan Prosecutor's Office for the alleged payment of bribes by several private parties to officers of the companies Enipower SpA and Snamprogetti SpA (controlled by the state-owned company ENI), for the obtaining of public contracts and supplying. Some of the defendants, individuals and companies have been sentenced by court decisions or entered into plea bargaining according to court authorisation.

Update and trends

As explained in this chapter, in past years the effectiveness of the Italian anti-corruption system has increased significantly, and many investigations and prosecutions started in recent years, with particular respect to corporate entities and their officers, and their alleged involvement in the corruption especially of foreign public officials.

The recent law provisions have also increased the punishments and the related time-bar for corruption offences, in such a way that one of the crucial causes of ineffectiveness of the Italian anti-corruption system has now been eliminated.

In the near future, the most interesting developments will relate to the decisions of the highest Italian courts about the alleged responsibility of the corporations and managers currently subject to investigation and prosecution, and about the effectiveness of the compliance programmes implemented by such corporations.

The Siemens AG case
This case started in connection with the *Enipower* case mentioned above, and concerned the alleged payment of bribes by Siemens' officers to Enipower's officers for obtaining public contracts. The great significance of the case relates to the fact that, in April 2004, the Milan court applied for the first time the provisions on corporate criminal responsibility to a foreign corporation (see questions 8, 15 and 16), and even at a pretrial stage as interim coercive measures (Siemens was prohibited from entering into contracts with the Italian public administration for one year.) The conviction of Siemens AG and of its officers has been subsequently confirmed at trial by the Milan court.

The G8 case
The *G8* case concerns allegations of corruption against government members in connection with the adjudication of public tenders regarding restructuring and building projects, in connection with the G8 summit held in Italy in June 2009. In October 2012, in a relevant leg of the prosecution, the Rome court of first instance sentenced both the public officials and private parties involved to punishments ranging from two to about four years' imprisonment. Appellate proceedings are currently pending. In another leg of the prosecution, in September 2013 the judge of the preliminary hearing in Rome ordered the committal for trial for some individuals charged with corruption and conspiracy. The first-instance trial started in January 2014, and it is currently pending before the Rome court.

The Lombardy region case
Prosecutions are currently pending against top politicians and officers of the Lombardy region for allegedly having facilitated the obtaining of public healthcare funds by certain private hospitals, in exchange for money or other benefits in kind. In a first leg of the prosecution, on 27 November 2014, the Milan court of first instance sentenced to five years of imprisonment, as alleged intermediary of the bribe, a former member of the Lombardy regional assembly. In the main leg, involving the former president of the Lombardy region, the trial of first instance started on 6 May 2014 before the Milan court of first instance for the offences of corruption and conspiracy. In December 2016, the above-mentioned president was convicted to six years' imprisonment for corruption, and some other defendants were convicted in the range of nine years imprisonment, for the offences of corruption and conspiracy. Appellate proceedings are expected to start in 2017.

The Expo 2015 case
The *Expo 2015* case concerns an investigation for corruption conducted by the Prosecutor's Office of Milan, regarding the adjudication of public tenders for building projects, food services, etc, in connection with Expo 2015, which took place in Milan from May to October 2015. In the course of 2014, many of the persons under investigation were subject to pretrial custody orders, and subsequently applied for plea bargaining with the Prosecutor's Office. The judge of the preliminary hearing, on 27 November 2014, granted most of the requested plea bargaining, applying convictions ranging from two years and six months to three years

and four months' imprisonment. In another leg of the proceeding, in July 2016 the Milan court of first instance sentenced a relevant public official to two years and two months' imprisonment.

The Mose case

In 2014, the Prosecutor's Office of Venice started an investigation against top politicians of the Veneto region and businessmen for corruption relating to public funds used for the Mose project, a huge dam aimed at protecting Venice from the high tide. On 16 October 2014, a relevant leg of the proceeding ended with plea bargaining of 19 defendants, granted by the judge of the preliminary hearing. The most severe sentence inflicted was two years and 10 months' imprisonment and confiscation of €2.6 million. In another leg of the prosecution, trial started in the course of 2015, and it is currently pending.

The Mafia Capitale case

In 2014, the Prosecutor's Office of Rome started investigations against top politicians of the Municipality of Rome and businessmen for corruption and conspiracy, in relation to the adjudication of public tenders concerning assistance services to be carried out by the Rome Municipality (in particular assistance services for immigrants and refugees). 44 people were arrested in December 2014, and in 2015 the trial started before the Rome court of first instance, and it is currently pending.

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1 International anti-corruption conventions

To which international anti-corruption conventions is your country a signatory?

Japan is a signatory to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the OECD Convention).

This was signed on 17 December 1997 and ratified on 13 October 1998. Based on this, the Unfair Competition Prevention Act (Act No. 47 of 1993; see question 2) (the UCPA) was amended in 1998 and bribery of foreign public officials became criminalised in Japan.

Japan is also a signatory to the United Nations Convention against Transnational Organized Crime, which was signed in December 2000 and ratified on 14 May 2003, and the United Nations Convention against Corruption, which was signed on 9 December 2003 and ratified on 2 June 2006.

2 Foreign and domestic bribery laws

Identify and describe your national laws and regulations prohibiting bribery of foreign public officials (foreign bribery laws) and domestic public officials (domestic bribery laws).

Bribery of foreign public officials is criminally punishable under the UCPA. Violators may be imprisoned for up to five years or fined up to ¥5 million (article 21, paragraph 2 of the UCPA).

Bribery of domestic public officials is criminally punishable under the Penal Code (Act No. 45 of 1907).

The prohibitions on foreign bribery and domestic bribery are based upon different philosophies. That is to say, the former is aimed at securing and promoting the sound development of international trade, while the latter is aimed at ensuring the rectitude of the Japanese public service and maintaining people's trust in such rectitude. As a consequence of this difference, the prohibition of foreign bribery was not incorporated in the Penal Code but in the UCPA.

Foreign bribery

3 Legal framework

Describe the elements of the law prohibiting bribery of a foreign public official.

In order for bribery of a foreign public official to be punished under the UCPA, the bribe must be paid with regard to an 'international commercial transaction' (article 18, paragraph 1). An 'international commercial transaction' means any activity of international commerce, including international trade and cross-border investment. The bribe must be provided to foreign public officials or others as defined in question 4.

The prosecutor must then establish that the bribe was made 'in order to obtain illicit gains in business'. Here, 'gains in business' means any gains that business persons may obtain during the course of their business activities, which include, for example, the acquisition of business opportunities or governmental approvals regarding the construction of factories or import of goods.

Further, the prosecutor must establish that the bribe was made 'for the purpose of having the foreign public official or other similar person act or refrain from acting in a particular way in connection with his or her duties, or having the foreign public official or other similar person use his or her position to influence other foreign public officials or other similar persons to act or refrain from acting in a particular way in connection with that person's duties'.

Please note that not only the giving of the bribe, but also the offering or promising of the bribe is punishable under the UCPA.

4 Definition of a foreign public official

How does your law define a foreign public official?

Under the UCPA, it is prohibited to give bribes not only to foreign public officials per se, but also to other persons in a position of a public nature. Such persons are included in the definition of 'foreign public officials, etc'. Article 18, paragraph 2 of the UCPA defines a foreign public official, etc, as:

(i) a person who engages in public service for a foreign state, or local authority (a public official in a narrow sense);
(ii) a person who engages in service for an entity established under a special foreign law to carry out special affairs in the public interest (ie, a person engaging in service for a public entity);
(iii) a person who engages in the affairs of an enterprise:
- for which the number of voting shares or the amount of capital subscription directly owned by one or more foreign states or local authorities exceeds 50 per cent of that enterprise's total issued voting shares or total amount of subscribed capital; or
- for which the number of officers (including directors and other persons engaging in the management of the business) appointed or designated by one or more foreign state or local authorities exceeds 50 per cent of that enterprise's total number of officers; and
- to which special rights and interests are granted by the foreign state or local authorities for performance of their business;
- or a person specified by a cabinet order (see below) as an 'equivalent person' (ie, a person engaging in the affairs of an enterprise of a public nature);

(iv) a person who engages in public services for an international organisation constituted by governments or intergovernmental international organisations; or
(v) a person who engages in affairs under the authority of a foreign state or local government or an international organisation.

The cabinet order referred to in (iii) above (Cabinet Order No. 388 of 2001) states that an 'equivalent person' is any person who engages in the affairs of the following enterprises (see below) to which special rights and interests are granted by foreign states or local authorities for the performance of their business:

(a) an enterprise for which the voting rights directly owned by one or more foreign states or local authorities exceeds 50 per cent of that enterprise's total voting rights;
(b) an enterprise for which a shareholders' resolution cannot become effective without the approval of a foreign state or local authority; or
(c) an enterprise:
- for which the number of voting shares or the amount of capital subscription directly owned by foreign states, local authorities

or 'public enterprises' (defined below) exceeds 50 per cent of that enterprise's total voting shares or capital subscription;
- for which the number of voting rights directly owned by foreign states, local authorities or public enterprises exceeds 50 per cent of that enterprise's total voting rights; or
- for which the number of officers (including directors and other persons engaging in the management of the business) appointed by foreign states, local authorities or public enterprises exceeds 50 per cent of that enterprise's total number of officers.

The cabinet order defines 'public enterprise' as an enterprise as set out in (iii) above, and an enterprise as set out in (a) and (b) above.

An 'international organisation' referred to in (iv) above must be constituted by a governmental or intergovernmental international organisation (for example, the UN, ILO, WTO, etc). Therefore, international organisations constituted by private organisations are outside of the scope of the foreign bribery regulations under the UCPA. According to the Guidelines for the Prevention of Bribery to Foreign Officials set by the Ministry of Economy, Trade and Industry (METI), which were most recently amended in 2015 (the Guidelines), an illicit payment to an officer of the International Olympic Committee cannot be punished because it is constituted by private organisations.

For the definition of a public official under a domestic bribery law, see question 25.

5 Travel and entertainment restrictions

To what extent do your anti-bribery laws restrict providing foreign officials with gifts, travel expenses, meals or entertainment?

The UCPA does not have any rules differentiating gifts, travel expenses, meals or entertainment from other benefits to be provided to foreign public officials. This means that the provision of any gifts, travel expenses, meals or entertainment could be considered as illegal bribery in the same way as the provision of cash or any other benefits.

6 Facilitating payments

Do the laws and regulations permit facilitating or 'grease' payments?

The UCPA does not permit facilitating or 'grease' payments.

7 Payments through intermediaries or third parties

In what circumstances do the laws prohibit payments through intermediaries or third parties to foreign public officials?

Payments of bribes to foreign public officials are prohibited, whether they are made directly or through intermediaries. While the relevant provision makes no express reference to intermediaries, it is sufficiently broad to capture and punish the payment of bribes through intermediaries.

However, in order for a person to be held liable for paying a bribe to foreign public officials through intermediaries, such person must recognise that the cash or other benefits provided by him or her to the intermediaries will be used for the payment of a bribe to such officials. For example, if a person appoints an agent in order to obtain an order from a foreign government and the appointer fully recognises that part of the fee he or she pays to the agent will be used to bribe an official of the foreign government, then the appointer may be punished. On the other hand, if the appointer was unaware of such fact, then the appointer will not be punished.

8 Individual and corporate liability

Can both individuals and companies be held liable for bribery of a foreign official?

Yes, both individuals and companies can be held liable for bribery to foreign public officials (article 22, paragraph 1 of the UCPA).

9 Successor liability

Can a successor entity be held liable for bribery of foreign officials by the target entity that occurred prior to the merger or acquisition?

A successor entity is not generally held liable for bribery of foreign officials by the target entity that occurred prior to the merger or acquisition. When the target entity has been sentenced to a criminal fine, in the event that the target entity undergoes a merger after the decision becomes final and binding, the sentence may be executed on the successor entity's estate (article 492 of the Code of Criminal Procedure (Act No. 131 of 1948)).

10 Civil and criminal enforcement

Is there civil and criminal enforcement of your country's foreign bribery laws?

As mentioned above, Japanese foreign bribery laws are included in the UCPA. The UCPA was originally intended to prohibit unauthorised use of others' trademarks (registered or unregistered) or trade secrets, as well as other activities that are against fair competition. The UCPA defines such acts as 'unfair competition' (article 2), and there are special civil remedies and related treatments available for unfair competition, such as injunctions, presumed damages and document production systems, etc.

However, foreign bribery is explicitly excluded from the definition of 'unfair competition', and there are no special civil remedies or related treatments available for the violation of foreign bribery restrictions under the UCPA.

Claims for damages and compensation may be possible based upon tort. However, in reality, it would be difficult for a plaintiff to prove the necessary causal relationship between the bribe and his or her loss of a business opportunity as well as the amount of damages. So far, there has been no case reported where victims of foreign bribery (for example, competitors of a violator who lost business opportunities because of the violator's payment of a bribe) filed a civil lawsuit against the violator to recover the damages they suffered.

As to criminal enforcement, see questions 2, 8 and 11.

11 Agency enforcement

What government agencies enforce the foreign bribery laws and regulations?

There is no special government agency to enforce the foreign bribery laws and regulations. Like other criminal laws, the foreign bribery laws are enforced by the Public Prosecutor's Office and the police departments of each prefecture.

12 Leniency

Is there a mechanism for companies to disclose violations in exchange for lesser penalties?

No. If a person who committed a crime surrendered himself or herself before being identified as a suspect by an investigative authority, his or her punishment may be reduced (article 42, paragraph 1 of the Penal Code). However, since this provision obviously assumes that a violator is an individual, companies themselves will not be able to enjoy the benefit of self-surrender under the said provision.

13 Dispute resolution

Can enforcement matters be resolved through plea agreements, settlement agreements, prosecutorial discretion or similar means without a trial?

Japanese criminal procedure does not have systems such as plea bargaining or settlement agreements. However, public prosecutors (who are, in principle, exclusively granted the power to decide whether or not to prosecute accused persons under article 248 of the Code of Criminal Procedure), may choose an immediate judgement procedure where a hearing and a judgment will be issued within a day; provided however, that these proceedings are conditional on the consent of the person to be accused (article 350-2, paragraph 2 of the Code of Criminal Procedure). This immediate judgment procedure is not available for a

case where the death penalty, imprisonment without term or imprisonment with a term not less than one year may be applied (article 350-2, paragraph 1 of the Code of Criminal Procedure). Public prosecutors may also choose summary proceedings at summary courts, where no hearings will be held and all examinations will be done on a paperwork basis; provided, however, that the summary proceedings are also conditional on the consent of the person to be accused (article 461-2, paragraph 2 of the Code of Criminal Procedure). In this summary procedure, summary courts can only impose on criminals fines of up to ¥1 million and the summary courts cannot sentence the accused persons to imprisonment (article 461 of the Code of Criminal Procedure).

14 Patterns in enforcement

Describe any recent shifts in the patterns of enforcement of the foreign bribery rules.

Although foreign bribery laws in Japan were once rarely enforced, Japanese authorities are paying more attention to corruption than ever before.

In 2007, two employees of a Filipino subsidiary of Kyushu Electric Power Co gave Filipino government officials golf sets whose value was approximately ¥800,000 in relation to the subsidiary's entry into the Filipino market for digital fingerprint recognition systems. The two individuals were prosecuted for violation of the UCPA. Both of the individuals admitted that they had violated the foreign bribery laws, and were fined ¥500,000 and ¥200,000, respectively, through the summary proceedings mentioned above.

In 2008, two officers and one high-level employee of KK Pacific Consultants International, a Japanese construction consulting company, were prosecuted for violation of the UCPA because they repeatedly bribed a Vietnamese official in order to win an ODA business (highway construction) opportunity. The bribe was approximately ¥90 million in total. In 2009, each of the three individuals was sentenced to imprisonment for one-and-a-half to two years, with their sentences suspended for three years. In addition, the company was fined ¥70 million.

In 2013, an ex-director of Futaba Industrial Co Ltd, a major Japanese car silencer company, was prosecuted for violation of the UCPA because he had bribed a Chinese official to overlook the illegal operation of Futaba Industrial Co Ltd's local Chinese factory in December 2007. The bribe included cash amounting to HK$30,000 as well as an expensive ladies' handbag. This case was dealt with through summary proceedings and the ex-director was fined ¥500,000. The news media reported that there were further bribes of more than ¥50 million to several people including customs staff, but these were not taken into consideration owing to the statute of limitations.

In 2014, three former executives of Japan Transportation Consultants Inc, a Japanese railway consultancy company, were prosecuted for violating the UCPA because they bribed railway officials with ¥144 million in kickbacks, in connection with Japanese government-funded railway projects in Vietnam, Indonesia and Uzbekistan. The company was also prosecuted and the defendants pleaded guilty at trial. In 2015, each of the three individuals was sentenced to imprisonment for two to three years, with their sentences suspended for three to four years. In addition, the company was fined ¥90 million.

15 Prosecution of foreign companies

In what circumstances can foreign companies be prosecuted for foreign bribery?

Like Japanese nationals and companies, foreign companies can be prosecuted for foreign bribery because article 22, paragraph 1 of the UCPA (see question 16) does not make any distinction between domestic companies and foreign companies. However, this does not mean that foreign companies can be prosecuted with no jurisdictional basis. Under the Japanese criminal law system, any crime committed within the territory of Japan should be punishable (article 1 of the Penal Code), and it is generally considered that when all or part of an act constituting a crime was conducted in Japan or all or part of the result of a crime occurred in Japan, such a crime is deemed to have been committed within Japan and therefore is punishable.

For example, if an employee of a US company, who may or may not be a Japanese national, invites a public official of the Chinese government to Japan and provides a bribe to that official in Japan in violation of the UCPA, then not only the employee, but also the US company can be punished under the UCPA. However, from a practical point of view, there may be procedural difficulties in the enforcement of Japanese foreign bribery laws against such a foreign company if it has no place of business in Japan or no business activities in Japan.

Another possible circumstance where foreign companies can be prosecuted under the UCPA is where a foreign company hires a Japanese national and the Japanese national gives a bribe to a foreign official on behalf of his or her employer (the foreign company), either inside or outside of Japan. This is because the UCPA stipulates that Japanese foreign bribery laws shall apply to any Japanese nationals who commit foreign bribery not only in Japan, but also outside of Japan (article 21, paragraph 6 of the UCPA, article 3 of the Penal Code).

For example, if a US company, which has no Japan-based business, hires a Japanese national in the US and the Japanese national gives a bribe to an official of the US government in the US, then we could not deny the theoretical possibility that the US company could be prosecuted under the UCPA of Japan. From a practical point of view, however, there may be procedural difficulties in the enforcement of Japanese foreign bribery laws against foreign companies in such circumstances.

16 Sanctions

What are the sanctions for individuals and companies violating the foreign bribery rules?

Individuals violating the foreign bribery laws may be imprisoned for up to five years, and/or fined up to ¥5 million (article 21, paragraph 2 of the UCPA). When a representative, agent or any other employee of a company has violated the foreign bribery laws with regard to the business of the company, the company may be fined up to ¥300 million (article 22, paragraph 1 of the UCPA).

17 Recent decisions and investigations

Identify and summarise recent landmark decisions or investigations involving foreign bribery.

In 2011, the OECD Working Group conducted the Phase 3 evaluation of Japan's implementation of the OECD Convention. At that time, there had been only two cases (the *Kyushu Electric Power Co* case and the *KK Pacific Consultants International* case) where anyone had actually been prosecuted for violation of the UCPA. Accordingly, the December 2011 OECD Phase 3 Report on Japan stated that prosecutions of only two foreign bribery cases in 12 years appears to be a very low figure in view of the size of the Japanese economy. After this evaluation, Japanese investigative authorities made efforts to detect foreign bribery cases and prosecuted two further cases (the *Futaba Industrial Co Ltd* case and the *Japan Transportation Consultants Inc* case). For details of the four cases refer to question 14. The February 2014 OECD Follow-up to Phase 3 Report stated that Japan is further recommended to establish and implement an action plan to organise police and prosecution resources to be able to proactively detect, investigate and prosecute foreign bribery cases.

In other jurisdictions, it was announced that the US Department of Justice had granted both JGC Corporation (a well-known Japanese engineering company) and Marubeni Corporation (a well-known Japanese trading company) immunity in exchange for paying fines of respectively US$218.8 million and US$54.6 million under the US Foreign Corrupt Practices Act (FCPA) in connection with suspected bribery of a Nigerian official relating to an LNG plant project in 2011 and 2012. It was also announced that the US Department of Justice had granted Bridgestone Corporation, a well-known Japanese rubber manufacturer, immunity in exchange for paying a fine of US$28 million under the US FCPA in connection with the suspected bribery of government officials of central and south American countries in relation to marine hose sales. In 2014, it was also announced that Marubeni Corporation entered a guilty plea for its participation in a scheme to pay bribes to high-ranking government officials in Indonesia to secure a power project, and paid a fine of US$88 million under the US FCPA. To the best of our knowledge, however, there is no information suggesting that the Japanese authorities are going to prosecute these matters under the UCPA. In 2015, it was also announced that the US Securities and Exchange Commission had granted Hitachi, Ltd, a well-known Japanese multinational conglomerate, immunity in exchange for paying a fine of US$19 million under the US FCPA in connection with inaccurate records of improper

Update and trends

In 2015, METI revised the Guidelines in order to support Japanese companies' overseas business expansion. This revision clarifies legal interpretations regarding 'to obtain or retain business or other improper advantage in the conduct of international business'. And it describes good practices on how Japanese companies as enterprise groups including their subsidiaries should strengthen their internal control systems for preparing, recording and auditing internal company regulations against risky actions to prevent and combat foreign bribery.

In 2016, the Japan Federation of Bar Associations decided to issue 'Guidance on Prevention of Foreign Bribery' (the Guidance). As a supplement to the Guidelines, this Guidance provides practical guidelines and contemporary best practice for Japanese companies and counsel who provide legal advice to them in relation to implementation of anti-bribery measures.

In 2016, the Japanese government adopted witness immunity by amending the Code of Criminal Procedure. In addition, the government introduced prosecutorial bargaining and agreements with suspects or defendants that, in return for testimony regarding another person's crime, the public prosecutor will refrain from prosecuting the suspect or suggest a lenient sentencing opinion to the court. These new criminal justice systems are applicable to bribery offences and could have a significant impact on the criminal investigation and trial of bribery cases.

payments to the African National Congress, the ruling political party in South Africa, in relation to contracts to build two multibillion dollar power plants.

Financial record keeping

18 Laws and regulations

What legal rules require accurate corporate books and records, effective internal company controls, periodic financial statements or external auditing?

Laws and regulations that require companies to keep accurate corporate books and records, prepare periodic financial statements and, in the case of large companies, undergo external auditing include the Companies Act (Act No. 86 of 2005) and the Company Accounting Regulations. In addition, the Financial Instruments and Exchange Law (Act No. 25 of 1948) (FIEL) requires public companies to keep accurate corporate books and records, prepare periodic financial statements, and establish effective internal control systems.

19 Disclosure of violations or irregularities

To what extent must companies disclose violations of anti-bribery laws or associated accounting irregularities?

Companies are not obliged to disclose violations of anti-bribery laws or associated accounting irregularities under the laws regarding financial record keeping. In the case of public companies, if the associated accounting irregularities are considered so 'material' that the irregularities may affect the decision-making of investors, then the companies may be required to disclose such irregularities under the FIEL.

20 Prosecution under financial record keeping legislation

Are such laws used to prosecute domestic or foreign bribery?

They are not directly intended to be used for prosecution of domestic or foreign bribery. However, it would be possible to use such laws in order to indirectly punish bribery if a company engages in false bookkeeping in order to create large slush funds for the purpose of bribery.

21 Sanctions for accounting violations

What are the sanctions for violations of the accounting rules associated with the payment of bribes?

There are no specific sanctions for violating the accounting laws associated with the payment of bribes. However, if there is a materially false statement (eg, fictitious description or intentional omission concerning the amount of bribes) in securities reports to be submitted by a company under the FIEL, the person who submitted such securities reports may be imprisoned up to 10 years and/or fined up to ¥10 million (article 197, paragraph 1 of the FIEL), and the company may also be fined up to ¥700 million (article 207, paragraph 1 of the FIEL). Whether such false statements are deemed as 'materially' false statements will depend on the amount of the bribe, the financial condition of the company, the amount of potential penalties and other factors.

22 Tax-deductibility of domestic or foreign bribes

Do your country's tax laws prohibit the deductibility of domestic or foreign bribes?

Yes. Article 55, paragraph 5 of the Corporate Tax Law (which applies to domestic corporations and also to foreign corporations mutatis mutandis pursuant to article 142 of the same law) stipulates that the amount spent for domestic or foreign bribes shall not be tax-deductible. A criminal court need not determine that such expenditure took the form of a bribe in order for tax authorities to deny the deductibility of such expenditure.

Domestic bribery

23 Legal framework

Describe the individual elements of the law prohibiting bribery of a domestic public official.

In order for bribery of a domestic public official to be punished under the Penal Code, the bribe must be paid in connection with the relevant public official's duties. In the Penal Code, the term 'public official' means a national or local government official of Japan, a member of an assembly or committee, or other employees engaged in the performance of public duties of Japan in accordance with laws and regulations (article 7, paragraph 1 of the Penal Code).

Cash, gifts or anything that satisfies one's desires or demands can be a bribe under Japanese domestic bribery law, provided that it is given in connection with the duties of a public official.

24 Prohibitions

Does the law prohibit both the paying and receiving of a bribe?

Yes, both paying for and receiving a bribe are prohibited by the Penal Code. See question 30.

25 Public officials

How does your law define a public official and does that definition include employees of state-owned or state-controlled companies?

A public official is defined as a national or local government official, or a member of an assembly or committee or other employee engaged in the performance of public duties in accordance with laws and regulations (article 7, paragraph 1 of the Penal Code) (see question 23). Thus, employees of state-owned or state-controlled companies are not necessarily included within this definition. However, persons that are not included in this definition may be deemed a public official by specific statutes. For example, officers and employees of the Bank of Japan are deemed public officials (article 30 of the Bank of Japan Act (Act No. 89 of 1997)). For the definition of a foreign public official, see question 4.

In addition, some special laws deem officials of private organisations, which private organisations are closely related to the public interest, to be public officials, and bribes to such officials are also prohibited. Public officials so deemed include employees of the Nippon Telegraph and Telephone Corporation, professors of public universities and officials of public funds.

26 Public official participation in commercial activities

Can a public official participate in commercial activities while serving as a public official?

National public officials are prohibited from participating in commercial activities while serving as public officials, except when approved by the National Personnel Authority (article 103, paragraphs 1 and 2 of the National Public Service Act (Act No. 120 of 1947)). Local public officials must obtain similar approval from those who appointed them

to their posts in order to participate in commercial activities (article 38, paragraph 1 of the Local Public Service Law).

27 Travel and entertainment

Describe any restrictions on providing domestic officials with gifts, travel expenses, meals or entertainment. Do the restrictions apply to both the providing and receiving of such benefits?

Even if gifts, entertainment or other benefits are intended as a courtesy, they could be considered an illegal bribe (regardless of their value) if they are given for and in connection with the duties of the relevant public official.

Certain high-level national government officials are obliged to report any gifts or benefits from business entities if the value of such gifts or benefits exceeds ¥5,000 (article 6 of the National Public Service Ethics Act (Act No. 129 of 1999)). Whether this reporting requirement applies is different from whether the gifts or benefits in question constitute bribes.

28 Gifts and gratuities

Are certain types of gifts and gratuities permissible under your domestic bribery laws and, if so, what types?

See question 27.

29 Private commercial bribery

Does your country also prohibit private commercial bribery?

Japanese law does not impose a general prohibition on private commercial bribery. However, if a director, or similar official, of a stock corporation, in response to unlawful solicitation, accepts, solicits or promises to accept any benefit of a proprietary nature in connection with his or her duties, such person may be punished by imprisonment for up to five years or a fine of up to ¥5 million. In addition, the benefit received by such person shall be confiscated, while the person who gives, offers or promises to give the benefit may be punished by imprisonment for up to three years or a fine of up to ¥3 million (articles 967 and 969 of the Companies Act (Act No. 86 of 2005)).

In addition, some special laws prohibit bribery to deemed public officials of certain private organisations, as mentioned in question 25.

30 Penalties and enforcement

What are the sanctions for individuals and companies violating the domestic bribery rules?

A person who gives, offers or promises to give a bribe to a public official may be imprisoned for up to three years or fined up to ¥2.5 million (article 198 of the Penal Code). Companies are not punished for their employees' bribery under the Penal Code.

Sanctions against public officials are different, depending on the circumstances. A public official who simply accepts, solicits or promises to accept a bribe in connection with his or her duties may be imprisoned for up to five years (article 197, paragraph 1 of the Penal Code). If an official agrees to perform a certain act in response to a request, the sanction may be increased to imprisonment for up to seven years (article 197, paragraph 1 of the Penal Code). If a public official commits any of the conduct described above and later actually acts illegally or refrains from properly acting in the exercise of his or her duty, he or she may be imprisoned for one year or longer (article 197-3 paragraph 1 of the Penal Code). A former public official may be imprisoned for up to five years, if he or she received a bribe in connection with his or her illegal performance of a duty or inaction in response to a request during his or her public service in the past (article 197-3, paragraph 3 of the Penal Code). These are typical circumstances of domestic bribery, and some derivative circumstances are also punished under the Penal Code.

A bribe accepted by a public official will be confiscated. If all or part of the bribe cannot be confiscated, then an equivalent sum of money shall be collected (article 197-5 of the Penal Code).

31 Facilitating payments

Have the domestic bribery laws been enforced with respect to facilitating or 'grease' payments?

Yes. Japanese domestic bribery law does not differentiate facilitating or 'grease' payments from other benefits, and such payments can constitute a bribe.

32 Recent decisions and investigations

Identify and summarise recent landmark decisions and investigations involving domestic bribery laws, including any investigations or decisions involving foreign companies.

In 2009, the Supreme Court found that a former official in the Central Procurement Office of the Defence Agency (subsequently reorganised as the Ministry of Defence), who deliberately overpaid refund claims from a private manufacturer, was guilty of the crime of bribery. The official overpaid the refund obligations of the Defence Agency and thereby paid the manufacturer an additional sum of money to which it was not entitled. Shortly after the payment, the official retired from the Defence Agency and became a part-time adviser to the manufacturer. While a part-time adviser, the former official was paid a higher salary as consideration for the overpayment he arranged while he worked at the Defence Agency. This was recognised as bribery.

In 2016, the Tokyo District Court handed down a prison sentence of one-and-a-half years, suspended for four years, to a former welfare ministry official for receiving a ¥1 million bribe to favour an information technology company in obtaining research service contracts related to the social security and tax number system.

Until the late 1980s, more than 100 domestic bribery cases were detected by Japanese police every year. This number, however, has decreased rapidly over the past decade, and only 29 bribery cases were detected in 2014. Bribery has become one of the most difficult crimes for Japanese investigative authorities to detect and investigate.

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1 International anti-corruption conventions

To which international anti-corruption conventions is your country a signatory?

Korea has signed and ratified the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention) and the UN Convention against Corruption.

2 Foreign and domestic bribery laws

Identify and describe your national laws and regulations prohibiting bribery of foreign public officials (foreign bribery laws) and domestic public officials (domestic bribery laws).

The rules governing bribery of domestic government officials are stipulated in the following laws and regulations:

- the Korean Criminal Code;
- the Act Concerning Aggravated Punishment of Specific Crimes (the Specific Crimes Act);
- the Act on the Creation and Operation of the Anti-Corruption and Civil Rights Commission and the Prevention of Corruption (the Anti-Corruption Act);
- the Act on the Prohibition of Improper Solicitation and Provision/Receipt of Money and Valuables (the Anti-Graft Act);
- the Public Officials' Code of Conduct for Maintenance of Integrity (the Code of Conduct); and
- other administrative laws and regulations.

As for bribery of foreign public officials, Korea has enacted the Foreign Bribery Prevention in International Business Transactions Act (the FBPA) pursuant to the OECD Convention, which has similarities to the Foreign Corrupt Practices Act in the United States.

Foreign bribery

3 Legal framework

Describe the elements of the law prohibiting bribery of a foreign public official.

In Korea, the main law governing bribery of foreign public officials is the FBPA which entered into force in 1999. Under the FBPA, any Korean national who intentionally engages in the bribery of a foreign public official in order to obtain improper advantages will be subject to criminal punishment. Moreover, any foreign nationals engaged in the bribery of a foreign public official within Korea are also subject to punishment under the FBPA under territoriality principles.

Under article 3.1 of the FBPA, a violation of the FBPA will be found if the following elements are satisfied: any person intentionally promising, giving or offering a bribe (money, goods and other pecuniary advantages as well as intangible benefits that satisfy the demands or the wishes of a person) to a foreign public official in connection with the performance of his or her official duties in order to obtain an improper advantage in an international business transaction.

However, even if the elements above are satisfied, article 3.2 of the FBPA provides an exception if the law of the foreign public official's country permits or requires such payment.

4 Definition of a foreign public official

How does your law define a foreign public official?

Article 2 of the FBPA defines a foreign public official in a way that is similar to the OECD Convention, encompassing not only government officials but also individuals performing a public function (eg, employees in public agencies, international organisations and government-controlled companies).

5 Travel and entertainment restrictions

To what extent do your anti-bribery laws restrict providing foreign officials with gifts, travel expenses, meals or entertainment?

The FBPA prohibits providing a bribe to a foreign official when the elements of article 3.1 are satisfied. A 'bribe' under the FBPA includes 'any undue advantage', which refers to money, goods and includes almost everything that the official demands or desires. As there is no specific exception regarding gifts or entertainment under the FBPA, whether a gift is criminally punishable will depend on the amount of the gift or entertainment and the specific facts of each case.

6 Facilitating payments

Do the laws and regulations permit facilitating or 'grease' payments?

The FBPA was amended on 15 October 2014 to eliminate the facilitation payment exception. Thus, facilitation payments are no longer permitted under the FBPA.

7 Payments through intermediaries or third parties

In what circumstances do the laws prohibit payments through intermediaries or third parties to foreign public officials?

The FBPA itself does not contain specific regulations concerning payments through intermediaries. However, in precedents involving domestic public officials, courts have held that payments provided to third parties may be a criminal offence if the relationship between the third party and the public official is such that the public official may be deemed to have directly received the payment, for example if the third party is an agent of the public official. Additionally, the Korean Supreme Court has ruled that the defendant committed bribery when he or she provided payments to a company where the public official was the de facto manager. In light of these precedents, payment through intermediaries or third parties to foreign public officials, albeit indirectly, is prohibited under the same circumstances.

8 Individual and corporate liability

Can both individuals and companies be held liable for bribery of a foreign official?

Yes. Individuals as well as legal entities can be held liable under the FBPA. A legal entity may be held liable for bribery of a foreign official when a representative, agent, employee or other individual working for such legal entity has committed the foreign bribery offence in connection to its business.

Article 4 of the FBPA, however, does not enforce strict liability if the legal entity has 'afforded due attention or exercised proper supervision to prevent the offence'. The corporation or other legal entity may be exempt from punishment if it proves that it has taken measures to prevent such FBPA violations by its representatives, agents or employees.

9 Successor liability

Can a successor entity be held liable for bribery of foreign officials by the target entity that occurred prior to the merger or acquisition?

No. While there are no specific laws on this point, in 2007 the Korean Supreme Court ruled that a successor entity cannot be held liable for the target entity's acts that occurred prior to the merger or acquisition.

10 Civil and criminal enforcement

Is there civil and criminal enforcement of your country's foreign bribery laws?

The FBPA only contains criminal penalties, but a convicted party may be held liable additionally for civil damages under a lawsuit initiated by a party whose rights were infringed (ie, competitors, customers, business partners, etc) pursuant to tort law.

11 Agency enforcement

What government agencies enforce the foreign bribery laws and regulations?

The FBPA is enforced by the police and the prosecutor's office. A Korean court has final authority in determining the amount of fine or the length of imprisonment.

12 Leniency

Is there a mechanism for companies to disclose violations in exchange for lesser penalties?

There is no explicit mechanism for companies to disclose violations in exchange for reduced penalties. As noted in question 8, however, the corporation or other legal entity may be fully or partially exempt from punishment if it proves that it has taken measures to prevent such FBPA violations by its representatives, agents or employees.

13 Dispute resolution

Can enforcement matters be resolved through plea agreements, settlement agreements, prosecutorial discretion or similar means without a trial?

FBPA enforcement matters are not resolved through plea agreements or settlement agreements. However, as in any other case, the public prosecutor possesses a certain amount of discretionary powers to decide whether to proceed with prosecution depending on the specific circumstances of the case.

14 Patterns in enforcement

Describe any recent shifts in the patterns of enforcement of the foreign bribery rules.

Since the enactment of the FBPA, there have only been a small number of convictions for foreign bribery in Korea, mostly with respect to US army projects in Korea.

In a recent case, the Korean Prosecutor's Office indicted individuals under the FBPA for bribery of an officer of a Chinese state-owned company. The court subsequently found that the officer was not a 'foreign public official' for the purpose of the FBPA and ruled that the defendants committed commercial bribery instead (see question 17).

15 Prosecution of foreign companies

In what circumstances can foreign companies be prosecuted for foreign bribery?

Foreign companies operating in Korea can be held liable for the behaviour of their employees, agents and representatives under the FBPA (see question 3). There are no thresholds as to size or legal form of the entity, so that any legal person acknowledged under the law including associations, foundations, joint-stock corporations, limited liability companies, unlimited or limited partnerships, etc, may potentially come under the reach of the FBPA.

16 Sanctions

What are the sanctions for individuals and companies violating the foreign bribery rules?

Individuals may be subject to imprisonment for up to five years or a fine of up to 20 million won. If the profit obtained through the offence exceeds a total of 10 million won, the individual can be subject to imprisonment of up to five years or a fine of up to twice the amount of the profit. Whenever an individual becomes subject to imprisonment, a fine will be imposed as well.

Corporate entities may be held liable to pay a fine of up to 1 billion won in addition to the imposition of penalties on the actual offender. If the profits that were obtained through the offence exceed a total of 500 million won, the legal entity can be subject to a fine of up to twice the amount of the total profit. The imposition of penalties on the actual offender is not a prerequisite for imposing a fine on the company.

17 Recent decisions and investigations

Identify and summarise recent landmark decisions or investigations involving foreign bribery.

In May 2011, the Incheon District Prosecutor's Office indicted the general manager and the representative directors of a domestic logistics company and a travel agency for offering a bribe to the general manager of a Korean branch office of a Chinese airline, in violation of the FBPA. The accused individuals were charged with providing and taking bribes totalling approximately 6.7 billion won. The Incheon District Court ruled on 14 February 2012 that the general manager of a Korean branch office of a Chinese airline was not a 'foreign public official' for the purpose of the FBPA (Case No. 2011 Gohab 277, 294, 757). The ruling was based on the judgment that there was insufficient evidence to prove that the airline was conducting business on an unequal footing with private companies and, hence, it could not be evaluated as a Chinese state-owned enterprise (SOE). Instead, the court found the general manager and representatives guilty of commercial bribery. Further, as a result of guilty verdicts in connection with other charges relating to embezzlement and document forgery, the general manager was given a six-year prison term and ordered to disgorge profits equivalent to the amount of the bribes received. The Incheon District Prosecutor's Office has appealed against the Incheon District Court's decision on several grounds, including the 'foreign public official' issue. On 1 February 2013, however, the Seoul High Court upheld the decision of the Incheon District Court, maintaining that there is insufficient evidence to prove that the airline branch is a Chinese SOE. The prosecution did not appeal the High Court's decision to the Supreme Court (Case No. 2012 No 865, 2012 No 2685).

In October 2015, the Seoul Central Prosecutors' Office indicted three closed-circuit television (CCTV) manufacturers and their respective executives and employees for offering bribes to a US military official (a US citizen) stationed in Korea, alleging violation of the FBPA. The CCTV manufacturers were charged with giving the bribes in exchange for inflating the number of CCTVs supplied to the US military. The US military official allegedly accepted a total of 128 million won from the three CCTV manufacturers, and has been arrested on charges of commercial bribery under the Korean Criminal Code. The case, which is pending, is in line with previous FBPA enforcement actions, which have largely related to US military projects in Korea.

Financial record keeping

18 Laws and regulations

What legal rules require accurate corporate books and records, effective internal company controls, periodic financial statements or external auditing?

Pursuant to the External Audit of Joint-Stock Company Law, listed companies and all unlisted joint-stock companies with 12 billion won or more (the threshold varies depending on the amount of liability and number of employees) in assets at the end of the latest fiscal year are

required to be audited by an external auditor on an annual basis and required to prepare and keep corporate books with effective internal controls in accordance with Korean GAAP (listed companies are subject to the Korean International Financial Reporting Standards (K-IFRS)). Additionally, the Korean Commercial Code requires a company to prepare an account book and a balance sheet on an annual basis and keep corporate books including important documents related to the business for 10 years. On 28 October 2013 the Financial Services Commission announced its plan to expand the application of the External Audit of Joint-Stock Company Law to limited companies meeting the same minimum size threshold as unlisted joint-stock companies. According to the plan, a limited company meeting the threshold will be subject to an audit by an external auditor and required to prepare and keep corporate books with effective internal controls in accordance with Korean GAAP. Further, on 7 October 2014, the Financial Services Commission issued a Legislation Notice of an amendment to the External Audit of Joint-Stock Company Law, which would subject limited companies meeting a certain threshold to compulsory external audit, as well as introducing the turnover of a company as another threshold for determining companies subject to external audit. The amendment to subject limited companies to compulsory external audit has been proposed in the National Assembly, but review is pending.

19 Disclosure of violations or irregularities

To what extent must companies disclose violations of anti-bribery laws or associated accounting irregularities?

There is no general obligation in the Korean anti-bribery laws to report violations of anti-bribery laws. However, in the case of financial institutions such as banks and securities companies, if the head of the financial institution discovers that a director, officer or an employee has committed a crime under the Aggravated Punishment of Specific Economic Crimes Act (Specific Economic Crimes Act), he or she has the obligation to report such matter to the relevant authorities. The Specific Economic Crimes Act punishes both giving and receiving of bribes with respect to employees of financial institutions.

A company subject to the external audit requirement above is also subject to the requirement that an audit report prepared by an external auditor be submitted to the Financial Supervisory Commission and the Korean Stock Exchange under the Capital Market Consolidation Act. The audit report should disclose information on any events that may have a significant impact on the company. These events would be disclosed in the financial statements (ie, balance sheet and profit and loss statement) as a loss or gain (or a liability or asset, or both) or in the footnote thereof as a 'contingent' liability or asset. The loss of a company that may result from being found guilty of foreign official bribery, if significant, is likely to be recognised as a contingent liability provided that the amount of such liability cannot be measured with sufficient reliability. The audit report must be submitted once per year after the annual financial statements have been prepared. This audit requirement does not require the company to disclose any such event as and when they occur.

An event or omission may be considered to have a 'significant impact' or be considered 'material' from an auditing point of view if such event could influence the economic decisions of those that make such decisions by relying on the financial statements of the company.

20 Prosecution under financial record keeping legislation

Are such laws used to prosecute domestic or foreign bribery?

The above-mentioned laws (other than the Specific Economic Crimes Act) are not used to prosecute domestic or foreign bribery.

21 Sanctions for accounting violations

What are the sanctions for violations of the accounting rules associated with the payment of bribes?

The External Audit of Joint-Stock Company Law states that violations of several of the provisions may subject a violator to up to five years' imprisonment or a fine of up to 50 million won, whereas the Capital Markets Consolidation Act provides for imprisonment of up to five years or a fine of up to 200 million won. According to the Korean Commercial Code, a violation can result in a fine of up to 5 million won.

22 Tax-deductibility of domestic or foreign bribes

Do your country's tax laws prohibit the deductibility of domestic or foreign bribes?

In Korea, the Corporate Income Tax Law and the Individual Income Tax Law prohibit the deductibility of domestic and foreign bribes.

Domestic bribery

23 Legal framework

Describe the individual elements of the law prohibiting bribery of a domestic public official.

Pursuant to articles 129 and 133 of the Criminal Code, the Specific Crimes Act and court precedent, to establish a charge of bribery of a public official (official bribery), prosecutors need to show that an economic benefit has been given to a public official in connection with his or her official duties and the benefits go beyond the boundaries of what is usually given as a matter of custom or social courtesy. 'Economic benefit' is broadly interpreted to encompass anything of value including entertainment, a gift of cash or goods, or even an invitation to a round of golf. A 'public official' includes a 'deemed public official' who is a senior staff employee of a government corporation meeting the requirements provided in article 4 of the Specific Crimes Act or an employee of a public corporation or quasi-government entity (see question 25). Corporations are not subject to liability for official bribery under the Criminal Code and Specific Crimes Act.

The Korean courts have developed a 'social courtesy' exception, and determine whether an act constitutes bribery by taking into account the 'totality of the circumstances' including, but not limited to, the following factors set forth by the Supreme Court: the scope and nature of the recipient's duties; the relevance of the recipient's duties to the giver; the purpose of the benefit; whether there is a pre-existing personal relationship between the recipient and the giver; the circumstances of the benefits conferred, including the frequency, timing and amount or value of the gift or benefit; and whether the benefits caused the recipient to carry out his official duties in a way that would lead the general public to question the propriety of his actions.

Separate from the prosecution of official bribery under the Criminal Code and the framework described above, the Anti-Graft Act was passed by the National Assembly on 3 March 2015 and took effect as of 28 September 2016. In Korea, the law is commonly referred to as the 'Kim Young-ran Law' (named after the then head of the Anti-Corruption & Civil Rights Commission who led the preparation of the original bill).

The new legislation contains several noteworthy features that represent significant departures from the existing anti-bribery regime in Korea, including the following:

- expansive definition of 'public officials': While the anti-bribery regime under the Criminal Code defines 'public officials' as government officials and employees of state-owned enterprises and other public entities, the Anti-Graft Act defines 'public officials' to also include employees of public and private schools, members of the media and 'those who serve a public function' (eg, private citizens on government-appointed committees);
- improper benefits: The anti-bribery regime under the Criminal Code imposes criminal liability only when benefits were provided or received 'in connection with the performance of official duties.' However, the Anti-Graft Act imposes criminal liability without showing such connection to official duties, if the value of benefits given or received exceeds 1 million won for a one-time benefit, or 3 million won in yearly aggregate. The Anti-Graft Act also prohibits giving and receiving benefits 'in connection with the performance of official duties' and imposes an administrative fine even when such benefits do not exceed the monetary thresholds described above. There are, however, certain exceptions for meals, gifts and other legitimate benefits to public officials;
- improper benefits to spouses: Under the Anti-Graft Act, the spouse of a public official is also prohibited from receiving improper benefits in connection with the official duties of the public official. The public official may face sanctions if he or she was aware that his or her spouse received improper benefits but did not report receiving such benefits to the head of the institution where the official is employed;

- improper requests: The Anti-Graft Act prohibits making 'improper requests' (ie, causing public officials to violate laws or abuse their position or authority), irrespective of whether such request involves any payment or provision of benefits. The Anti-Graft Act illustrates 15 types of acts that could constitute an 'improper request,' and at the same time enumerates certain types of requests that would not constitute 'improper request', which include the following:
  - requests made in an open forum;
  - requests by elected officials, political parties or civic groups for public interest purposes;
  - requests to protect rights that are infringed upon, pursuant to legal procedure; and
  - other requests that are within the bounds of social custom.

  Someone who directly makes an improper request for his or her own benefit is not subject to sanctions. However, any person who makes an improper request through a third party to a public official is subject to an administrative fine under the Anti-Graft Act. For example, if a representative director or an employee of a company makes an improper request for the company, he or she will be deemed to have made an improper request for a third party (the company) and be subject to sanctions; and
- corporate liability: The anti-bribery regime under the existing Criminal Code does not impose liability on a corporation when its employee gives unlawful bribes. Under the Anti-Graft Act, however, a corporation may also be subject to administrative or criminal liability if its employees give benefits or make improper requests that violate the Anti-Graft Act. To be exempt from this corporate liability, the company must demonstrate that it exerted significant care and supervision to prevent such violations from being committed by its employees.

24 Prohibitions

Does the law prohibit both the paying and receiving of a bribe?

Yes, under both the Criminal Code and the Anti-Graft Act.

25 Public officials

How does your law define a public official and does that definition include employees of state-owned or state-controlled companies?

Public officials who are employed by both state and local government are primarily defined by the State Public Officials Act and the Local Public Officials Act. However, when it comes to bribery, many statutes include provisions under which certain employees of state-owned or state-controlled companies are deemed to be public officials, thereby subjecting them to bribery provisions under the Criminal Code. For example, a person is deemed to be a public official if he or she is a senior staff employee of a government corporation meeting the requirements provided in article 4 of the Specific Crimes Act. An exhaustive list under the Presidential Enforcement Decree to the Specific Crimes Act specifically identifies the Bank of Korea and the Financial Supervisory Service, in addition to 44 other entities, as organisations that qualify as government-controlled entities. Additionally, pursuant to the Public Organisation Management Act, the state government issues a list of public corporations and quasi-government entities, the employees of which are deemed to be government officers under the Criminal Code with respect to the charge of bribery.

The Anti-Graft Act defines the term 'public official' more broadly to also include school employees, employees of media outlets and those who perform public functions.

26 Public official participation in commercial activities

Can a public official participate in commercial activities while serving as a public official?

According to both the State Public Officials Act and the Local Public Officials Act, public officials of the state and local governments shall not engage in profit-making activities other than public affairs and shall not hold any other jobs without approval by the head of the institution to which he or she belongs. Meanwhile, the Official Duties of Public Officials of the National Assembly forbids officials from engaging in activities that may obstruct the efficiency of their services, wrongfully influence public affairs, give such officials benefits contrary to the interest of the state or affect the government in a dishonourable manner. Lastly, the Code of Conduct, the Code of Conduct for Judges and Court Officials, the Code of Conduct for Constitutional Court Officials and the Code of Conduct for Election Committee Officials require that public officials report to the head of the institution to which they belong regarding any lecture stipends, expositions, presentations or discussions they conduct outside the institution.

27 Travel and entertainment

Describe any restrictions on providing domestic officials with gifts, travel expenses, meals or entertainment. Do the restrictions apply to both the providing and receiving of such benefits?

According to the Criminal Code and the Specific Crimes Act, any type of economic benefit that is provided to or received by a domestic official in connection with his or her duties is prohibited (unless the benefits are within the boundaries of what is usually given as a matter of social courtesy). In such case, both the giver and the taker are punished.

The Anti-Graft Act, however, prohibits any type of benefit to public officials (regardless of whether such benefit is connected to the public official's official duties), and imposes criminal or administrative sanctions for provision or receipt of benefits that would not be categorised as permissible exceptions specifically provided under the Anti-Graft Act. For example, providing meals up to 30,000 won, gifts up to 50,000 won and wedding or funeral cash gifts or flowers up to 100,000 won will not be subject to sanctions under the Anti-Graft Act unless there is a directly pending matter with the recipient public official. As another example, the Anti-Graft Act also allows transportation, accommodation and meals to public officials, if they are:

- provided in connection with an official event that is relevant to the public official's official duties;
- provided uniformly to all participants; and
- within socially acceptable boundaries.

Meanwhile, the Code of Conduct was enacted and took effect on 19 May 2003 in the form of a Presidential Decree to the Anti-Corruption Act to provide general guidelines with respect to, among other things, giving gifts to and entertaining public officials. The Code of Conduct prohibits a public official from receiving any cash, gifts or other entertainment from anyone who has an interest in the performance of the official duties of the official, with a few exceptions, such as a limit of 30,000 won per person for meals. A violation of the Code of Conduct does not necessarily mean that it is a violation of bribery laws. Therefore, in the case of a violation of the Code of Conduct, unless the gifts or entertainment are determined to constitute bribery in violation of the Criminal Code or the Specific Crimes Act, only the public official at the receiving end is subject to disciplinary measures under the Code of Conduct.

28 Gifts and gratuities

Are certain types of gifts and gratuities permissible under your domestic bribery laws and, if so, what types?

It cannot be said that certain types of gifts and gratuities are permissible under Korean law because any gift, no matter how small, could constitute a bribe depending upon the context in which it is given. With respect to government officials, however, the Code of Conduct sets forth certain exceptions that would allow government officials to receive certain gifts and gratuities in certain circumstances and under certain conditions. These exceptions include, for example, a limit of 50,000 won for congratulatory or condolatory gifts, and 'food or conveniences provided within the extent of normal practices'. However, these exceptions do not provide an automatic 'safe harbour', but merely allow a possible defence against bribery charges.

Meanwhile, as discussed in question 27, there are several exceptions for gifts and gratuities under the Anti-Graft Act.

29 Private commercial bribery

Does your country also prohibit private commercial bribery?

Article 357 of the Criminal Code prohibits giving economic benefits to a person who is entrusted with conducting the business of another person if such benefits are related to an improper request made in connection with the duties of the person in question. This essentially concerns the bribery of private sector employees.

The difference between the elements of commercial bribery and those of official bribery is that, in principle, commercial bribery requires that an improper request be made (eg, a request to award a bid in exchange for cash), whereas an improper request is not a necessary element of official bribery. For official bribery, as long as the economic benefits are connected to the public official's duties, providing benefits to an official could be considered bribery even if no improper request is made. In practice, however, prosecutors have tended to gloss over the requirement that an improper request be made in commercial bribery cases, and the courts have not been vigilant in requiring that the element be satisfied.

Articles 5 and 6 of the Specific Economic Crimes Act prohibit offering economic benefits to an officer or an employee of a financial institution in connection with the performance of his or her duties. Similar to the official bribery laws, the Specific Economic Crimes Act explicitly lists the companies, institutions and entities that are considered 'financial institutions' for the purposes of the legislation. The list contains both government-controlled financial institutions and private institutions such as commercial banks, securities companies, asset management companies and insurance companies. Aside from the requirement that the recipient be an officer or employee at a financial institution, the analysis of whether a payment constitutes a bribe is substantially similar to that under the official and commercial bribery provisions.

30 Penalties and enforcement

What are the sanctions for individuals and companies violating the domestic bribery rules?

A giver of a bribe to a government official in violation of the Criminal Code can face up to five years of imprisonment or a fine of up to 20 million won. The penalty that would apply to the giver of commercial bribe would be either a fine of up to 5 million won or imprisonment of up to two years. Companies cannot be held liable for either type of bribery under the Criminal Code.

Under the Criminal Code, a public official who receives, solicits or agrees to a bribe can face imprisonment of up to five years or be disqualified for up to 10 years. In the case of violations under the Specific Crimes Act and the Specific Economic Crimes Act, the penalties may be higher since the maximum penalties are set higher than those under the Criminal Code in correlation with the bribery amount.

Under the Anti-Graft Act, any benefit to public officials above 1 million won, or above 3 million won in yearly aggregate, is subject to either a fine of up to 30 million won or imprisonment of up to three years. The penalty would apply to the both the giver and recipient of the benefit. For benefits under that threshold that are related to the officials duties of the recipient public official, both giver and recipient may be subject to an administrative fine of at least twice, but not exceeding five times, the amount of the benefit. A company may be held liable for the acts of its employees under the Anti-Graft Act.

31 Facilitating payments

Have the domestic bribery laws been enforced with respect to facilitating or 'grease' payments?

Domestic bribery laws do not provide for any 'facilitation payment' exception. The laws regarding bribery of public officials have been enforced with respect to relatively small amounts of money because a violation can be found simply if the payment is made 'in connection with the duties' of the public official.

32 Recent decisions and investigations

Identify and summarise recent landmark decisions and investigations involving domestic bribery laws, including any investigations or decisions involving foreign companies.

On 27 December 2012, the Constitutional Court found that a private person appointed as a member of a government committee is not a public official for the purpose of official bribery, unless there are any explicit laws stipulating that such person would be deemed a public official. According to the decision, it is a violation of the principle of statutory criminal punishment if a private person is deemed a public official without any statutory grounds (Case No. 2011 Hunba 117). This should be viewed in contrast with the Anti-Graft Act, however, which would include such individuals (ie, civilians appointed to government committees) as public officials under the Anti-Graft Act, since they are individuals performing a public function. That is, if the individual at issue received a bribe exceeding 1 million won, he or she would not be subject to official bribery charges under the Criminal Code, but he or she would be subject to criminal charges under the Anti-Graft Act.

Cash wedding gifts are common and customary in Korea, and a December 2013 Supreme Court decision clarified that the amount of the gift is not necessarily indicative of whether it constitutes a bribe. Specifically, the Supreme Court ruled that a public official's receipt of cash gifts for his daughter's wedding from those associated with companies that were subject to his supervision and authority, whom he came to know through work and with whom he did not have a personal relationship, constitutes bribery irrespective of the amount. In reaching its decision, the Supreme Court considered various factors including the following: the public official had indiscriminately sent wedding invitations to personnel of companies under his jurisdiction and subsequently received cash gifts; the invitees did not have a personal relationship with the public official – rather, most of those who gave cash gifts had met the public official only once or twice during business visits to the official's office; the invitees were in a position to fear they might be disadvantaged if they did not give cash gifts; and sending wedding

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invitations and subsequently receiving cash gifts could lead the public to question the fairness and impartiality of the public official in performing his duties. In conclusion, the Supreme Court ruled: 'if a public official received money or other valuables from a person associated with his work, unless there were special circumstances showing that such gifts were provided out of a personal relationship or friendship, even if such gifts appear to be within the bounds of social custom, the receipt of such gifts may constitute bribery'.

The case was remanded to the Seoul High Court, and on 12 June 2014, the Seoul High Court rendered its final decision, which explained in a relatively detailed manner why it found some instances of cash gifts to constitute bribery but not others. The key factors considered by the court in determining cash gifts as bribes include the following:

- the public official mailed out invitations or sent text messages concerning his daughter's wedding to persons associated with companies that had an interest in his official duties (the duty-related companies) and subsequently received cash gifts from such companies;
- while some representatives of the duty-related companies did not receive wedding invitations or text messages, such representatives of the duty-related companies nevertheless gave cash gifts to the public official (directly or by giving the cash gift to a public official's subordinate to be relayed to the public official), and the public official was aware that such representatives of the duty-related companies had given cash gifts;
- the representatives of the duty-related companies (whether they had been invited to the wedding or sent cash gifts without receiving an invitation), had merely met the public official on business once or twice and did not have a personal relationship with the public official; and
- the representatives of the duty-related companies used company funds to make the cash gifts or used personal funds but subsequently sought reimbursement from their company as a business expense.

Finally, there has been a recent case that signifies a greater level of sophistication on the part of the anti-corruption authorities in Korea, to expand their review beyond the typical bribery cases involving one-time payments to also question long-term or ongoing transactions or relationships involving government officials. On 13 May 2015, the Special Investigation Unit of the Busan District Prosecutor's Office announced that it had indicted and taken into custody the former president of the Busan Metropolitan Corporation (BMC), senior police officials and members of the city council who provided preferential administrative treatment and other favours to a large corporation in return for being allowed to obtain leases in a shopping mall owned by that corporation.

An investigation conducted by the Prosecutor's Office has revealed that the public officials had pressured BMC and other entities to implement changes to the surrounding infrastructure in favour of the shopping mall and to issue the approval for land use to the shopping mall ahead of schedule. Although the public officials argued that they obtained leases in the shopping mall under customary terms and conditions, the Prosecutor's Office took the view that allowing the public officials to obtain the leases constituted a 'pension-type bribe', in that the lease would have enabled the public officials to obtain an ongoing, regular stream of income, as opposed to receiving a one-time payment.

Referring to the benefit received by the public officials as a 'new form of illegal lobbying', the Prosecutor's Office stated that it plans to further investigate whether there have been similar cases of bribery in other instances.

Liechtenstein

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1 International anti-corruption conventions

To which international anti-corruption conventions is your country a signatory?

Recent anti-corruption conventions signed by Liechtenstein include the United Nations Convention against Corruption (UNCAC) in 2003, which was ratified in 2009 and put into force in August 2010, and the United Nations Convention against Transnational Organized Crime and the protocols thereto (especially the Palermo Agreement), which entered into force in Liechtenstein in March 2008.

The first review of implementation of the United Nations Convention against Corruption in Liechtenstein took place in November 2014. The Country Report, which was published by the United Nations in June 2015, noted Liechtenstein's efforts in the field of anti-corruption and recommended swift adoption and implementation of the already-planned amendments to the Penal Code and other related laws.

Furthermore, Liechtenstein has signed the Criminal Law Convention on Corruption of the Council of Europe and therefore is member of the Council of Europe Group of States against Corruption (GRECO). A first Compliance Report on Liechtenstein was published by GRECO in October 2013. The report concluded that Liechtenstein has implemented satisfactorily some of the recommendations contained in the Joint First and Second Round Evaluation Report, whereas other recommendations remain to be dealt with. The Third Round Evaluation took place in September 2015.

An amended piece of legislation implementing additional recommendations by the United Nations and GRECO entered into force on 1 June 2016. Inter alia, specific rules to fully criminalise active and passive bribery in the private sector as well as other amendments to the existing bribery laws in Liechtenstein were introduced.

Liechtenstein is active in the prevention of and the fight against corruption at both national and international levels and supports several international institutions in anti-corruption projects. Good governance including prevention of corruption is a main focus of the Liechtenstein development policy according to the new development assistance law. The government of the Principality of Liechtenstein supports on an ongoing and substantial basis for example, the International Centre for Asset Recovery of the Basel Institute on Governance. In November 2011, Liechtenstein signed the Agreement for the Establishment of the International Anti-Corruption Academy (IACA, Austria) as an international organisation.

The anti-money laundering legislation of Liechtenstein, especially important in corruption cases, and its implementation and practical application is very strict. Comprehensive due diligence rules oblige banks and all other financial intermediaries to identify the contractual partner and the beneficial owner of any funds. Banks have to identify their customers and there are specific provisions with regard to politically exposed persons. Banks and other financial intermediaries are obliged to submit suspicious transaction reports to the national Financial Intelligence Unit (FIU) in case of any suspicion of specified illegal activities, including corruption offences, and if substantiated, they are obliged to immediately block respective accounts. Liechtenstein's FIU is a member of the Egmont Group and exchanges information with its foreign counterparts. Liechtenstein has fully implemented the third EU Anti-Money Laundering Directive. The implementation of the fourth EU Anti-Money Laundering Directive is in progress. Specific provisions have already been implemented into national law.

Liechtenstein banking secrecy does not offer any protection against criminal prosecution, including with respect to international legal assistance. There are effective measures in place to prevent assets from being withdrawn. Within the framework of legal assistance, Liechtenstein supplies the state that has submitted a request with details of suspicious accounts that can be used as evidence in criminal procedures or legal proceedings. Liechtenstein cooperates with the states concerned to find ways to return the assets to the rightful owners (see Basel Institute on Governance, country profile of Liechtenstein, at www.assetrecovery.org).

2 Foreign and domestic bribery laws

Identify and describe your national laws and regulations prohibiting bribery of foreign public officials (foreign bribery laws) and domestic public officials (domestic bribery laws).

Active and passive corruption of domestic officials is criminalised under section 302ff of the Liechtenstein Penal Code.

Active corruption is defined as offering, promising or giving any advantage to a public official, for the benefit of that person or anyone else, for him or her to act, or refrain from acting in relation to his or her official activity, in breach of his or her duties. Passive corruption is defined respectively as soliciting, receiving a promise of or accepting such an advantage by a public official. Passive corruption (according to section 304 of the Penal Code) and active corruption (according to section 307 of the Penal Code) is punishable with a term of imprisonment of up to 10 years.

According to section 305 of the Liechtenstein Penal Code, any public official demanding or accepting any undue advantage as consideration for any action or omission within his or her official duties is punishable with a term of imprisonment of up to five years. Anybody offering an undue advantage to a public official or a third party is sanctioned according to section 307a of the Penal Code with a term of imprisonment of up to five years.

Furthermore, cases of bribery in the private sector may also be prosecuted according to the general provisions of section 153 of the Penal Code (fraudulent breach of trust), if applicable in the particular circumstances of the case.

Finally, handling any proceeds of corruption also constitutes the crime of money laundering according to section 165 of the Penal Code, which expressly mentions corruption offences as indicative offences of money laundering.

Foreign bribery

3 Legal framework

Describe the elements of the law prohibiting bribery of a foreign public official.

Active corruption of a foreign public official is included in the same provisions of the law that also prohibit active corruption of a domestic official. According to section 307 of the Penal Code, anybody offering, promising or giving any advantage to a (foreign) public official so that this public official will act, or refrain from acting in relation to his or

her official activity, in breach of his or her duties, will be punished with imprisonment of up to 10 years.

Passive corruption of a (foreign) public official is a crime according to section 304 the Liechtenstein Penal Code.

4 Definition of a foreign public official

How does your law define a foreign public official?

The definition of an foreign public official corresponds to the requirements of the OECD Anti-Bribery Convention and includes any person holding an office in the foreign state in legislation, administration or in the judiciary, who acts on behalf of a foreign state, an administrative body or a foreign public enterprise or who is an official of an international organisation (section 74.4a of the Penal Code).

5 Travel and entertainment restrictions

To what extent do your anti-bribery laws restrict providing foreign officials with gifts, travel expenses, meals or entertainment?

In general, any undue advantage given, promised or offered with the purpose of influencing the foreign public official's decision about acting or refraining from acting in a specific way, which is in breach of his or her duties, is covered by section 307a of the Penal Code; the undue advantage can be of any nature.

6 Facilitating payments

Do the laws and regulations permit facilitating or 'grease' payments?

Facilitating or 'grease' payments paid to a foreign public official are in general also covered by the respective bribery provisions of the law and are therefore prohibited, if these 'bribes' affect the public official's acting or refraining from acting in breach of his or her duties.

7 Payments through intermediaries or third parties

In what circumstances do the laws prohibit payments through intermediaries or third parties to foreign public officials?

Payments through intermediaries or third parties are punishable according to section 307 of the Penal Code.

According to section 12 of the Penal Code, an accomplice will be punished to the same extent as the main perpetrator of a crime.

8 Individual and corporate liability

Can both individuals and companies be held liable for bribery of a foreign official?

Based on section 74a ff of the Penal Code, both the company and individuals acting on its behalf may be held liable. These provisions apply also to bribery of a foreign official.

According to section 25 of the Unfair Competition Act, a legal entity was already before liable together with the individual acting on its behalf for respective fines based on this act.

9 Successor liability

Can a successor entity be held liable for bribery of foreign officials by the target entity that occurred prior to the merger or acquisition?

The provisions about specific criminal liability of legal entities in the Penal Code, which also apply to bribery of a foreign official, expressly state in section 74d that the successor entity can also be held liable. Legal consequences imposed on the legal predecessor do also affect the successor entity.

10 Civil and criminal enforcement

Is there civil and criminal enforcement of your country's foreign bribery laws?

Bribery laws as previously described will be enforced and respective offences prosecuted ex officio by the Attorney General's Office and the courts. The legal basis in the Penal Code is section 302 ff with respect to corruption, section 165 with respect to money laundering and section 153 with respect to fraudulent breach of trust.

The proceeds of corruption may be confiscated or forfeited by court order according to section 20ff of the Liechtenstein Penal Code.

In cases of international mutual legal assistance according to the respective act, legal assistance to a foreign authority will be granted. At the same time, a parallel national criminal investigation and a respective prosecution will usually be initiated in cases, for example, where bribes have been deposited in accounts within the jurisdiction or there is some other connection to Liechtenstein.

Foreign civil forfeiture decisions with respect to corruption payments can be enforced in Liechtenstein by way of mutual legal assistance.

11 Agency enforcement

What government agencies enforce the foreign bribery laws and regulations?

The Ministry of Justice of the Liechtenstein government is the central authority to receive and handle respective requests regarding cases of international cooperation by way of mutual legal assistance. From there the respective request will be forwarded to the district court to conduct investigations, freeze assets and collect evidence to be forwarded to the foreign requesting authority by respective court orders.

Through the courts, the Attorney General's Office, the national police with its specialised department on economic crime, the national FIU and possibly also the Financial Market Authority and other administrative bodies get involved as well. As soon as these additional agencies are involved, national investigations and proceedings will be opened and conducted.

12 Leniency

Is there a mechanism for companies to disclose violations in exchange for lesser penalties?

Based on section 74b of the Penal Code there is a mechanism in place for companies to disclose violations in exchange for lesser penalties. Depending on whether the legal entity indemnifies the victim of any illegal activities or compensates for damages produced by this activity, and whether the legal entity is cooperative with the investigating authorities, this will be taken into account by the court when determining sanctions for the legal entity and its representatives.

13 Dispute resolution

Can enforcement matters be resolved through plea agreements, settlement agreements, prosecutorial discretion or similar means without a trial?

In Liechtenstein law there are no provisions that would facilitate enforcement matters to be resolved through plea agreements, settlement agreements, prosecutorial discretion or similar means without a trial. The only exceptions are the possibility to reduce the criminal sanctions according to sections 34, 41f or 74b of the Penal Code in cases of full cooperation with the authorities, etc, or in specific circumstances, the possibility of a 'diversion', according to section 22a ff of the Code of Penal Procedure.

14 Patterns in enforcement

Describe any recent shifts in the patterns of enforcement of the foreign bribery rules.

The amended provisions of the Penal Code with respect to corruption entered into force in June 2016. With this new regulation, additional recommendations by the United Nations and GRECO were implemented into national law.

Furthermore, the Act on Mutual Legal Assistance has been amended and the respective regulations have been recently strengthened and tightened.

Update and trends

The national anti-corruption laws have been amended in 2016. The new provisions entered into force on 1 June 2016 and strengthened the existing anti-corruption regulation in Liechtenstein. Inter alia, a new provision on private sector bribery was introduced in the Penal Code.

Based on an amendment of the Code of Criminal Procedure, new provisions were implemented which allow for the search of documents of third persons as well as seizure and confiscation also in respect of offences that are only punishable with less than six month's imprisonment, thereby ensuring that in all corruption-related investigation information may also be obtained from information holders who are themselves not suspects.

According to statistical information of the Financial Intelligence Unit (Annual Report 2015), corruption offences as predicate offences to money laundering increased by 20 per cent in 2015 (in the previous year it increased by 16 per cent).

15 Prosecution of foreign companies

In what circumstances can foreign companies be prosecuted for foreign bribery?

A problem with the direct prosecution of a foreign company might be the establishment of jurisdiction. In general, however, the provisions of the Penal Code (section 74a ff) do apply to foreign legal entities as well. The representatives of a company may, furthermore, be prosecuted for infliction of foreign bribery laws according to the aforementioned Liechtenstein laws. For a prosecution there needs to be a connection to the jurisdiction of Liechtenstein, that is, there must be illegal activities or incriminating assets within the jurisdiction of Liechtenstein.

The International Monetary Fund, in a Progress Report in 2008, pointed out that the Liechtenstein legal system is very efficient with respect to forfeiture proceedings, according to section 20 ff of the Penal Code. The respective forfeiture provisions have recently been strengthened.

16 Sanctions

What are the sanctions for individuals and companies violating the foreign bribery rules?

Individuals violating foreign bribery laws and regulations are criminally liable under the aforementioned provisions of the Penal Code and of the Unfair Competition Act. There might, however (also for companies), be collateral sanctions including disqualification from a regulated economic activity, business or industry. In the case of criminal sanctions, individuals may also be expelled from Liechtenstein, if they are not citizens of Liechtenstein. As already mentioned, respective proceeds of crime will be confiscated or forfeited by court order.

17 Recent decisions and investigations

Identify and summarise recent landmark decisions or investigations involving foreign bribery.

A landmark procedure in this respect is certainly the in 2014, successfully concluded *Abacha* case, where a judgment of the Appeals Court was handed down after several years of trial in 2010, confirming a judgment of the first-instance criminal court. By this judgment, all the seized assets have been declared forfeited; the case was then taken on final appeal to the Constitutional Court, which finally confirmed the forfeiture, as last instance. Since the defendants filed an appeal with the ECHR in Strasbourg, the execution of the national decision and the repatriation of the monies to the Republic of Nigeria, delayed again, was, however, finally arranged in line with the provisions of UNCAC in 2014.

In this whole matter, proceedings have been and are still conducted in several jurisdictions to recover funds misappropriated by the late General Sani Abacha, former Prime Minister of Nigeria, in an amount of several billion US dollars. Corresponding proceedings have been initiated in several jurisdictions such as France, Jersey, Liechtenstein, Luxembourg, Switzerland and the UK, some of which are still pending today.

The evidence obtained in Switzerland and Luxembourg showed important connections to accounts with Liechtenstein banks. In late July 2000, a request for mutual legal assistance was lodged with the Liechtenstein authorities, which was admitted in August 2000, leading to the freezing of more than 10 bank accounts, in which assets totalled more than US$200 million. The Liechtenstein mutual legal assistance proceedings for the transmittal of evidence to Nigeria have been terminated and the requested legal assistance has been granted.

At the same time, the Liechtenstein authorities initiated a domestic criminal investigation into money laundering, in which Nigeria was admitted as a party suing for damages. In the context of their domestic investigation, the Liechtenstein authorities obtained mutual assistance from Austria, Germany, Luxembourg, Nigeria and Switzerland, among others. On 19 January 2005 the Liechtenstein Attorney General's Office requested the indictment of Mohammed Abacha, Abba Abacha and four Liechtenstein businessmen for fraudulent breach of trust and money-laundering. On 10 October 2006 a criminal trial began, which was converted into forfeiture proceedings regarding the assets frozen in Liechtenstein, owing to the absence of the accused from the proceedings. In summer 2014, after the appeal with the ECHR was withdrawn, the Republic of Nigeria, as the victim of the crimes, received the allocation of the forfeiture proceeds and the whole matter was successfully concluded.

A further recent case is a matter of corruption that involved the bribing of a high-ranking official in the Foreign Ministry of Germany in connection with the sale of military equipment to Saudi Arabia.

Another matter was resolved at the beginning of 2013 involving important corruption suspicions against a former member of the Austrian government with regard to the BUWOG affair. Legal assistance has been granted and the matter now falls to the Austrian courts to deal with.

Also ongoing is a high-profile matter of a well-known Austrian lobbyist involving BAE (dealing with Eurofighter aircraft) and other multinationals in connection with investigating political corruption in various important international transactions.

Financial record keeping

18 Laws and regulations

What legal rules require accurate corporate books and records, effective internal company controls, periodic financial statements or external auditing?

The basic law requiring accurate corporate books and records is the Liechtenstein Act on Persons and Companies, according to which companies are under an obligation to keep proper (ie, true, fair and complete) balance sheets and profit and loss statements according to the general principles on bookkeeping and accountancy.

A further legal basis for the obligations is the Due Diligence Act (the DDA) and the respective Ordinance (the DDO).

Special rules apply to companies in specifically regulated sectors such as banking or insurance. There is no general duty for internal auditing except for specially regulated sectors.

19 Disclosure of violations or irregularities

To what extent must companies disclose violations of anti-bribery laws or associated accounting irregularities?

Companies might be obliged to disclose violations of anti-bribery laws or associated accounting irregularities according to the DDA or according to specific regulations of the respective specially regulated sector (eg, in the banking industry).

20 Prosecution under financial record keeping legislation

Are such laws used to prosecute domestic or foreign bribery?

In general, financial record keeping legislation, except due diligence legislation with its obligations to document, monitor and report business relationships, is rarely used to prosecute domestic or foreign bribery.

21 Sanctions for accounting violations

What are the sanctions for violations of the accounting rules associated with the payment of bribes?

The sanctions for violations of the accounting laws and regulations associated with the payment of bribes include fines according to the rules pertaining to the Commercial Registry and possibly also according to the general provisions of the Penal Code. There might be further sanctions in connection with the tax laws and for regulated industries according to the specific regulations (eg, in the banking and insurance industry).

22 Tax-deductibility of domestic or foreign bribes

Do your country's tax laws prohibit the deductibility of domestic or foreign bribes?

According to the Tax Act of 2011 there is a provision that expressly prohibits the deductibility of domestic or foreign bribes. It is clear, that such payments – irrespective of whether they are transparent or hidden as expenditure – are illegal and can therefore not be deducted, owing to the fact that corruption is prohibited according to the Penal Code.

Domestic bribery

23 Legal framework

Describe the individual elements of the law prohibiting bribery of a domestic public official.

Active and passive corruption of domestic officials is criminalised under section 302ff of the Liechtenstein Penal Code.

Active corruption is defined as offering, promising or giving any advantage to a public official, for the benefit of that person or anyone else, for him or her to act, or refrain from acting in relation to his or her official activity in breach of his or her duties.

Passive corruption is defined as soliciting, receiving a promise of or accepting such an advantage by one of the mentioned officials.

According to section 302ff of the Liechtenstein Penal Code any public official demanding or accepting any advantage as consideration for any action or omission within his official duties is punishable with a term of imprisonment of up to three years. The penalty will be increased to a term of imprisonment of up to 10 years, depending on the amount of the advantage offered.

According to section 307 of the Liechtenstein Penal Code, anybody offering an advantage to a public official will be punished with a term of imprisonment of up to three years. The penalty will be increased to a term of imprisonment of up to 10 years, depending on the amount of the advantage offered.

24 Prohibitions

Does the law prohibit both the paying and receiving of a bribe?

As mentioned before, according to sections 304 and 307 of the Liechtenstein Penal Code, the law prohibits both the paying and the receiving of bribes.

25 Public officials

How does your law define a public official and does that definition include employees of state-owned or state-controlled companies?

According to the definitions of section 74.4a of the Penal Code, the qualification 'public official' includes any person entrusted at state or municipal level or by a legal entity under public law with functions in legislation, administration or in the judiciary. The definition includes equally domestic and foreign officials and those of international organisations.

According to section 74.4a(c) of the Penal Code the definition also includes employees of a public enterprise.

26 Public official participation in commercial activities

Can a public official participate in commercial activities while serving as a public official?

As an exception, an individual holding a full-time position in the public administration or in the judiciary may participate in commercial activities while serving as a public official, if these activities are of a minor nature and do not conflict with the public official's duties. Express authorisation from the government is required for such private commercial activities of a member of the public administration or the judiciary.

27 Travel and entertainment

Describe any restrictions on providing domestic officials with gifts, travel expenses, meals or entertainment. Do the restrictions apply to both the providing and receiving of such benefits?

According to sections 305 and 307a ff of the Penal Code, the asking or accepting of whatever undue advantage for the performance of his or her legal duties by the public official is penalised. According to subparagraph 3 of section 305, a public official will not be sanctioned if the advantage is permitted by law or in case of customary courtesy presents of a minor nature.

Also according to section 39 of the Act on Public Officials, public officials are not allowed to accept gifts or other advantages for themselves or for others, except minor courtesy presents. According to the recommendations of a governmental working group, it is recommended for all public officials not to accept any gifts at all. For members of the judiciary, receiving any benefit is prohibited (article 22 of the Code of Employment of Judges).

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In cases of acting or refraining from acting in breach of the public official's duties, providing or receiving of whatever benefit is sanctioned.

28 Gifts and gratuities

Are certain types of gifts and gratuities permissible under your domestic bribery laws and, if so, what types?

As mentioned above, according to the law, minor gifts and gratuities might be permissible under Liechtenstein domestic bribery laws, as long as the domestic official does not act or refrain from acting in breach of his duties and as long as he or she is not a member of the judiciary. However, there is a recommendation within the administration in general not to accept any gifts at all, so that there might still be disciplinary sanctions, even if a public official accepts only such a 'minor gift'.

29 Private commercial bribery

Does your country also prohibit private commercial bribery?

According to a new provision in section 309 of the Liechtenstein Penal Code, active and passive bribery in the private commercial sector is punishable with a term of imprisonment of up to two years. The penalty will be increased to a term of imprisonment of up to five years, depending on the value of the advantage offered or accepted.

30 Penalties and enforcement

What are the sanctions for individuals and companies violating the domestic bribery rules?

For individuals, the maximum sanction based on the core provisions of section 302 ff of the Penal Code can be imprisonment of up to 10 years. According to section 153 (fraudulent breach of trust) of the Penal Code, imprisonment of up to three years can be the sanction, and in cases of very important damages (section 153 II of the Penal Code), the sanction can be imprisonment of up to 10 years. Alternatively, there is always the possibility of major fines.

Active and passive bribery in the private sector provides for a punishment with a term of imprisonment of up to five years, depending on the amount of the advantage offered or accepted.

According to the provisions of the Unfair Competition Act, individuals and companies violating these provisions will be sanctioned with major fines. The company is jointly and severally liable with the individual for the payment of these fines.

A company can be fined based on the new provisions of section 74a ff of the Penal Code as mentioned above, which provides for fines up to a maximum of 2.7 million Swiss francs.

31 Facilitating payments

Have the domestic bribery laws been enforced with respect to facilitating or 'grease' payments?

No case regarding the enforcement of domestic bribery laws with respect to facilitating or 'grease' payments is known to have been reported to date.

32 Recent decisions and investigations

Identify and summarise recent landmark decisions and investigations involving domestic bribery laws, including any investigations or decisions involving foreign companies.

Recent landmark decisions and investigations involving violations of domestic bribery laws and investigations or decisions involving foreign companies include the well-known cases of *Siemens* and *Parmalat*.

Mexico

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1 International anti-corruption conventions

To which international anti-corruption conventions is your country a signatory?

Mexico is now a signatory to three international anti-corruption conventions:

- the Inter-American Convention against Corruption;
- the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions; and
- the United Nations Convention against Corruption.

2 Foreign and domestic bribery laws

Identify and describe your national laws and regulations prohibiting bribery of foreign public officials (foreign bribery laws) and domestic public officials (domestic bribery laws).

In Mexico, the foreign bribery law that applies to foreign public officials, besides of course the Federal Criminal Code, is also the US Foreign Corrupt Practices Act (FCPA). Even though the FCPA is a foreign law with application within the US, it effects are applicable for certain activities from abroad (Mexico) in connection with US officials.

The FCPA has primarily two main components:

- anti-bribery provisions; and
- accounting provisions.

Any violation of the FCPA could result in both criminal and civil penalties (imprisonment and fines).

The national regulations applying to domestic public officials are:

- Mexican Federal Constitution: established in article 113 is the creation of the National Anti-Corruption System (SNA). This agency is the coordinating body between the authorities of all levels of government responsible for the prevention, detection and punishment of acts of corruption and administrative responsibilities and the supervision and control of public resources. Also article 108 of the Federal Constitution defines as a 'public official' all the representatives elected as members of the federal judiciary and the judicial branch of the Federal District, officers and employees and, in general, any person who holds a position, post or commission of any nature in Congress, in the legislative assembly of the Federal District or the federal government or the Federal District, as well as civil officials of the bodies to which the Constitution grants autonomy, who will be responsible for the acts or omissions incurred in the performance of their respective functions;
- the International Cooperation for Development Act: this provides legal guidelines for the administration, quantification and control of the resources received from other national sources and worldwide, through procedures that ensure full transparency;
- the Act on the Conclusion of Treaties: this Act aims to regulate the conclusion of treaties and agreements internationally. Treaties may only be concluded between the government of the United Mexican States and one or more subjects of public international law;
- the Anti-Corruption within Public Procurements Act: this Act shall become invalid from 19 July 2017;
- the National Anti-Corruption System General Act: this aims to, among others: establish the coordination mechanisms between the diverse members combatting corruption at the federal, local, and municipality levels, as well as in city halls of Mexico City; set the minimum basis for corruption prevention and administrative offences; regulate the organisation and functioning of the Anti-Corruption National System; and set forth basis, principles and procedures for the organisation and operation of the Civic Participation Committee. This Act shall become enforceable on 18 July 2017;
- the Administrative Liabilities General Act: this Act establishes the administrative liabilities, the obligations and the sanctions for the commission or omission of public officials of the three governmental levels, as well as of the particulars that are incurred in administrative major offences. This Act shall become enforceable on 18 July 2017;
- the Federal Administrative Liabilities of Public Officials Act: establishing in article 45 that public officials who receive goods or donations, the cumulative value of which during a year exceeds 10 UMAs (the new economic measurement in Mexico, which replaces the prior economic measurement, the minimum wage), must provide timely notice of such donations or goods;
- the Federal Criminal Code: this sets forth bribery as a crime in article 222 for domestic public officials and in article 222-bis for foreign public officials;
- the Prevention and Identification of Transactions with Funds from Illegal Sources Act: this considers as a vulnerable activity the emission or marketing, card services, credit, prepaid cards and all the instruments constituting the storage of monetary value;
- the National Development Plan: this plan is elaborated by the executive during the first six months of the presidential six-year term and consists of a government's guideline to what will be executed during the current term of the president; and
- the Federal Civil Code: articles 2108 and 2109 set forth the civil liabilities in the case of compensatory damages and loss of future legal earnings.

Foreign bribery

3 Legal framework

Describe the elements of the law prohibiting bribery of a foreign public official.

The Federal Criminal Code established as a crime the act of obtaining or retaining for himself, herself or another person undue advantages in the development or conducting of international business transactions, and the offering, promising or giving, directly or through an intermediary, of money or any other gift, either in goods or services.

4 Definition of a foreign public official

How does your law define a foreign public official?

Within Mexican law, the legal definition of a foreign public official is established in the Federal Criminal Code; article 222-bis defines foreign public official as one who has a job, position or commission whether inside the legislative, executive or judicial branches, or an autonomous public organism inside any order or at any government level of a foreign country, whether appointed or elected; any person exercising a function for an authority, body or public company or state participation

in a foreign country; and any official or agent of a body or public international organisation.

5 Travel and entertainment restrictions

To what extent do your anti-bribery laws restrict providing foreign officials with gifts, travel expenses, meals or entertainment?

In our domestic legislation, the restriction on receiving gifts, travel expenses, meals or entertainment is expressly provided by the Federal Act on Public Officials' Liabilities, applicable for domestic public officials. The referred-to law established the following restrictions to determine conflict of interest: during the course of employment, position or commission, and for a year after, public officials may not request, accept or receive for themselves, or through an intermediary, money or any kind of gift, service, employment, position or commission for themselves, from anyone whose professional activities, commercial or industrial, are directly linked, regulated or supervised by the public official in the performance of his or her job, position or commission.

We consider that this could apply for foreign officials in connection with article 222-bis of the Federal Criminal Code, referred to in questions 3 and 4.

6 Facilitating payments

Do the laws and regulations permit facilitating or 'grease' payments?

The anti-bribery provisions of the FCPA, expressly provides that: '... shall not apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action ... .' However, Mexican laws do not permit facilitating or grease payments.

7 Payments through intermediaries or third parties

In what circumstances do the laws prohibit payments through intermediaries or third parties to foreign public officials?

Based on the Federal Act on Public Officials' Liabilities, payments through intermediaries or third parties to any public official are prohibited under any circumstances; notwithstanding, such prohibition has a restriction, consistent when performing the public charge and for a year after, receive, request or accept money or any kind of gift, service, employment, position or commission for himself or herself, from anyone whose professional activities, commercial or industrial, are directly linked, regulated or supervised by the public official in the performance of his or her job, position or commission, to determine conflict of interest.

It should be mentioned here that domestic public officials are subject to the above; however, as we stated in question 5, there is some interpretation in the field of foreign public officials as they could be considered inside the protection arena of such regulation.

8 Individual and corporate liability

Can both individuals and companies be held liable for bribery of a foreign official?

Yes, Mexican law prohibits bribery equally by individuals and corporations, but the sanctions are different because of the nature of the liability assumed by the parties. This means that companies cannot be punished with an imprisonment sanction, but the ones who are legally responsible, shareholders, the board of directors or those who work in the company or the partners of it, or anyone involved in the bribery, could face criminal sanctions. On the other hand, companies can bear civil liability, and they most likely will be penalised with economic sanctions.

Additionally, the sanctions imposed by the Administrative Liabilities General Act for the commission of major offences (bribery; illegal participation in administrative procedures; traffic of influences; submitting false or altered information or simulating compliance with the requirements in order to obtain any kind of authorisation, benefit or advantage, or to prejudice third parties; when corporations or individuals that are participating in the public procurement reach a commercial agreement in order to obtain a benefit or damage the public finances; unlawful use of public resources; and contracting with former public servants) are:

- major economic penalties: For individuals the penalties are from $7,304 up to approximately $10,956,000 Mexican pesos; and for corporations the sanctions are from $73,040 up to approximately $109,560,000 Mexican pesos;
- temporarily disqualification on participation in acquisitions, leasing, services or public works for three to 10 years;
- dissolution of the legal entity; and
- indemnification for damages and lost profits.

9 Successor liability

Can a successor entity be held liable for bribery of foreign officials by the target entity that occurred prior to the merger or acquisition?

Pursuant to the Corporations Act, a merger agreement has no full effect until a three-month term has passed since its execution between the parties. The main purpose of the aforementioned term is so that any creditor can claim any right. So, the successor entity can be held liable for bribery in the event of a merger or acquisition, since the legal character of the corporations is also assigned to the target, so in such event, the target company and the successor are the same person for legal purposes.

Additionally, the successor and new company can argue in its own favour that the illegal action was committed prior its constitution, and reduce the liability.

10 Civil and criminal enforcement

Is there civil and criminal enforcement of your country's foreign bribery laws?

Civil enforcement is regulated in the Federal Civil Code, and criminal enforcement is established pursuant the Federal Criminal Code. These codes enforce the application of penalties for the breach of any disposition of the aforementioned codes, including the Criminal Code that provides that bribery is a crime, the purpose of which is the gathering or retention for himself, herself or for another person undue advantages in the development or conduction of international business transactions, offering, promising or giving, directly or through an intermediary, money or any other gift, either in goods or services.

We interpreted that the obligation for the enforcement of foreign bribery acts is also established in the Federal Constitution. The Constitution established in article 133 that the Constitution, the treaties to which Mexico is a signatory (and that are ratified by our Senator's Chamber) and the federal acts are the supreme law of our nation. This means, that if a foreign bribery law is provided by a convention or a treaty, the Mexican state is obligated to execute and monitor its compliance with such Act.

11 Agency enforcement

What government agencies enforce the foreign bribery laws and regulations?

The government agency in charge of enforcing all the bribery acts and regulations is the Ministry of Government Affairs. This Ministry monitors the performance of federal public officials, determines the purchasing policy of the Federation, audits the spending of federal funds and coordinates internal control bodies in each federal agency, among other functions that are determined in the Structural Act on the Public Federal Administration and its own rules and regulations governing internal organisation in detail.

On 27 May 2015, the Constitutional Amendment in Anti-Corruption Matters was published in the Official Federal Gazette. Because of this amendment, the SNA was created constitutionally, which will comprise the heads of the Superior Audit Office, the Prosecutor for the Fight Against Corruption, the Ministry of the Federal Executive in charge of internal control, the president of the Federal Court of Administrative Justice, the president of the Mexican Agency of Transparency, Access to Information and Protection of Personal Data and a representative of the Council of the Federal Judiciary and other public committees. On 18 July 2016, in the evening edition of the Federal Official Gazette, the

National Anti-Corruption System General Act was published, which regulates the SNA.

12 Leniency

Is there a mechanism for companies to disclose violations in exchange for lesser penalties?

There are no express mechanisms for companies to disclose violations in exchange for lesser penalties under the Mexican regulations regarding anti-bribery; however, under the criminal processes the judge or tribunal that manages the process can – at its own discretion – reduce the penalty for mitigating factors (ie, no recurrence).

13 Dispute resolution

Can enforcement matters be resolved through plea agreements, settlement agreements, prosecutorial discretion or similar means without a trial?

Violations of criminal or civil enforcement law are not subject to alternative resolution mechanisms, following public order, pursuant to the law. This is different from agreements between parties that can be solved through a dispute resolution process determined by the same parties.

Public order is known as the institutions and rules considered essential by the state for the running of the government and the well-being of the community. Public order dispositions cannot be waived.

14 Patterns in enforcement

Describe any recent shifts in the patterns of enforcement of the foreign bribery rules.

It must be said that the most important and recent shift regarding the enforcement of both national and foreign rules is the approbation by the Mexican Congress of the National Anti-Corruption System (SNA), during May 2015, pushing a major constitutional amendment and the creation of secondary laws, which were published on 18 July 2016.

The SNA aims at working as a coordination mechanism between the governmental entities, the auditing entities and the ones in charge of controlling public resources. The main highlights of the constitutional amendment are the obligation for public officers to file personal estate and conflict of interest statements; the Federal Superior Auditor (ASF) is granted extra powers to execute 'real time' audits; the creation of a new system to determine liability over public servers and, when applicable, to individuals committing administrative offences; and Mexican states are bound to create their own local anti-corruption systems, inter alia.

At a glance, the SNA has the following features, aimed at preventing, detecting and sanctioning corrupt acts:

- the ASF is in charge of reviewing the use of public federal resources and Mexican states' debt in cases where the federation appears as guarantor; it will submit claims for unlawful actions to the anti-corruption prosecutor and administrative courts;
- the ASF has the faculty to investigate corruption offences and will take them to court; and
- the Federal Tax and Administrative Tribunal rules over corruption crimes cases, imposing sanctions on public officers and private entities through the creation of specialised courts on administrative liabilities procedures.

15 Prosecution of foreign companies

In what circumstances can foreign companies be prosecuted for foreign bribery?

For the prosecution of any foreign person – both individuals and companies – the domestic authority will require the support of a judicial authority located in the place where the violation occurred. The foreign support needed is requested through a rogatory letter; under the rules of civil and criminal procedure, it is a communication from a court of law officially asking another court in a different jurisdiction for assistance in a particular court action.

16 Sanctions

What are the sanctions for individuals and companies violating the foreign bribery rules?

Pursuant to the Federal Criminal Code, the sanctions can be imprisonment for individuals and economic penalties for entities; however, the amount would vary depending on the seriousness of the violation.

Additionally, the FCPA, applicable for the foreign bribery rules, imposes huge economic sanctions for those violating this Act. Individuals and corporations are subject to both civil and criminal penalties if found to be in violation of the FCPA anti-bribery, accounting or other provisions. This means not only fines, but the possibility of imprisonment for individuals found in violation of an FCPA provision.

17 Recent decisions and investigations

Identify and summarise recent landmark decisions or investigations involving foreign bribery.

Recent decisions include Wal-Mart's investigation over bribery conduct for the processing of land permits.

Financial record keeping

18 Laws and regulations

What legal rules require accurate corporate books and records, effective internal company controls, periodic financial statements or external auditing?

The Corporations Act sets forth the specific rules for a shareholders' registry, shareholders' meeting registry and capital variations, besides the control of the financial statements that must be presented at the annual shareholders' meeting.

19 Disclosure of violations or irregularities

To what extent must companies disclose violations of anti-bribery laws or associated accounting irregularities?

Every person, both individuals and companies, must respect and protect privacy data of other individuals; such information must always remain confidential, unless the data owner authorises its disclosure. When violations to anti-bribery laws occur, privacy data can be disclosed only under court order; in such event, any person whether an individual or a company must cooperate with the authority, in order to prevent or mend the illegal action; under such scenario, the person who manages personal information, must disclose the necessary data or information – including violations – under its power and to its knowledge.

The specific regulation ruling data protection is the Federal Law on the Protection of Personal Data in the Possession of Private Parties, which includes several chapters about confidentiality rules inside companies.

20 Prosecution under financial record keeping legislation

Are such laws used to prosecute domestic or foreign bribery?

The financial record keeping legislation is territorial, or in other words meant to prosecute domestic bribery; however, as explained earlier, the domestic (national) court can ask for foreign support from a court located in another jurisdiction, in order to prosecute the crime abroad. This kind of action consists of the sending of a rogatory letter to the court in the other jurisdiction, requesting the provision of support by such court.

21 Sanctions for accounting violations

What are the sanctions for violations of the accounting rules associated with the payment of bribes?

The Federal Tax Code provides the accounting rules and every obligation around them. In connection with bribery, the tax authority shall apply the law based on the seriousness of the violation.

Update and trends

On 18 July 2016, the secondary laws of the SNA were published in the Federal Official Gazette. In administrative matters, these laws oversee different benefits and sanctions for the private sector and whether or not firms comply with the dispositions. Companies need to be aware of the fact that the anti-corruption amendment and its secondary laws, establishing at a constitutional level the possibility to impose sanctions for individuals involved with the commission of administrative offences. The above-mentioned sanctions may form economic penalties, disqualification on participation in public bids and tenders and the compensation of the damage caused to the treasury of federal, local or municipal public entities.

22 Tax-deductibility of domestic or foreign bribes

Do your country's tax laws prohibit the deductibility of domestic or foreign bribes?

Yes, the Federal Tax Code only provides for the deductibility of those expenses that are or were strictly necessary for the normal course of business.

Domestic bribery

23 Legal framework

Describe the individual elements of the law prohibiting bribery of a domestic public official.

The Federal Criminal Code typifies the activity of bribery as a crime. In this case, it is regulated in article 222 for domestic public officials, and it is legally defined as:

> *A public official who themselves, or through another person requests or receives for themselves or unduly for another, money or any other gift, or accept a promise to do or stop doing an act related to his functions of his job, position or commission, and who spontaneously gives or offers any of the money or any other gift persons mentioned above, to any public official to do or skip an event related to their duties, their employment, office or commission.*

Article 45 of the Federal Administrative Liabilities of Public Officials Act establishes that public officials who receive goods or donations, the cumulative value of which during a year exceeds 10 UMAs, must provide timely notice of such donations or goods.

Additionally, the sanctions imposed by the Administrative Liabilities General Act, because of the commission of major offences (bribery; illegal participation in administrative procedures; traffic of influences; submitting false or altered information or simulating compliance with the requirements in order to obtain any kind of authorisation, benefit or advantage, or to prejudice third parties; when corporations or individuals that are participating in the public procurement reach a commercial agreement in order to obtain a benefit or damage the public finances; unlawful use of public resources; and contracting with former public servants) are:

- major economic penalties: For individuals the penalties are from 7,304 up to approximately 10,956,000 Mexican pesos; and for corporations the sanctions are from 73,040 up to approximately 109,560,000 Mexican pesos;
- temporarily disqualification on participation in acquisitions, leasing, services or public works for three to 10 years;
- dissolution of the legal entity; and
- indemnification for damages and lost profits.

24 Prohibitions

Does the law prohibit both the paying and receiving of a bribe?

Yes, the Federal Criminal Code penalises both activities. The first section of article 222 regulates the actions of receiving, requesting or accepting any kind of bribe, and the second section of the same article sanctions the activity of giving and offering money to any domestic public official.

The Administrative Liabilities General Act prohibits the commission of major offences (bribery; illegal participation in administrative procedures; traffic of influences; submitting false or altered information or simulating compliance with the requirements in order to obtain any kind of authorisation, benefit or advantage, or to prejudice third parties; when corporations or individuals that are participating in the public procurement reach a commercial agreement in order to obtain a benefit or damage the public finances; unlawful use of public resources; and contracting with former public servants).

25 Public officials

How does your law define a public official and does that definition include employees of state-owned or state-controlled companies?

Article 108 of the Federal Constitution defines a public official as all the elected representatives, members of the federal judiciary and the judicial branch of the federal district, officers and employees and, in general, any person who holds a position, post or commission of any nature in the Congress, in the legislative assembly of the Federal District or the federal government or the Federal District, as well as civil officials of the bodies to which the Constitution grants autonomy, who will be responsible for the acts or omissions incurred in the performance of their respective functions.

26 Public official participation in commercial activities

Can a public official participate in commercial activities while serving as a public official?

Based upon the Federal Constitution, public officials are requested to submit, under penalty of perjury, a disclosure of assets and interests to the authorities that are legally competent for this kind of information.

According to the Federal Administrative Liabilities of Public Officials Act, any public official has the legal obligation to recuse oneself, by reason of his or her duties, from any processing or resolution of matters in which he or she has personal, family or business interests, including those for which there may be some benefit for himself or herself, his or her spouse or relatives with consanguinity or affinity to the fourth degree (cousin, great aunt or great uncle, grandniece or grandnephew), civil relatives, or others with those who have professional, labour or business partners or partnerships or relationships in which the public servant or the aforementioned persons belong or take part.

27 Travel and entertainment

Describe any restrictions on providing domestic officials with gifts, travel expenses, meals or entertainment. Do the restrictions apply to both the providing and receiving of such benefits?

The restriction on receiving gifts, travel expenses, meals or entertainment is expressly provided by the Federal Act on Public Officials' Liabilities, applicable for domestic public officials. The Act established the following restrictions to determine conflict of interest: during the course of employment, position or commission, and for a year after, public officials may not request, accept or receive for themselves, or through an intermediary, money or any kind of gift, service, employment, position or commission for themselves, from anyone whose professional activities, commercial or industrial, are directly linked, regulated or supervised by the public official in the performance of his or her job, position or commission.

28 Gifts and gratuities

Are certain types of gifts and gratuities permissible under your domestic bribery laws and, if so, what types?

Yes; if a public official receives, from a person, a good or donation, the cumulative value of which exceeds 10 UMAs at the time of reception, he or she has the legal obligation to inform the authority that the Ministry of Government Affairs determines (to make them available) in a period not exceeding 15 working days.

29 Private commercial bribery

Does your country also prohibit private commercial bribery?

Mexico lacks full regulation regarding private commercial bribery; however, these types of violations are prosecuted as fraud. After the publication of the secondary laws of the SNA, the Federal Administrative Court has the faculty to sanction public officials and others, whether individuals or companies, acting in acts linked to administrative major offences.

30 Penalties and enforcement

What are the sanctions for individuals and companies violating the domestic bribery rules?

For violations of domestic bribery rules, sanctions that can be imposed are imprisonment or economic penalties, or both, depending on the seriousness of the violation.

The sanctions imposed by the Administrative Liabilities General Act for the commission of major offences are:

- major economic penalties: For individuals the penalties are from 7,304 up to approximately 10,956,000 Mexican pesos; and for corporations the sanctions are from 73,040 up to approximately 109,560,000 Mexican pesos;
- temporarily disqualification on participation in acquisitions, leasing, services or public works for three to 10 years;
- dissolution of the legal entity; and
- indemnification for damages and lost profits.

31 Facilitating payments

Have the domestic bribery laws been enforced with respect to facilitating or 'grease' payments?

No.

32 Recent decisions and investigations

Identify and summarise recent landmark decisions and investigations involving domestic bribery laws, including any investigations or decisions involving foreign companies.

One recent investigation regarding bribery is around the former governor of the state of Veracruz, Mr Javier Duarte. Mr Duarte faces charges of organised crime and money laundering.

There is also the *Chapo* case, which is being investigated for anti-money laundering provisions violations, besides bribery actions.

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1 International anti-corruption conventions

To which international anti-corruption conventions is your country a signatory?

Nigeria is a signatory to the United Nations International Convention against Corruption and the African Union Anti-Corruption Convention. Nigeria signed the United Nations International Convention against Corruption on 9 December 2003 and the African Union Anti-Corruption Convention on 12 December 2003. It ratified the United Nations International Convention against Corruption on 14 December 2004, and the African Union Anti-Corruption Convention on 26 September 2006.

2 Foreign and domestic bribery laws

Identify and describe your national laws and regulations prohibiting bribery of foreign public officials (foreign bribery laws) and domestic public officials (domestic bribery laws).

Nigerian law has no specific legislation prohibiting the bribery of foreign public officials. Given that Nigeria has been and principally remains a nation seeking foreign investment and assistance, the bribing of foreign public officials has not been considered an important issue.

Nigeria has, however, legislated against the bribing of domestic public officials and the provisions can be found in the criminal codes of the various states of the federation, in the Federal Criminal Code and in specific legislation that created the anti-corruption agency, the Independent Corrupt Practices Commission (ICPC). The legislation is uniform in prohibiting the corrupt giving of any property or benefit to public officers or to any other person. It is conceivable that this provision could also be used to deal with the bribing of foreign public officials. Bribery carries a sentence of up to seven years' imprisonment upon conviction. Whether such an attempt would succeed remains to be seen as the courts have yet to consider the matter. In addition, corruptly promising to give or attempting to give benefits to domestic public officials carries a sentence of up to seven years' imprisonment upon conviction.

Foreign bribery

3 Legal framework

Describe the elements of the law prohibiting bribery of a foreign public official.

Nigerian law does not specifically prohibit bribery of a foreign public official. Such prohibition as exists is general in nature and is to the effect that 'any person who corruptly gives, confers or procures any property or benefit of any kind to, on or for any person is guilty of an offence'. Consequently, the giving of material benefit to any person for 'corrupt' purposes is an offence. The legislation further provides that, in specified circumstances, the material benefit is, unless the contrary is proved, 'deemed to have been given corruptly'.

4 Definition of a foreign public official

How does your law define a foreign public official?

Nigerian law contains no specific provisions relating to public officials and, consequently, there is no definition of a foreign public official. A domestic public official is described as:

a person employed or engaged in any capacity in the public service of the Federation, State or Local Government, public corporations or private company wholly or jointly floated by a government or its agency including the subsidiary of any such company whether located within or outside Nigeria and includes judicial officers serving in Magistrate or Customary Courts or Tribunals.

5 Travel and entertainment restrictions

To what extent do your anti-bribery laws restrict providing foreign officials with gifts, travel expenses, meals or entertainment?

The anti-bribery laws contain no specific provisions relating to this, and no guidelines are available as to the extent of what is permissible.

6 Facilitating payments

Do the laws and regulations permit facilitating or 'grease' payments?

There are no specific provisions regarding facilitating or 'grease' payments. Nevertheless, any material benefit given to public officials in Nigeria is prohibited. This prohibition appears not to have been enforced at any time during the past 40 years, however.

7 Payments through intermediaries or third parties

In what circumstances do the laws prohibit payments through intermediaries or third parties to foreign public officials?

Payments to any person for corrupt purposes, whether directly or through third parties, are prohibited under Nigerian law.

8 Individual and corporate liability

Can both individuals and companies be held liable for bribery of a foreign official?

Individuals and companies can be held liable for bribery.

9 Successor liability

Can a successor entity be held liable for bribery of foreign officials by the target entity that occurred prior to the merger or acquisition?

In theory, it would be possible for a successor entity to be held liable for acts of bribery of foreign officials prior to a merger or acquisition; however, Nigerian law currently has no specific legislation dealing with successor liability.

10 Civil and criminal enforcement

Is there civil and criminal enforcement of your country's foreign bribery laws?

There continues to be little enforcement in Nigeria of domestic bribery laws. Presently the focus of the authorities has been on addressing kleptocracy by members of the federal government voted out of office in April 2015. This notwithstanding, in the last two months of 2016, action was taken against senior judicial officers accused of receiving

bribes in exchange for, in the case of High Court judges, delivering decisions in favour of parties paying judges bribes and, in the case of appellate judges, influencing decisions in favour of parties paying bribes. There are no specific laws expressly prohibiting the bribing of foreign officials, and those provisions capable of enabling prosecution for the bribery of foreign officials have not yet been tested.

With regard to civil proceedings, theoretically it would be possible for persons injured as a result of such bribery to institute proceedings founded in tort, equitable tracing and constructive trusts. Nigeria has, however, yet to see any such actions.

11 Agency enforcement

What government agencies enforce the foreign bribery laws and regulations?

The agency specifically empowered to enforce anti-bribery laws in Nigeria is the ICPC. In addition, the Economic and Financial Crimes Commission (EFCC) is at the forefront of efforts to stamp out corruption locally. The prosecutions embarked upon by the EFCC have, however, tended to be based on anti-money-laundering and anti-fraud provisions rather than anti-bribery. Additionally, the Nigerian police force is empowered to enforce the laws. It was the ineffectiveness of the police that made it necessary for the other agencies to be established. The perception appears to be that the EFCC is the more vigorous agency. The ICPC, although empowered to investigate and prosecute, appears to focus more on educational programmes.

12 Leniency

Is there a mechanism for companies to disclose violations in exchange for lesser penalties?

At present, there is no formal mechanism in place in Nigeria for companies to disclose violations in exchange for lesser penalties.

13 Dispute resolution

Can enforcement matters be resolved through plea agreements, settlement agreements, prosecutorial discretion or similar means without a trial?

Enforcement matters can be resolved through plea agreements, settlement agreements, prosecutorial discretion or similar means. The use of such methods remains, however, in its infancy in Nigeria, with a formal framework only having been introduced by federal legislation in 2015, albeit similar legislation was introduced in Lagos State in 2007, and re-enacted in 2011.

14 Patterns in enforcement

Describe any recent shifts in the patterns of enforcement of the foreign bribery rules.

There are no specific laws prohibiting bribery of foreign officials. The provisions capable of being employed to punish the bribery of foreign officials have very rarely been employed in the fight against the bribery of local officials. Accordingly, the pattern of enforcement is that there is no enforcement to speak of. Developments since the elections of 2007 suggest that the current federal government does not view official corruption in the same manner as the previous one.

15 Prosecution of foreign companies

In what circumstances can foreign companies be prosecuted for foreign bribery?

If it can be established that a foreign company committed a criminal act within Nigeria (acts done within Nigeria by individuals who can properly be described as the 'operating minds' of the foreign company), then there would be no obstacle, in theory, to the prosecution in Nigeria of that foreign company. Of course, there would be a number of practical problems in pursuing such a prosecution. It would not naturally follow that the action of the Nigerian subsidiary of a foreign company could create criminal liability in Nigeria in the foreign company.

Update and trends

The latter part of 2016 has witnessed a more vigorous drive with regard to investigations and trials that are in line with the present government's avowed goal to fight corruption. However, it appears to be clear that the agencies charged with leading this effort are ill-equipped to discharge their functions, and corruption prosecutions continue to be beset by slow progress.

16 Sanctions

What are the sanctions for individuals and companies violating the foreign bribery rules?

There are no specific prohibitions against bribing foreign officials. Nevertheless, the provision capable of enabling the prosecution of persons bribing or seeking to bribe foreign officials stipulates a term of imprisonment of up to seven years. This provision enables the court to impose fines in lieu of imprisonment and such a sanction would be imposed upon a company convicted of violating the provision. As the legislation does not make any provision for a maximum fine, it would appear that, in theory, there is no limit on the fine that could be imposed.

17 Recent decisions and investigations

Identify and summarise recent landmark decisions or investigations involving foreign bribery.

In the absence of laws prohibiting the bribery of foreign officials, there are no decisions or investigations upon which to report.

Financial record keeping

18 Laws and regulations

What legal rules require accurate corporate books and records, effective internal company controls, periodic financial statements or external auditing?

The legislation regulating the conduct of joint stock corporations (the Companies and Allied Matters Act) regulates the keeping of corporate books and records. In addition, banks and certain other financial institutions are subject to additional regulation under separate legislation, as are companies listed on, or trading on, the Nigerian Stock Exchange.

19 Disclosure of violations or irregularities

To what extent must companies disclose violations of anti-bribery laws or associated accounting irregularities?

There are no provisions that require companies to disclose violations of anti-bribery laws. There are provisions that require banks or their auditors to report violations under the legislation regulating banking in Nigeria.

20 Prosecution under financial record keeping legislation

Are such laws used to prosecute domestic or foreign bribery?

Financial record keeping laws have not been used to prosecute domestic or foreign bribery.

21 Sanctions for accounting violations

What are the sanctions for violations of the accounting rules associated with the payment of bribes?

There are no accounting laws or regulations specifically associated with the payment of bribes.

22 Tax-deductibility of domestic or foreign bribes

Do your country's tax laws prohibit the deductibility of domestic or foreign bribes?

Bribery, in any form, is prohibited under Nigerian law. Consequently, bribes are not deductible expenses for tax purposes. Needless to say, if such payments are made they are unlikely to be so described and are usually hidden under other heads of expenditure.

Domestic bribery

23 Legal framework

Describe the individual elements of the law prohibiting bribery of a domestic public official.

A public official who seeks or receives any material benefit for him or herself or for any other person or who agrees or attempts to receive such material benefit on account of any action taken by him or her that is connected with the discharge of his or her official functions is guilty of corruption. Similarly, any person who gives or offers to give a public official a material benefit on account of any action to be taken by the public official in his or her official capacity is guilty of corruption. In both instances, the material benefit is presumed to have been offered or received corruptly, shifting the burden of proving otherwise onto the accused.

24 Prohibitions

Does the law prohibit both the paying and receiving of a bribe?

As indicated above, the law prohibits both the paying and receiving of a bribe.

25 Public officials

How does your law define a public official and does that definition include employees of state-owned or state-controlled companies?

As indicated above, a domestic public official is described as:

> *a person employed or engaged in any capacity in the public service of the Federation, State or Local Government, public corporations or private company wholly or jointly floated by a government or its agency including the subsidiary of any such company whether located within or outside Nigeria and includes judicial officers serving in Magistrate or Customary Courts or Tribunals.*

Accordingly, the definition covers employees of state-owned and state-controlled companies.

26 Public official participation in commercial activities

Can a public official participate in commercial activities while serving as a public official?

Public officials are permitted to hold interests in joint-stock companies and to 'engage in farming'. Apart from the foregoing, all full-time public officials are prohibited from participating in the 'management or running of any private business, profession or trade'.

27 Travel and entertainment

Describe any restrictions on providing domestic officials with gifts, travel expenses, meals or entertainment. Do the restrictions apply to both the providing and receiving of such benefits?

The anti-bribery laws contain no specific provisions relating to this. However, all material benefits given to public officials are prohibited and, in certain situations, it is presumed that the benefit was given for corrupt purposes, placing the burden of proving otherwise on the recipient or the giver. There has been little or no enforcement of these provisions and no guidelines are available as to the extent of what is permissible.

28 Gifts and gratuities

Are certain types of gifts and gratuities permissible under your domestic bribery laws and, if so, what types?

All material benefits received by a public official in Nigeria are presumed to have been corruptly received.

29 Private commercial bribery

Does your country also prohibit private commercial bribery?

There are prohibitions in the legislation dealing with official corruption that prohibit the giving of material benefits to 'any person'. It is possible that such provisions could be employed to prosecute instances of bribery not involving government officials. In addition, there are provisions that make criminal the receipt of secret commissions by agents.

30 Penalties and enforcement

What are the sanctions for individuals and companies violating the domestic bribery rules?

Persons convicted of bribery offences are liable to fines and to a term of imprisonment of between five and seven years. The legislation does not stipulate any maximum fine.

31 Facilitating payments

Have the domestic bribery laws been enforced with respect to facilitating or 'grease' payments?

Domestic bribery laws have not been enforced with respect to facilitating or 'grease' payments.

32 Recent decisions and investigations

Identify and summarise recent landmark decisions and investigations involving domestic bribery laws, including any investigations or decisions involving foreign companies.

During the year in review there was an increased wave of investigations and arraignments in respect of corruption-related matters.

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A former head of the Nigerian Maritime Administration and Safety Agency was arraigned in different courts over charges that he had corruptly enriched himself to the tune of 37 billion naira. The trial is still ongoing.

A former head of the Nigerian Air Force was also charged with multiple counts including stealing and corruption to the tune of 23 billion naira. The trial is ongoing and the accused person is reported to be exploring the option of a plea bargain.

A former minister was charged with corruptly receiving the sum of 6.32 billion naira. His trial is ongoing.

A former governor of one of the north-central states is undergoing trial over alleged fraud in the sum of 1.2 billion naira.

A former head of the Nigeria Customs Service returned 1 billion naira to the federal government out of the 40 billion naira alleged to have been stolen by him during the period he was in office as the head of the Service.

A former national security adviser is undergoing multiple trials in connection with the alleged misappropriation of 840 billion naira that was voted for the purchase of arms to combat Boko Haram terrorism. Instead of using the funds for this purpose, they are alleged to have been diverted and used for other purposes, including the financing of the re-election campaign of former president, Goodluck Jonathan. The trials are ongoing. The head of one of Nigeria's largest media groups was arraigned in connection with corruptly receiving the sum of 2.15 billion naira from funds meant to have been used for the campaign against Boko Haram terrorism. The trial is still ongoing.

In an unprecedented action, the homes of several serving judicial officers were raided by officials of the Department of State Security in connection with investigations into allegations of corruption levelled against them. Following the raids, a number of judges were arraigned on charges of abuse of office, corruption and bribery. Their trials are ongoing.

A serving judge of the Federal High Court and a senior lawyer were arraigned on criminal charges of bribery and corruption. The trial is ongoing.

Norway

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1 International anti-corruption conventions

To which international anti-corruption conventions is your country a signatory?

Norway is a signatory to the following anti-corruption conventions:

- OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 17 December 1997;
- Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, 8 November 1990;
- Council of Europe Criminal Law Convention on Corruption, 27 January 1999;
- Council of Europe Civil Law Convention on Corruption, 4 November 1999;
- Council of Europe Additional Protocol of Criminal Law Convention on Corruption, 15 May 2003;
- Council of Europe Resolution (99) 5 of the Committee of Ministers of the Council of Europe: Agreement on Establishing the Group of States Against Corruption (GRECO);
- Council of the Europe Resolution (97) 24 of the Committee of Ministers of the Council of Europe: Twenty Guiding Principles for the Fight Against Corruption;
- UN Convention against Transnational Organized Crime, 15 November 2000; and
- UN Convention against Corruption, 31 October 2003.

2 Foreign and domestic bribery laws

Identify and describe your national laws and regulations prohibiting bribery of foreign public officials (foreign bribery laws) and domestic public officials (domestic bribery laws).

The basic provisions on bribery and corruption are found in the Norwegian Penal Code Chapter 30, sections 387, 388 and 389 (incorporated in October 2015). These provisions apply to both foreign and domestic bribery, within the public and the private sectors. Offering or providing bribes (active bribery) as well as requesting or receiving bribes (passive bribery) is an offence under section 387. The influencing of conduct of any position, office or assignment by offering or requesting an improper advantage is an offence according to section 389 (trading in influence).

A bribe is described as an improper advantage in connection with a position, office or assignment. An offer or a payment may be deemed improper based on several criteria. The most important criteria are the following: the objective of the offer, the position of the person offering or receiving the advantage, the value or the nature of the advantage in question, the level of transparency in place and whether it is an act contrary to the ethical rules for that office, assignment or position.

The regulations apply to all types of employment, office or assignment for both public and private employers and principals, irrespective of position. The Norwegian Penal Code does not distinguish between bribery of a foreign public official and bribery of a domestic public official.

According to the Norwegian Act relating to compensation, section 1(6), anyone who has suffered damage from corruption can, through civil damages action, claim compensation for the financial losses caused by the corrupt act.

In addition to these provisions in the Norwegian Penal Code, the Norwegian Civil Service Act Chapter 3, section 20 prohibits civil servants from accepting a gift, commission, service or other payment that is likely, or which by the donor is intended, to influence his or her official actions, or of which regulations forbid the acceptance. Acts of corruption may also violate a number of other sections in the Penal Code and other civil laws including the Working Environment Act, Bookkeeping Act, Taxation Act, the Public Procurement Act and the Marketing Act.

Foreign bribery

3 Legal framework

Describe the elements of the law prohibiting bribery of a foreign public official.

According to the Penal Code section 387, the offence of giving a bribe (active bribery) is consummated when a person offers or gives any foreign public official an improper advantage in connection with the position, office or assignment. The offence of receiving a bribe (passive bribery) is consummated when a foreign public official for himself or others requests or receives an improper advantage, or accepts an offer thereof, in connection with the position, office or assignment.

The party giving or offering a bribe may be a legal entity or a physical person. The improper advantage must be requested, received, promised, given or offered in connection with the position, office or assignment. The terms 'position', 'office' and 'assignment' are intended to include all types of employment, office or assignment for public and private employers and principals, regardless of position. It is clearly expressed in section 387, second paragraph, that position, office or assignment also denotes position, office or assignment of a foreign public official.

It is not a prerequisite for criminal conduct that the advantage has had any influence in the making of a decision.

The bribe may be directly given to the receiver, or provided through an intermediary.

Trading in influence is a criminal act according to the Penal Code section 389, and encompasses position, office or assignment in a foreign country, including a foreign public official.

The courts will decide what constitutes an undue or improper advantage in every case. Ordinary gifts of representation, promotional effects, etc will typically not be seen as undue or improper advantages. The court's decisions will mainly be based on factors such as:

- the objective of the offer;
- the position of the person offering or receiving the advantage;
- the value of the advantage in question;
- the nature of the advantage;
- the level of transparency in place; and
- whether the act is contrary to the ethical rules or organisational guidelines, etc, for that office, assignment or position.

To constitute an offence, the act must be clearly censurable according to the legislative background of the named sections in the Norwegian Penal Code.

4 Definition of a foreign public official

How does your law define a foreign public official?

Norwegian anti-corruption legislation does not distinguish between foreign and domestic public officials, and covers all types of employment, office or assignment for public and private employers and principals, irrespective of position.

In the public sector, the receiver may be:

- a person who exercises public authority;
- a member of a directorate, administration, board, committee or other public body, a municipality, religious society or social insurance office;
- a member of the armed forces;
- a judge or other official in a Norwegian or international court;
- anyone who exercises an arbitral assignment; or
- ministers, cabinet members and members of parliament.

The above list is not exhaustive.

5 Travel and entertainment restrictions

To what extent do your anti-bribery laws restrict providing foreign officials with gifts, travel expenses, meals or entertainment?

Foreign officials are subject to the same restrictions as domestic officials.

Norwegian anti-corruption legislation does not clearly restrict providing foreign or domestic officials with gifts, travel expenses, meals or entertainment (advantages). The advantage falls within the scope of the Norwegian Penal Code if it is to be considered improper.

As indicated in question 3, there are no minimum levels for when an advantage is deemed improper. Even an offer of an advantage with no monetary value may represent an improper advantage according to the Norwegian Penal Code. Whether or not the advantage is improper depends on the circumstances in each case, and the factors mentioned in question 4. However, small gifts of representation and promotional effects are generally accepted.

6 Facilitating payments

Do the laws and regulations permit facilitating or 'grease' payments?

In principle, facilitating payments are to be understood as improper advantages according to the Norwegian Penal Code section 387. There is no exception for grease payments. It is the requesting, receiving, promising, giving or offering of an improper advantage that constitutes an offence. Whether facilitating payments are considered to be improper advantages according to the Norwegian Penal Code, must be individually assessed in each situation.

In the preparatory works of the Norwegian Penal Code, it is stated that some situations prevent facilitating payments from being characterised as improper, for example in a situation where there is risk of extortion. It refers to situations such as where one considers oneself forced to pay a foreign public official a smaller amount to reclaim one's passport, or to be permitted to leave the country. To consummate an offence, the act must be clearly censurable.

7 Payments through intermediaries or third parties

In what circumstances do the laws prohibit payments through intermediaries or third parties to foreign public officials?

Payments to foreign officials through intermediaries or third parties fall within the scope of the Norwegian anti-bribery legislation, and constitute an offence. Any person who aids or abets such an offence as mentioned in the Norwegian Penal Code Chapter 30, sections 387 and388, shall be liable to the same penalty.

A person who is not regarded as the perpetrator may, if he or she induced another to commit the crime, be sentenced for instigating or aiding the crime.

Section 389 prohibits trading in influence (described as giving, offering, requesting or receiving an improper advantage, or accepting an offer thereof, in return for influencing the conduct of any position, office or assignment).

The Norwegian bribery and corruption legislation is strict and exceeds the minimum requirements set by the Council of Europe Criminal Law Convention on Corruption, 27 January 1999, as bribes between private companies are also considered an offence in Norway.

8 Individual and corporate liability

Can both individuals and companies be held liable for bribery of a foreign official?

Companies, as well as individuals, can be held liable for bribery according to the Norwegian Penal Code.

According to the Norwegian Penal Code Chapter 4, sections 27 and 28, an enterprise may be subject to penalty if someone acting on behalf of the enterprise violates the penal provision.

In this respect, the term 'enterprise' denotes a company, society or other association, sole proprietorship, foundation, estate or public activity.

Section 27, establishes that the penalty shall be a fine. In addition to a fine, the enterprise may also, by a court judgment, be deprived of the right to exercise business, or exercise business in certain forms according to section 27.

9 Successor liability

Can a successor entity be held liable for bribery of foreign officials by the target entity that occurred prior to the merger or acquisition?

The successor entity can be held liable for bribery of foreign officials if the acquiring company has failed to terminate arrangements or contracts that involve bribery and corruption. Any company that has failed to implement adequate measures to prevent bribery and corruption, or maintain agreements that entail criminal liability for bribery and corruption, may be issued corporate penalties.

If the acquiring company has undertaken all adequate measures to hinder and prevent corruption as the successor of the entity, there is no reason to assume that the prosecuting authorities will pursue the company.

10 Civil and criminal enforcement

Is there civil and criminal enforcement of your country's foreign bribery laws?

Criminal enforcement

As previously mentioned, corruption constitutes a criminal offence pursuant to the Norwegian Penal Code sections 387, 388 and 389. Cases of corruption or trading in influence are investigated by the police and prosecuted by the Norwegian prosecution authorities.

Civil enforcement

There is no public body conducting civil enforcement in Norway.

However, in accordance with the Norwegian Act relating to compensation in certain circumstances, anyone who has suffered damage as a result of corruption can, through civil damages action, claim compensation from the person who with intent or negligence is responsible for, or has abetted, the corruptive act.

Compensation may also be claimed from the perpetrator's employer if the corrupt act has occurred in connection with the perpetrator's execution of work, unless the employer proves that every reasonable precaution has been taken to prevent corruption.

It is statutory that the compensation shall cover the claimant's financial losses. Compensation can be claimed regardless of whether an individual is sentenced for the corruptive act. Provided that the perpetrator or his or her employer are Norwegian residents, the legislation similarly applies to corruptive acts committed abroad, or situations where the damage occurs abroad.

11 Agency enforcement

What government agencies enforce the foreign bribery laws and regulations?

Cases of corruption are prosecuted by the Norwegian Public Prosecution Authority and investigated by the Norwegian police. There is one national police and prosecution authority in Norway – The

National Authority for Investigation and Prosecution of Economic and Environmental Crime in Norway (ØKOKRIM) – consisting of highly specialised and trained investigators and prosecutors. ØKOKRIM investigates and prosecutes the most complex and severe violations of the provisions in the Penal Code sections 387, 388 and 389. ØKOKRIM is both a police specialist agency and a public prosecutor's office with national authority. Within the ordinary police force, there are specific law enforcement teams consisting of financial crime and white-collar crime experts. These expert teams investigate and prosecute cases of financial crime, including bribery and corruption. The organisation of the Norwegian police, including ØKOKRIM, is up for review by the Ministry of Justice. Ongoing organisational changes in the Norwegian police force implemented in 2016 may lead to changes in how the Norwegian police will enforce bribery laws and regulations in the future.

12 Leniency

Is there a mechanism for companies to disclose violations in exchange for lesser penalties?

There is no legal mechanism for companies to disclose violations in exchange for lesser penalties, although the Public Prosecution Authority has made it clear that they encourage self-reporting of violations. The disclosure of violations may influence the Prosecution Authority's decision of whether to bring an enforcement action and the final penalty given as a fine.

13 Dispute resolution

Can enforcement matters be resolved through plea agreements, settlement agreements, prosecutorial discretion or similar means without a trial?

There is no official legal mechanism for plea agreements or settlement agreements. However, enforcement for minor offences can be resolved both for individuals and for legal persons by accepting a fine given by the prosecution authority. This may lead to the impression that there is an unofficial option to enter into an agreement with the prosecution authority for a settlement agreement.

According to the Criminal Procedure Act Chapter 18, section 248, enforcement matters can, in specific cases, also be resolved without a full trial. Depending on the prosecuting authority application, and with the consent of the individual charged, the district court may adjudicate a case without an indictment and main hearing. This may occur when the court does not find this questionable, when the case concerns a criminal act that is not punishable by imprisonment for a term exceeding 10 years and when the person charged has made an unreserved confession in court that is corroborated by other evidence.

All OECD countries are obliged to establish a non-judicial grievance mechanism. There is a National Contact Point in Norway that contributes to resolving conflicts of alleged violations of the OECD guidelines for multinational enterprises. Its role is also to raise awareness regarding the guidelines and provide advice and guidance. The OECD guidelines include enterprises' responsibilities in combating corruption and bribery through internal controls, ethics and compliance programmes.

14 Patterns in enforcement

Describe any recent shifts in the patterns of enforcement of the foreign bribery rules.

Generally, Norway is viewed as a country with low levels of corruption. However, several of Norway's largest companies have faced allegations of, and investigations into, corruption during previous years, including Statoil, Telenor Group and Yara, among others.

Norway experienced an increase in the number of investigated corruption cases both in the private and public sector. It is likely that the increase of cases was a result of the anti-corruption legislation that came into force in 2003. From 2003 to 2015, approximately 40 major corruption cases were investigated, resulting in convictions for companies and individuals.

The Norwegian police has close cooperation with other enforcement authorities, partly as a result of international investigations of Norwegian companies operating outside Norway.

The next phase of the Norwegian police reform may lead to a change in the organisation of ØKOKRIM and the enforcement of bribery and corruption in police districts. At the time this publication goes to press, the number of staff specialising in investigation and prosecution of bribery and corruption is limited.

15 Prosecution of foreign companies

In what circumstances can foreign companies be prosecuted for foreign bribery?

According to the Norwegian Penal Code section 5, Norwegian registered companies may be held criminally liable for foreign bribery. A foreign company that has transferred all of its operations to a company registered in Norway after the bribery took place can also be held criminally liable in Norway (Penal Code section 5). Foreign companies bribing individuals or companies in Norway can be held criminally liable in Norway.

Foreign individuals, including individuals who represent foreign companies, can be prosecuted for bribery committed outside of Norway (foreign bribery) under certain circumstances.

16 Sanctions

What are the sanctions for individuals and companies violating the foreign bribery rules?

Individuals violating the Penal Code sections 387, 388 or 389 may be sentenced to a fine or imprisonment for a term not exceeding three years. Gross corruption (section 388) is punishable by imprisonment for a term not exceeding 10 years.

As mentioned in question 8, companies violating the corruption regulations may be punishable by a fine, and by a court judgment the enterprise may also be deprived of the right to exercise business, or exercise business in certain forms.

17 Recent decisions and investigations

Identify and summarise recent landmark decisions or investigations involving foreign bribery.

There are ongoing investigations of a few major and complex cases of bribery and corruption, including the investigation of Telenor Group, one of the shareholders of VimpelCom Ltd. The investigation is one of several ongoing investigations into accusations that VimpelCom made unlawful payments to the company Takilant, in order to secure licences in Uzbekistan. VimpelCom Ltd faces investigation by the US Department of Justice, US Securities and Exchange Commission and Dutch and Swiss authorities.

In 2014, the Norwegian chemical company Yara accepted a fine of 295 million kroner for bribery committed abroad. The bribes in question were made to the parent company of an international group with in excess of 8,000 employees worldwide. The alleged bribes, made in the period 2004 to 2009 and totalling approximately US$12 million, were made to high-ranking government officials both in Libya and India, as well as to a supplier in Russia. The prosecutor (ØKOKRIM) brought charges against four former Yara executives associated with the company during the time the alleged bribery took place. The four Yara executives were convicted in the District Court of Oslo in July 2015. In the court of appeal in 2016, only one of the four charged former executives was convicted of corruption.

In January 2017, a case was brought against a former police officer from the Oslo police headquarters charging him with accepting bribes from a drug dealer. The case is currently ongoing in the District Court of Oslo.

Financial record keeping

18 Laws and regulations

What legal rules require accurate corporate books and records, effective internal company controls, periodic financial statements or external auditing?

The primary relevant laws and regulations are:

- the Bookkeeping Act;
- the Accounting Act;
- the Taxation Act;

- the Partnerships Act (concerning unlimited liability partnerships and limited partnerships);
- the Money Laundering Act (on measures to combat the laundering of proceeds, etc);
- the Limited Liability Companies Act;
- the Public Limited Liability Companies Act; and
- the Auditors Act.

19 Disclosure of violations or irregularities

To what extent must companies disclose violations of anti-bribery laws or associated accounting irregularities?

According to Norwegian law, there is no such legal obligation for Norwegian companies.

20 Prosecution under financial record keeping legislation

Are such laws used to prosecute domestic or foreign bribery?

No. Any criminal offence of foreign bribery will be prosecuted according to the Penal Code sections 387, 388 and 389.

21 Sanctions for accounting violations

What are the sanctions for violations of the accounting rules associated with the payment of bribes?

There are no specific sanctions for violations of accounting rules associated with the payment of bribes. Any violation of accounting rules is a criminal offence according to the legal offence set out in the accounting rules.

22 Tax-deductibility of domestic or foreign bribes

Do your country's tax laws prohibit the deductibility of domestic or foreign bribes?

Yes. The Taxation Act sections 6 to 22 states that bribes or other advantages given for wrongful supply of services are not deductible.

Domestic bribery

23 Legal framework

Describe the individual elements of the law prohibiting bribery of a domestic public official.

The Norwegian corruption legislation does not distinguish between foreign public officials and domestic public officials. See question 3.

24 Prohibitions

Does the law prohibit both the paying and receiving of a bribe?

Yes. See question 3.

An offence is committed if a bribe is offered orally or in writing. It is also consummated if such an offer is accepted or if the offender asks for a bribe. The formation of an oral contract that includes bribes constitutes an offence.

25 Public officials

How does your law define a public official and does that definition include employees of state-owned or state-controlled companies?

Owing to the fact that the Norwegian corruption legislation covers all types of employment, office or assignment for public and private employers and principals, there is no definition of a 'public official' within the framework of the Penal Code.

In accordance with this, employees of state-owned or state-controlled companies are subject to the legislation.

26 Public official participation in commercial activities

Can a public official participate in commercial activities while serving as a public official?

Yes. A public official is entitled to be involved in commercial activities as long as the public official fulfils impartiality requirements.

Update and trends

A number of cases of corruption investigated by the police appear to originate from whistle-blowers and through self-reporting by companies involved in allegations of corruption. Norwegian law concerning the protection of whistle-blowers (Chapter 2, sections 4 and 5, and Chapter 3, section 6 of the Act relating to the Working Environment, Working Hours and Employment Protection, etc) requires any enterprise to establish a whistle-blowing system. Employees who report censurable conditions are protected from retaliation by law. The protection of whistle-blowers has increased the likelihood of reporting suspicions of corruption and resulted in a heightened number of cases of corruption subject to prosecution. As an example, the Norwegian Ministry of Foreign Affairs, the Norwegian Agency for Development Cooperation and the Norwegian Peace Corps have developed a whistle-blowing system allowing anyone who has information of alleged corruption to report suspicions through both internal reporting lines and an external partner.

27 Travel and entertainment

Describe any restrictions on providing domestic officials with gifts, travel expenses, meals or entertainment. Do the restrictions apply to both the providing and receiving of such benefits?

Public officials are subject to the same restrictions as foreign officials. See question 5.

28 Gifts and gratuities

Are certain types of gifts and gratuities permissible under your domestic bribery laws and, if so, what types?

There is no legislation that expressly allows for certain types of rewards or advantages. As mentioned in questions 3 and 5, any advantage requested, received, promised, offered or given must represent an undue advantage to constitute an offence.

Not all advantages will be regarded as representing an undue advantage. Small gifts of representation, promotional effects, etc, do not generally constitute a violation of the Norwegian corruption legislation. One must consider the facts in each case to determine whether the gift in question represents an undue advantage. Thus, in some cases, even small gifts may constitute an offence as the monetary value of the gift in question is not vital to determine whether the gift represents a criminal offence.

29 Private commercial bribery

Does your country also prohibit private commercial bribery?

Yes. Norwegian corruption regulations apply to both the public and private sectors.

30 Penalties and enforcement

What are the sanctions for individuals and companies violating the domestic bribery rules?

Companies, as well as individuals, can be held liable for bribery according to the Norwegian Penal Code.

According to the Norwegian Penal Code Chapter 4, section 27, an enterprise can be subject to penalty if a penal provision is contravened by a person who has acted on behalf of the enterprise. This applies even if no individual person may be punished for the contravention. In this respect, the term 'enterprise' denotes a company, society or other association, sole proprietorship, foundation, estate or public activity.

Section 27 paragraph 3 establishes that the penalty shall be a fine. The enterprise may also, by a court judgment, be deprived of the right to exercise business, or exercise business in certain forms.

Individuals violating the Penal Code, section 387, 388 or 389 may be sentenced to a fine or imprisonment for a term not exceeding three years. Gross corruption is punishable by imprisonment for a term not exceeding 10 years.

31 Facilitating payments

Have the domestic bribery laws been enforced with respect to facilitating or 'grease' payments?

Facilitation payments or grease payments are not exempt under the Norwegian Penal Code. The law does not distinguish 'facilitation payments' from other bribes. Whether the offer or payment constitutes an undue advantage and something the recipient is not lawfully entitled to accept or receive is determined in a court of law. Advantages permitted by law or by administrative rules, minimum gifts, gifts of very low value or socially acceptable gifts are accepted.

32 Recent decisions and investigations

Identify and summarise recent landmark decisions and investigations involving domestic bribery laws, including any investigations or decisions involving foreign companies.

Recent decisions to be mentioned are the cases briefly described in question 17, some of which are currently ongoing. From 2003 to 2015 approximately 40 major corruption cases were investigated, resulting in convictions for companies and individuals in Norwegian courts. These cases involve both the public and private sectors.

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1 International anti-corruption conventions

To which international anti-corruption conventions is your country a signatory?

Qatar ratified the United Nations Convention against Corruption (the UN Convention) by virtue of Decree No. 17 of 2007 under the condition that Qatar is not bound by paragraph 2 of article 66 of the UN Convention related to arbitration and dispute referral to the International Court of Justice.

Furthermore, by virtue of Decision No. 37 of 2012, Qatar ratified the Arab Convention for Fighting Corruption dated 21 December 2010 (the Arab Convention).

2 Foreign and domestic bribery laws

Identify and describe your national laws and regulations prohibiting bribery of foreign public officials (foreign bribery laws) and domestic public officials (domestic bribery laws).

Bribery of foreign public officials
There is no specific law in Qatar governing bribery of foreign public officials.

However, the Qatari Penal Code No. 11 of 2004 (Penal Code) defining public officials does not exclude foreign public officials. Furthermore, the Qatari Civil Human Resources Law No. 15 of 2016 (the HR Law) applicable to a limited type of public officials expressly provides that a public official may be a foreigner.

For information, the public officials governed by the HR Law are those working in ministries, other governmental bodies and in public authorities and institutions to the exception of:

- judges, judges assistants, members and assistants of the public prosecution;
- officials of the Emiri Diwan;
- officials of the diplomatic and consular services;
- members of the higher education authority;
- officials of Qatar Petroleum;
- officials of Qatar Investment Authority; and
- officials of the Accounting Diwan.

Furthermore, the provisions of the Public Tender Law No. 24 of 2015 (the Tender Law) applicable to contracts concluded with ministries, governmental authorities and public entities (with few exclusions), should be taken into account as they provide for cancellation of the public sector contract, should any bribery be involved.

In the case of bribery of a foreign public official in Qatar, the provisions of the Penal Code, Tender Law and the HR Law (within the scope of its application as mentioned above) would apply except if:

- there are specific provisions of a treaty to the contrary between Qatar and other countries; in which case such provisions will prevail; or
- the foreign public official benefits from diplomatic or consular immunity in accordance with the Vienna Convention of 1961 on diplomatic relations or the Vienna Convention of 1963 on consular relations that have been ratified by Qatar; in which case, the foreign public official will not be subject to prosecution and sanctions in Qatar.

Based on the above, legal provisions applicable on bribery of domestic public officials under Qatari law (as mentioned below) shall apply on bribery of foreign public officials.

Bribery of domestic public officials
Bribery of domestic public officials is mainly regulated by the Penal Code, the Tender Law and the HR Law.

Additional special regulations also apply on specific public officials such as those working at the public prosecution or in the public hospital of Qatar (Hamad Hospital).

Pursuant to article 80 of the HR Law, a public official is forbidden to accept gifts, donations, gratuities, advantages, monies or others, from any person, whether directly or through an intermediary, in return for, or because of, an act related to his or her job, and for the purpose of realising an interest to a third party.

According to the provisions of the Penal Code, bribery of a public official is sanctioned whether the public official has accepted the bribe in order to undertake an act falling within or outside his or her function or whether he or she has thought or has pretended that such act falls within his or her functions.

According to article 23 of the Tender Law, and without prejudice to any other provisions of Qatari law, the contract shall be considered cancelled in the event it is proven that a party committed bribery of a public official or colluded with the latter, whether personally or through an intermediary and whether directly or indirectly, damaging the governmental counterparty entity. Furthermore, the governmental entity is entitled to impose fines on the contracting party and to cease any dealing with the latter.

Foreign bribery

3 Legal framework

Describe the elements of the law prohibiting bribery of a foreign public official.

As mentioned above, there is no specific law in Qatar governing bribery of foreign officials.

The UN Convention explicitly requests in its article 16 that:

(i) Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the promise, offering or giving to a foreign public official or an official of a public international organisation, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business.
(ii) Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the solicitation or acceptance by a foreign public official or an official of a public international organisation, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.

Furthermore, the Arab Convention provides in its article 4 that each state member shall adopt the necessary legislative and other measures to establish as a criminal offence the:

> *(...) (4) bribery of foreign public officials and the officials of public international institutions with respect to the undertaking of international commercial activities within a state member.*

Currently, in case of bribery of a foreign public official who does not benefit from diplomatic or consular immunity, and subject to the provisions of any specific treaty between Qatar and the country of the foreign public official, the provisions of the Penal Code, the Tender Law and the HR Law (within the scope of their application as mentioned in our answer under question 2) will apply.

The following elements of law should be met in order to establish the violation of the laws of bribery of a foreign public official.

The capacity of the public official
According to the provisions of the Penal Code related to bribery of a public official, the intended individual to bribe should be a public official.

Article 3 of the Penal Code defines 'public officials' as:

> *those performing duties for the public service as well as the persons working in ministries, other governmental bodies and public authorities and institutions. The following are considered as public officials:*
> - *arbitrators, experts, insolvency representatives, liquidators and judicial safeguards;*
> - *chairmen, board members, managers and other officials working at private associations and institutions and at cooperative associations and companies in which one of the ministries, other governmental bodies or public authorities or institutions participate;*
> - *any person undertaking a job related to the public service upon a delegation given by a public official;*
> - *chairmen and members of the legislative and municipal councils as well as others having a public delegation capacity, whether elected or designated.*

There should be no distinction on whether the job or service is permanent or temporary, against a compensation or not, voluntary or not.

The end of the service or the capacity does not prevent the application of the provisions of this law in case where the crime is committed during the term of the service or at the time of holding such capacity.

The legal element
The legal element is the text of law by which the act of bribery is considered punishable. Indeed, the crime of bribery is criminally sanctioned in Qatar mainly by articles 140 and so forth of the Penal Code and article 80 of the HR Law.

The tangible element
The tangible element of the crime consists of the material elements constituting the crime of bribery and which are the following:

The criminal act
One of the following acts should take place in order for the crime of bribery to be considered as an established criminal act:
- the act of requesting of a specific benefit made by the public official;
- the act of acceptance by the public official of the offer or promise made by the briber; or
- the act of taking the bribe by the public official.

The object of the crime
The object of the crime is, according to the Penal Code, money or a benefit. According to the HR Law, the object of the crime is either a gift, a donation, a gratuity, an advantage or money.

The purpose of the crime
The purpose of the crime of bribery as mentioned in the Penal Code is:
- to perform or refrain from performing any act falling within the public official's job description;
- to perform or refrain from performing an act falling outside of the official's job description while the latter mistakenly believes the contrary or pretends the contrary; or
- to accept a bribe for an act falling within the official's job description and that was already performed or for refraining to perform such act.

The intangible element
The intention of bribery should be established given that bribery is an intentional crime according to article 28 of the UN Convention.

4 Definition of a foreign public official

How does your law define a foreign public official?

Qatari law does not define a foreign public official.

However, through the ratification of the UN Convention, Qatar adopted the definition of a foreign public official provided therein, which states:

> *A foreign public official is any person holding a legislative, executive, administrative or judicial position in a foreign country, whether designated or elected, and any person practising a public function for the benefit of a foreign country including the benefit of a public agency or enterprise.*

Furthermore, through the ratification of the Arab Convention, Qatar also adopted the definition of a public official provided in the said convention, which is identical to the one provided in the UN Convention (as mentioned above) except that it adds that the definition covers designated or elected public officials on a permanent or temporary basis.

5 Travel and entertainment restrictions

To what extent do your anti-bribery laws restrict providing foreign officials with gifts, travel expenses, meals or entertainment?

In case of bribery of a foreign public official who does not benefit from diplomatic or consular immunity, and subject to the provisions of any specific treaty between Qatar and the country of the foreign public official, the provisions applicable to the domestic public official would in principle apply, being the provisions of the Penal Code, the Public Law and the HR Law (within the scope of their application as mentioned in our answer under question 2).

In this respect, Qatari law does not provide the extent to which an official may be provided with gifts, travel expenses, meals or entertainment.

The Penal Code refers to money and benefits in general. The HR Law prohibits the receipt of gifts by a public official whether directly or indirectly.

6 Facilitating payments

Do the laws and regulations permit facilitating or 'grease' payments?

Qatari law does not distinguish between grease and non-grease payments made to public officials. The sanctions of bribery do not take into consideration the value of it except for deciding, in some cases, the amount of the fine.

However, the Qatari court has the authority to render a strict or a lighter judgment according to the value of the bribe offered.

7 Payments through intermediaries or third parties

In what circumstances do the laws prohibit payments through intermediaries or third parties to foreign public officials?

In the event that the foreign public official does not benefit from diplomatic or consular immunity, and subject to the provisions of any specific treaty between Qatar and the country of the foreign public official, the Penal Code, the Tender Law and the HR Law (within the scope of their application as mentioned in our answer under question 2) will apply. According to their provisions, the bribery of a foreign public official is sanctioned whether made directly or through an intermediary or a third party.

Indeed, the Penal Code provides that the same sanctions applicable to the public official and the briber shall also apply to the intermediary.

Furthermore, article 143 of the Penal Code sanctions a person:

1 *requesting or taking monies or a benefit under the claim that it is a bribery to a public official while such person intends keeping the bribe, fully or partially;*
2 *taking or accepting monies or a benefit, with knowledge of its purpose, even when the public official intended by the bribe has not designated such person or has not known about him/her unless he/she acted as an intermediary in the bribe.*

8 Individual and corporate liability

Can both individuals and companies be held liable for bribery of a foreign official?

Yes, both the individual and the company committing the bribery will be sanctioned.

Article 37 of the Penal Code provides:

To the exception of ministries, other governmental bodies and public authorities and institutions, a legal entity shall be criminally liable for the crimes committed by its representatives, managers and agents working for its account or under its name. The legal entity may only be sanctioned by a fine and any other applicable sub-sanction determined by law. In case the original sanction determined by law is not a fine, the applicable sanction on the legal entity shall then be a fine not exceeding five hundred thousand Qatari Riyals.
This should not prevent the application of the sanctions determined by law on the individual who has actually committed the crime.

9 Successor liability

Can a successor entity be held liable for bribery of foreign officials by the target entity that occurred prior to the merger or acquisition?

In the event of a merger, and according to article 281 of the Commercial Companies Law No. 11 of 2015 (the Companies Law), the rights and obligations of the target company shall automatically be transferred to the successor entity following the completion of the merger measures.

In the event of an acquisition, the successor entity becomes a partner/shareholder in the target company under the Companies Law. Accordingly, as a partner/shareholder in the target company, the successor entity becomes, in this capacity, responsible for the target company's liabilities.

10 Civil and criminal enforcement

Is there civil and criminal enforcement of your country's foreign bribery laws?

Not applicable since there are no foreign bribery laws in Qatar.

11 Agency enforcement

What government agencies enforce the foreign bribery laws and regulations?

Not applicable since there are no foreign bribery laws in Qatar.

12 Leniency

Is there a mechanism for companies to disclose violations in exchange for lesser penalties?

According to article 141 of the Penal Code, the briber or the intermediary shall be exempted from sanctions in case he or she has notified the crime to the competent authorities, or has confessed the crime prior to its discovery, even after it has been committed.

13 Dispute resolution

Can enforcement matters be resolved through plea agreements, settlement agreements, prosecutorial discretion or similar means without a trial?

Not applicable since there are no foreign bribery laws in Qatar.

14 Patterns in enforcement

Describe any recent shifts in the patterns of enforcement of the foreign bribery rules.

Not applicable since there are no foreign bribery rules in Qatar.

15 Prosecution of foreign companies

In what circumstances can foreign companies be prosecuted for foreign bribery?

See question 8.

16 Sanctions

What are the sanctions for individuals and companies violating the foreign bribery rules?

Not applicable since there are no foreign bribery rules in Qatar.

17 Recent decisions and investigations

Identify and summarise recent landmark decisions or investigations involving foreign bribery.

It is very rare for courts' decisions in Qatar to be published, and we have not found any decisions or investigations involving foreign bribery.

Financial record keeping

18 Laws and regulations

What legal rules require accurate corporate books and records, effective internal company controls, periodic financial statements or external auditing?

As a general rule, article 21 and so forth of the Qatari Commercial Law No. 27 of 2006 require each trader, whether an individual or a legal entity, to keep accurate books and records in a way to reflect the actual financial situation in detail. These books should be kept for a period of 10 years from their closing date. The trader should also keep all correspondence, emails and mail sent in relation with his, her or its trade for a period of five years.

On the other hand, the Companies Law provides that a company, regardless of the form under which it is established, should issue the balance sheet and the profits and losses accounts at the end of each year. Furthermore, companies should appoint an auditor who will issue audited financial accounts at the end of each year to be submitted for review and approval, to the company's managers or board of directors and then to the company's partners or shareholders in a general assembly meeting.

The Companies Law also imposes on some companies and in specific cases to have a board of auditors. In all cases, the company's auditor should be one of those registered in the auditors register in Qatar.

The company's managers or board of directors are required by law to provide the auditor with any document requested by the latter and in case of failure to do so, the auditor should report it to the Qatar Ministry of Economy and Commerce.

The audited financial statements of publicly listed companies are published.

Additional requirements apply in this regard for specific type of companies, such as banks and financial institutions.

19 Disclosure of violations or irregularities

To what extent must companies disclose violations of anti-bribery laws or associated accounting irregularities?

Qatari law does not impose on companies the obligation to disclose violations of anti-bribery or associated accounting irregularities.

20 Prosecution under financial record keeping legislation

Are such laws used to prosecute domestic or foreign bribery?

The laws related to financial record keeping are not imposed specifically for bribery, whether domestic or foreign.

21 Sanctions for accounting violations

What are the sanctions for violations of the accounting rules associated with the payment of bribes?

Violation of the accounting rules is sanctioned in general and not as specifically associated with the payment of bribes.

According to article 34 of the Law of Organisation of Auditors Profession No. 30 of 2004, any violation by the auditor of the accounting or professional standards and rules will be sanctioned by imprisonment of up to two years or a fine not exceeding 50,000 Qatari riyals, or both.

The sanctions of the Penal Code related to bribery shall also apply.

22 Tax-deductibility of domestic or foreign bribes

Do your country's tax laws prohibit the deductibility of domestic or foreign bribes?

Qatari tax law does not expressly provide that bribes may not deducted. However, given that the bribe is a crime and sanctioned under Qatari law, the deduction of the bribe amount for tax purposes cannot be permitted.

Domestic bribery

23 Legal framework

Describe the individual elements of the law prohibiting bribery of a domestic public official.

The individual elements of the Qatari law prohibiting bribery of a domestic public official are those mentioned in the Penal Code. See question 3.

24 Prohibitions

Does the law prohibit both the paying and receiving of a bribe?

Yes. According to article 141 of the Penal Code, the same sanctions applicable on the public official shall apply on the briber.

Furthermore, according to article 145 of the Penal Code, if a person offers a bribe to a public official who refuses it, the briber shall be sanctioned by imprisonment up to five years and a fine not exceeding 15,000 Qatari riyals.

The briber is, however, exempted from the sanctions in case he or she informs the competent authorities about the crime or in case he or she confesses it prior to its discovery, and even after the crime is committed.

25 Public officials

How does your law define a public official and does that definition include employees of state-owned or state-controlled companies?

Public officials are defined in article 3 of the Penal Code. See our answer under question 3.

Furthermore, the Arab Convention defines the domestic public official as:

> *any individual undertaking a public function or any individual considered as a public official according to the laws of the state member in the field of executive, legislative, judicial and operational matters, whether he/she is designated or elected, permanently or temporary, or was delegated a public service in any state member, against a compensation or not.*

26 Public official participation in commercial activities

Can a public official participate in commercial activities while serving as a public official?

According to article 80 of the HR Law, a public official (see the scope of application of this law in question 2) may not participate in commercial activities that do not comply with his or her obligations and responsibilities as a public official or with the interest of a governmental entity or that may provide the official with a direct or indirect benefit in contracts, works and auctions connected with the government activity or in which the government is a party.

The HR Law further adds that the public official should avoid performing any work that may lead to opposed interests between his or her personal activities and the interests and projects of the government entity or that may influence, directly or indirectly, his or her interests or those of any of its relatives up to the fourth degree.

There are other special laws applicable to a specific type of public official providing for the same restrictions. For instance, Ministerial Decision No. 9 of 2003 applicable to employees of the public prosecution provides in its article 91 that these employees are prevented from performing any commercial or professional activities or to have a direct or indirect interest in any work, auction or contract related to activities of the public prosecution.

27 Travel and entertainment

Describe any restrictions on providing domestic officials with gifts, travel expenses, meals or entertainment. Do the restrictions apply to both the providing and receiving of such benefits?

See question 5.

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28 Gifts and gratuities

Are certain types of gifts and gratuities permissible under your domestic bribery laws and, if so, what types?

No types of gifts or gratuities are permissible under Qatari law.

29 Private commercial bribery

Does your country also prohibit private commercial bribery?

Yes. Article 146 of the Penal Code provides that every employee requesting for himself or herself, or for a third party, money or a benefit, or a mere promise of a gift or gratuity, without the knowledge and consent of the employer, with the purpose of undertaking or refraining from undertaking any of the acts delegated to him or her, shall be considered subject of a bribe and shall be sanctioned with imprisonment up to three years or a fine not exceeding 15,000 Qatari riyals.

The amount of the bribe shall also be confiscated.

30 Penalties and enforcement

What are the sanctions for individuals and companies violating the domestic bribery rules?

See questions 8 and 24.

31 Facilitating payments

Have the domestic bribery laws been enforced with respect to facilitating or 'grease' payments?

See question 6.

Furthermore, grease payments are not usually common in Qatar.

32 Recent decisions and investigations

Identify and summarise recent landmark decisions and investigations involving domestic bribery laws, including any investigations or decisions involving foreign companies.

It is very rare for courts' decisions in Qatar to be published.

A decision based on the limited number of published court decisions related to bribery is the following:

Decision No. 172/2009 of the Criminal Court of Cassation dated 15 June 2009

According to this case, based on the manager's request, an employee offered a bribe to a domestic public official to refrain from undertaking an act falling within his job description, and such act was related to visa matters. The bribe had been accepted by the public official only for the purpose of establishing a proof of the bribe. The court has confirmed the decision of the Court of Appeal sanctioning the briber and the manager, as an instigator.

Russia

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1 International anti-corruption conventions

To which international anti-corruption conventions is your country a signatory?

Russia is a signatory to the following international anti-corruption conventions:

- Council of Europe Criminal Law Convention on Corruption (Strasbourg, 27 January 1999) (the 1999 Strasbourg Convention), which came into force for the Russian Federation on 1 February 2007;
- the UN Convention against Corruption (31 October 2003) (UNCAC), which came into force for the Russian Federation on 8 June 2006;
- the UN Convention against Transnational Organized Crime (15 November 2000), which came into force for the Russian Federation on 29 April 2004;
- on 7 May 2009 the Russian Federation signed the Additional Protocol to the Criminal Law Convention on Corruption (15 May 2003), but has not yet ratified it; and
- the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (21 November 1997), which came into force for the Russian Federation on 17 April 2012.

2 Foreign and domestic bribery laws

Identify and describe your national laws and regulations prohibiting bribery of foreign public officials (foreign bribery laws) and domestic public officials (domestic bribery laws).

At the core of Russian anti-bribery legislation are the following provisions:

- the Federal Law on Counteraction against Corruption (25 December 2008 No. 273-FZ);
- the Federal Law on monitoring of correspondence between the expenses of the holders of public officers and other persons, and their income (3 December 2012 No. 230-FZ);
- the Federal Law on the prohibition for certain persons to open and maintain accounts (deposits) and to keep cash and other values with the foreign banks located outside the Russian Federation as well as to use foreign financial instruments (7 May 2013 No. 79-FZ);
- articles 184, 204, 290, 291, 304 and 309 of the Criminal Code of the Russian Federation (13 June 1996 No. 63-FZ) (the Criminal Code);
- articles 13 to 20.1 of the Federal Law on the State Civil Service of the Russian Federation (27 July 2004 No. 79-FZ);
- article 169 of the Civil Code of the Russian Federation (Part I) (30 November 1994 No. 51-FZ) and article 575 of the Civil Code of the Russian Federation (Part II) (26 January 1996 No. 14-FZ) (both parts referred to as the Civil Code); and
- articles 19.28 and 19.29 of the Code of the Russian Federation on the Administrative Offences (30 December 2001 No. 195-FZ) (the Administrative Offences Code).

Foreign bribery

3 Legal framework

Describe the elements of the law prohibiting bribery of a foreign public official.

The legal consequences of an offence of bribery of foreign officials are provided for by Russian criminal and civil legislation.

Articles 184, 204 and 309 of the Criminal Code, which respectively criminalise bribery in sport, commercial bribery and bribery of witnesses, interpreters, victims and experts in court and other official proceedings, are applicable to appropriate cases of foreign bribery. The provisions of the Criminal Code (articles 290 and 291) that criminalise bribery of public officials apply not only to Russian state and municipal officials (including some the officials of some state-owned entities), but also to foreign officials and the officials of international organisations. It is notable that the Criminal Code is silent on the possibility of extraterritorial application of these provisions. In the absence of any relevant court practice we can only state in general terms that nowadays the bribery of foreign state and municipal officials is criminally sanctioned in Russia in the same way as domestic bribery, but applicability of these provisions ratione loci is not clear.

In general, according to articles 184, 204, 290, 291 and 309 of the Criminal Code, bribery takes place when there is a giving (article 184 paragraphs 1 and 2; article 204 paragraphs 1 and 2; article 291; article 309 paragraphs 1 and 4 of the Criminal Code) or when there is a receiving (article 184 paragraphs 3 and 4; article 204 paragraphs 3 and 4; article 290) of a consideration for the performance or non-performance of an official function (in the public sector or in private sport or commercial interest) to the person that can or has to perform such function or to refrain from performing such function and who is not officially entitled to such consideration.

Most relevant to foreign bribery is the provision stipulated in article 169 of the Civil Code. It makes invalid ab initio transactions that are against the fundamentals of legal order and morals, for example a transaction to acquire a bribe, and provides for taking of all or part of the consideration in such transactions into federal state ownership.

4 Definition of a foreign public official

How does your law define a foreign public official?

Russia is bound by the definitions of FPOs contained in article 2(b) of UNCAC and in article 1(c) and article 5 of the 1999 Strasbourg Convention. The definition in article 2(b) of UNCAC is the most detailed and reads:

> *'Foreign public official' shall mean any person holding a legislative, executive, administrative or judicial office of a foreign country, whether appointed or elected; and any person exercising a public function for a foreign country, including for a public agency or public enterprise.*

This definition has been reproduced almost verbatim in article 290 of the Criminal Code. An official of an international organisation is defined in the same article as 'any international civil servant or any other person authorised by the international organisation to act on its behalf'. These definitions are valid for articles 290, 291 and 291.1 of the

Criminal Code. The same definitions have been introduced into article 19.28 of the Administrative Offences Code.

5 Travel and entertainment restrictions

To what extent do your anti-bribery laws restrict providing foreign officials with gifts, travel expenses, meals or entertainment?

As soon as these benefits, given to an official, amount to bribes under the Criminal Code or the Administrative Offences Code, they are prohibited as explained in questions 3 and 8. However, the restrictions provided for in the other acts (such as the Federal Law on Counteraction against Corruption, the Federal Law on the State Civil Service of the Russian Federation or article 575 of the Civil Code) do not apply to any foreign officials.

6 Facilitating payments

Do the laws and regulations permit facilitating or 'grease' payments?

See question 7.

7 Payments through intermediaries or third parties

In what circumstances do the laws prohibit payments through intermediaries or third parties to foreign public officials?

Any undue payments to an official intended to influence performance of his or her functions or to facilitate a result that is dependent on the performance of his or her functions are criminalised, regardless of the amounts of such payments. This applies regardless of whether intermediaries or third parties were involved. An intermediary or a third party, if they acted intentionally in facilitating a bribe, shall be criminally liable under article 291.1 of the Criminal Code.

8 Individual and corporate liability

Can both individuals and companies be held liable for bribery of a foreign official?

Companies are not subject to criminal liability according to Russian criminal legislation (article 19 of the Criminal Code). Only individuals of 16 and older can be criminally liable for bribery (article 20 of the Criminal Code). Companies are liable for giving bribes under the Administrative Offences Code, as explained in question 23. The legal entity can be made liable under this provision even if its officer faces criminal charges for the same offence.

In civil law individuals and companies alike can be held liable for bribery. In particular, a bribery transaction should be declared illegal according to article 169 of the Civil Code. This applies to both companies and individuals. Bribery can also be regarded as a tort, but it is unlikely that any private party would be damaged directly by an act of bribery (as opposed to any unlawful act committed by a public official for a bribe).

9 Successor liability

Can a successor entity be held liable for bribery of foreign officials by the target entity that occurred prior to the merger or acquisition?

Legal entities can be brought to administrative liability for bribery of foreign officials (see questions 16 and 23). In the event a merger or an acquisition takes place, the successor entity is held liable for the actions of the initial wrongdoer (article 2.10 of the Administrative Offences Code).

10 Civil and criminal enforcement

Is there civil and criminal enforcement of your country's foreign bribery laws?

There is both criminal and civil enforcement of the foreign bribery provisions in the territory of the Russian Federation.

11 Agency enforcement

What government agencies enforce the foreign bribery laws and regulations?

Criminal and administrative anti-bribery provisions are enforced by the state prosecutors through the courts of general jurisdiction.

Particular investigation of criminal bribery of state and municipal officials shall be in most cases within the jurisdiction of the Investigations Committee of the Russian Federation and its territorial bodies as well as within the jurisdiction of investigative bodies of the Ministry of the Interior. Investigation of sports bribery is within the jurisdiction of the Ministry of the Interior. Commercial bribery and bribery of witnesses is generally within the jurisdiction of the investigative bodies of the Ministry of the Interior, but can in some cases be investigated by the other law enforcement bodies (article 151 of the Code of Criminal Procedure of the Russian Federation).

In the area of civil law, remedies for bribery can be claimed by an interested private party or, in some cases, by the state prosecutors of the Russian Federation.

12 Leniency

Is there a mechanism for companies to disclose violations in exchange for lesser penalties?

The Administrative Offences Code (articles 4.1. and 4.2) provides for a voluntary disclosure of an offence as an extenuating circumstance. Thus a lesser fine will be imposed in such case under article 19.28 (see question 23). This mitigation of liability is wholly within the court's discretion.

Several tools exist for private individuals to achieve leniency in a criminal prosecution. If a person pleads guilty, article 75 of the Criminal Code (that requires application to confess to commitment of crime, remorse and assistance to investigation) or articles 314 to 317 of the Code of Criminal Procedure of the Russian Federation (that provide for a 'simplified' trial, based on the confession of guilt) might be applicable. In general, those tools are within the discretion of investigators, prosecutors and the court; however, if the procedure of simplified trial is applied, the actual punishment cannot exceed two-thirds of the maximum punishment (article 316 paragraph 7 of the Code of Criminal Procedure of the Russian Federation).

The wrongdoer may also choose to cooperate with the investigation by entering into a formal cooperation agreement with the investigators in the course of the preliminary investigation, if the criminal sanction for the offence that he or she has committed does not exceed 10 years' imprisonment. To enter into this agreement the wrongdoer shall make a full report of the crime committed; the article(s) of the Criminal Code applicable to this crime shall also be indicated in this agreement. The wrongdoer shall further undertake to provide information and render cooperation to help to investigate the crimes committed by other persons. It is not sufficient to provide cooperation with regard to his or her own criminal activities. (articles 317.1–317.9 of the Code of Criminal Procedure of the Russian Federation).

If the wrongdoer fulfils all his or her obligations under the valid cooperation agreement, the court shall hold summary proceedings to issue sentence, which shall not exceed half (or, in exceptionally serious cases where life imprisonment might be applicable, two-thirds) of the maximum punishment provided by the Criminal Code for the crime at issue (article 62 of the Criminal Code of the Russian Federation). The court may at its entire discretion show further leniency, but is not obliged to do so.

It should be mentioned that the rules concerning plea bargains are relatively new and do not provide for all practical possibilities. On 28 June 2012 the Supreme Court of the Russian Federation issued its Resolution No. 16 to clarify certain provisions of the Criminal Procedure Code. This resolution makes it clear that the court in certain cases has powers to proceed as in the normal course of procedure, if required by the interests of justice. Although this field would benefit from more detailed regulations, cooperation agreements are already used in practice.

13 Dispute resolution

Can enforcement matters be resolved through plea agreements, settlement agreements, prosecutorial discretion or similar means without a trial?

See question 12.

14 Patterns in enforcement

Describe any recent shifts in the patterns of enforcement of the foreign bribery rules.

We are not aware of any recently reported cases of foreign bribery. In general the most up-to-date non-binding but very authoritative judicial interpretation of bribery can be found in the Resolution of the Plenum of the Supreme Court of the Russian Federation dated 9 July 2013 No. 24, on Court Practice in the Cases of Bribery and other Corruption Crimes, as amended by the resolution of the same court No. 33, dated 3 December 2013.

This resolution provides useful guidance in the cases of both domestic and foreign bribery, but on the matters of special relevance to foreign bribery (such as the definition of a foreign public official) mostly recites the statute. The guidelines of this resolution may be said to interpret some provisions of the Criminal Code to impose even stricter prohibitions than might appear from the text of the statute itself.

15 Prosecution of foreign companies

In what circumstances can foreign companies be prosecuted for foreign bribery?

The legal regime for prosecuting a foreign company in Russia is the same as for companies of Russian nationality: a legal entity is not subject to the criminal law. Civil liability and the liability under the Administrative Offences Code can be applied by the competent Russian court, as previously described in relation to Russian companies (see questions 8 and 12). An offence of a foreign entity can only be punished in the Russian Federation under the Administrative Offences Code, if such offence is committed within the Russian Federation.

16 Sanctions

What are the sanctions for individuals and companies violating the foreign bribery rules?

In criminal law, depending on the nature of the crime (giving or taking of a bribe), the type of the official involved (acting in public or in private interest) and on the severity of crime, sanctions can take the form of a fine, public works, administrative arrest, deprivation of the right to hold a specific position or to work at a specific job, or imprisonment. In the most severe cases, imprisonment can be for a period of 12 years.

Article 19.28 of the Administrative Offences Code provides for the fine, which, as a general rule, shall be up to three times as much as the amount of the bribe, but not less than 1 million roubles. Depending on the amount of the bribe involved, the fine may go up to 100 times the bribe amount, with an absolute maximum of 100 million roubles. The bribe shall be confiscated.

In civil law the following remedies are available: restitution and compensation for damage caused by the bribery.

17 Recent decisions and investigations

Identify and summarise recent landmark decisions or investigations involving foreign bribery.

See question 14. We are not aware of any cases involving foreign bribery in Russia.

Financial record keeping

18 Laws and regulations

What legal rules require accurate corporate books and records, effective internal company controls, periodic financial statements or external auditing?

The system of reporting in Russia is rather complicated. Three layers of reporting provisions – provisions on bookkeeping and tax reporting, corporate affairs reporting, and investments and securities related reporting – are briefly described.

Bookkeeping and tax reporting

The Tax Code of the Russian Federation (Federal Law dated 31 July 1998 No. 146-FZ) (article 23) provides that corporate taxpayers have a duty to submit appropriate tax reports to the tax authorities as well as bookkeeping reports according to the Law on Bookkeeping (Federal Law dated 6 December 2011 No. 402-FZ).

The Law on Bookkeeping generally requires the following submissions:

- balance sheet;
- account of financial results;
- supplements to these documents provided for by the normative acts; and
- audit reports when mandatory auditing is provided for by federal law.

That law further obliges some legal entities (open-type joint-stock companies, insurance companies, banks, funds, exchanges, etc) to publish their accounts.

Mandatory auditing is prescribed by article 5 of the Federal Law on Auditing Activities (dated 30 December 2008 No. 307-FZ), for, inter alia, joint-stock companies, insurance companies, banks and investment funds. Mandatory auditing can also be provided for by other federal laws.

Corporate affairs reporting

Corporate affairs reporting is generally prescribed by the Federal Law on the State Registration of Legal Entities and Individual Entrepreneurs (dated 8 August 2001 No. 129-FZ) and by several laws on specific types of corporations, such as the Federal Law on Joint-stock Companies (dated 26 December 1995 No. 208-FZ) and the Federal Law on Limited Liability Companies (dated 8 February 1998 No. 14-FZ).

Thus in the sphere of internal accounting the Federal Law on Joint-stock Companies prescribes mandatory formation of the internal auditing commission for all joint-stock companies. This commission supervises the financial and economic life of the company. The formation of a similar internal body is prescribed by the Federal Law on Limited Liability Companies for limited liability companies formed of more than 15 members. Auditing commissions have a duty to examine annual reports and balance sheets of the company before they are approved by the general meeting of shareholders or members, and in a more general sense are obliged to supervise the financial and economic life of the company.

Competition legislation (Federal Law on the Protection of Competition dated 26 July 2006 No. 135-FZ) makes it obligatory for corporations to communicate with or to report to the competition regulator in the case of certain intra-corporate changes as well as in the case of some intercorporate market-affecting transactions.

Special rules of reporting are established for non-commercial legal entities. In addition to the Law on Bookkeeping further requirements can be found in the Civil Code of the Russian Federation (Part I) (Federal Law dated 30 November 1994 No. 51-FZ), by the Law on Non-profit Organisations (Federal Law dated 12 January 1996 No. 7-FZ), by the Law on Charitable Activities and Charitable Organisations (Federal Law dated 11 August 1995 No. 135-FZ), by the Law on Social Associations (Federal Law dated 19 May 1995 No. 82-FZ) and by some other acts.

Investments and securities-related reporting

The Federal Law on the Securities Market (dated 22 April 1996 No. 39-FZ) governs, inter alia, issuance of and operations concerning shares and bonds. It requires reporting, maintaining a register and keeping and disclosure of information with regard to shares. Some special rules on disclosure of information are established by the Federal Law on Mortgage Securities (dated 11 November 2003 No. 152-FZ).

The Federal Law on Investment Funds (dated 29 November 2001 No. 156-FZ) provides for some reporting and record keeping by funds, managing companies and some other related entities.

Special reporting was introduced for some professional market participants (banks, insurance and leasing companies, etc) by the Law on Countermeasures to Legalisation (Laundering) of Criminally

Drawn Income (Federal Law dated 7 August 2001 No. 115-FZ) (the AML Law). Anti-money-laundering measures include, inter alia, providing the competent authority with information on the wide range of operations concerning money and property.

Federal Law dated 28 November 2007 No. 275-FZ supplemented article 7 of the AML Law with paragraph 1.3, requiring market participants to pay additional attention to the operations of foreign officials and their close relatives. On 3 June 2009 (by Federal Law No. 121-FZ) these provisions were re-enacted as article 7.3 of the same law.

The AML Law and various ensuing regulations also establish diligence requirements (know-your-client policies) for banks (article 7.2).

The requirements of the AML Law are partially extended to advocates, notaries, law firms and firms of accountants.

Other regulations issued by various government agencies are a significant part of the regulation of accounting and reporting, especially with regard to bookkeeping, tax, investment and securities-related reporting.

19 Disclosure of violations or irregularities

To what extent must companies disclose violations of anti-bribery laws or associated accounting irregularities?

There are no direct provisions establishing a duty of companies to disclose violations of anti-bribery laws or of associated accounting irregularities. However, these violations and irregularities should be reported if the companies comply with their duties to report important information to investors and other participants in the financial markets and to submit the correct reports and bookkeeping records to the appropriate state bodies.

20 Prosecution under financial record keeping legislation

Are such laws used to prosecute domestic or foreign bribery?

Financial record keeping laws are used as an ancillary to the appropriate provisions of criminal and civil codes and other laws establishing civil, criminal or administrative liability.

21 Sanctions for accounting violations

What are the sanctions for violations of the accounting rules associated with the payment of bribes?

It is important to distinguish between violation of bookkeeping and tax reporting provisions and violation of other types of reporting provisions.

Sanctions for violation of bookkeeping rules are provided for by article 15.11 of the Administrative Offences Code.

Sanctions for violation of tax-reporting provisions take the form of administrative fines of various amounts and are provided for by the sixth section of the Tax Code of the Russian Federation (Part I) and articles 15.3, 15.4 to 15.9 of the Administrative Offences Code.

The second group includes sanctions for violation of the AML Law rules, provided by the Administrative Offences Code (article 15.27) and the AML Law itself. Article 15.27 of the Administrative Offences Code now includes four different offences against the AML rules. The wrongdoer may be subjected to a fine or administrative suspension of a company's activity for a period of up to 90 days. The company's executives, including any responsible officers, can also be fined and prohibited from holding certain offices for a defined period of time. The AML Law itself provides in particular for annulment of the company's licence to perform specific types of activity such as banking or lease financing.

22 Tax-deductibility of domestic or foreign bribes

Do your country's tax laws prohibit the deductibility of domestic or foreign bribes?

All deductible expenditures are provided for in the Tax Code of the Russian Federation (Part II) (dated 5 August 2000 No. 117-FZ). Expenditure on bribe payments is not mentioned in the Tax Code of the Russian Federation. Moreover, transactions relating to bribe giving and receiving are void under the Civil Code of the Russian Federation (Part I). As a result a taxpayer cannot refer to such transactions to justify the expenditure.

Domestic bribery

23 Legal framework

Describe the individual elements of the law prohibiting bribery of a domestic public official.

Such bribery is prohibited by articles 290 and 291 of the Criminal Code of the Russian Federation (the Criminal Code).

To establish bribery, the prosecutor must prove:

- the receipt of or the payment in money, securities or other property or pecuniary benefits, effectuated directly or through an intermediary. At least part of the bribe must be transferred for the crime to be declared completed;
- that the bribe was given or taken for the actions in favour of the bribe-giver or any person represented by him or her, as well as for general employment-related favour or connivance;
- that such actions are within the scope of the bribe-taker's authority, or the bribe-taker can promote such actions due to his or her authority. If those actions are illegal, the bribery is punished more severely; and
- that the bribe-taker is a public official (see question 25).

It must be mentioned that some of the corruption crimes provided for by international treaties are not expressly proscribed by the cited articles of the Criminal Code. In this light the question arises in the doctrine of criminal law whether it is possible to punish these crimes under some other articles of the Criminal Code.

The Administrative Offences Code now includes article 19.28, which prohibits providing undue advantage to an official (whether in the private or public sector) in return for some actions or omissions in the exercise of the functions of such official. The elements of this offence are similar to those described above in relation to the crime under article 291 of the Criminal Code. The official in the private sector is defined in the note to article 201 of the Criminal Code (see question 29). The only difference between this administrative offence and the crimes described above and in question 29 is that the Criminal Code punishes only individuals whereas article 19.28 provides for the liability of legal entities. The Administrative Offences Code stipulates no sanctions for companies for bribery in sport, and bribery of witnesses, interpreters, victims and experts in court and other official proceedings.

The Federal Law on the State Civil Service of the Russian Federation (dated 27 July 2004 No. 79-FZ) also prohibits state civil servants from, inter alia:

- engaging in entrepreneurial activities, corporate management or being in any way engaged to represent any private party in the state agency where he or she is employed;
- acquiring any interest-bearing securities or holding such securities if that leads to a conflict of interest;
- being in any way engaged for remuneration without the employer's consent or if that leads to a conflict of interest (see question 26 for more detail);
- receiving from natural persons and legal entities gifts in connection to performance of their public duties (except for those received in connection with the official events amounting to less than 3,000 roubles);
- travelling abroad within the scope of his or her public duties at the expense of individuals and legal entities (unless otherwise provided for by international treaties of the Russian Federation or agreed by the Russian Federation state authorities and foreign state authorities and international and foreign organisations);
- receiving, without the written permission of the employer, awards, honorary and special degrees (except for scientific ones) from foreign states, international organisations, political parties and other social and religious associations if he or she interacts with them in the scope of his or her office;
- using his or her public authority in favour of political parties, other social and religious associations or other organisations or publicly expressing his or her attitude to these associations and organisations if such activities are outside the scope of his or her public duties;
- engaging, without the written permission of the employer, in paid activities that are financed exclusively by foreign states, international or foreign organisations, foreign citizens or stateless

Update and trends

Anti-corruption laws and policies continue to be in focus for Russian law enforcement and other agencies. However, it is important that the implementation of these (rather extensive) rules and regulations are now effectively implemented at all levels of public service. While high-level officials and the vulnerable law-enforcement sector are clearly not immune from corruption-related offences, this culture should permeate the whole system. It is very significant from this perspective that the necessary amendments have been recently introduced to ensure that all companies controlled by the state and municipal authorities may be seen as public from the point of view of anti-corruption provisions. The range of possible corruption-related violations is broader for public officials, and it shall be seen how these changes will affect policies in the state-controlled sector of the economy.

individuals (unless otherwise provided by an international treaty or the legislation of the Russian Federation); and

- being employed or working on the basis of a civil law contract in profit-making and non-profit organisations within two years after release without the special commission's consent, if he or she performed particular state managing functions in the scope of his or her authority in respect of these organisations.

The Federal Law on the prohibition for certain persons to open and maintain accounts (deposits) and to keep cash and other values with the foreign banks located outside the Russian Federation as well as to use foreign financial instruments (dated 7 May 2013 No. 79-FZ) introduces the prohibition that its name suggests for various public officials. Violation of this prohibition is a separate ground for dismissal of the public official under paragraph 7.1 of article 81(1) of the Labour Code of the Russian Federation.

The idea of conflict of interest is one of the focal points of the anti-corruption provisions related to the status of civil servants. Civil servants are responsible for settling their own conflicts of interest and the conflicts of interest of their subordinates. Failure to do that may lead to dismissal for 'loss of trust'. Similar and even more restrictive provisions have been introduced for other public servants and for the senior state and municipal officials that do not fall within the category of public servants.

Most relevant to the bribery provisions of civil legislation are article 169 and article 575 of the Civil Code. The latter regulates gifts to state and municipal officials related to performance of their functions (for details, see question 27). The former makes invalid ab initio transactions that are against the fundamentals of legal order and morals, such as a transaction to acquire a bribe. Pursuant to the National Plan on counteraction against corruption, a standard guidance on receiving gifts was issued by the government (Ruling No. 10 dated 9 January 2014). In the course of 2014, it has been reproduced by various state agencies.

24 Prohibitions

Does the law prohibit both the paying and receiving of a bribe?

As indicated in question 23, both paying and receiving a bribe are prohibited. Furthermore, provocation of a bribe or of a commercial bribe is criminalised as well by article 304 of the Criminal Code. 'Provocation' is defined as an attempt to give a bribe without the consent of the person who is supposed to receive the bribe, where such attempt has the ultimate aim of manufacturing evidence of criminal taking of the bribe or of blackmailing the person receiving a bribe.

25 Public officials

How does your law define a public official and does that definition include employees of state-owned or state-controlled companies?

Different provisions of the Russian law target different categories of public officials and state servants.

For the purposes of criminal law, a public official is the person who discharges the functions of a public authority representative on a permanent or temporary basis or by special authority (delegation), or performs organisational, regulatory, administrative and economic functions in state bodies, local self-governing bodies' state and municipal institutions, state corporations and also in the armed forces of the Russian Federation, in other troops and military formations of the Russian Federation (note 1 to article 285 of the Criminal Code). State and municipal institutions and state-controlled corporations are separate legal entities entirely controlled by the state. As indicated in the definition their employees performing the mentioned functions in these legal entities are to be treated as public officials for the purposes of the Criminal Code.

Note 1 to article 19.28 of the Administrative Offences Code defines public official by reference to the described provisions of the Criminal Code.

For the purposes of criminal law, a public official is the person who discharges the functions of a public authority representative on a permanent or temporary basis or by special authority (delegation), or performs organisational, regulatory, administrative and economic functions in state bodies, local self-governing bodies' state and municipal institutions, state corporations, state companies, state and municipal unitary enterprises, joint-stock companies, controlling interest in which is owned by the Russian Federation, constituent entities of the Russian Federation or municipalities as well as in the armed forces of the Russian Federation, in other troops and military formations of the Russian Federation (note 1 to article 285 of the Criminal Code).

The Federal Law on Counteraction against Corruption now imposes compliance obligations upon the officers of state corporations, state funds and other entities created to perform the functions of federal state agencies, as well as institutions owned by municipalities. Those officers shall avoid conflict of interest and report any attempted corruption. For the purposes of anti-corruption regulations they are treated as civil servants.

The Law on Counteraction against Corruption and the Federal Law on Monitoring of Correspondence between the Expenses of the Holders of Public Officers and Other Persons, and Their Income dated 3 December 2012 No. 230-FZ require certain public officials and state servants to report on their income and expenses. The purpose of this legislation is, of course, to ensure that appropriate inquiries are made where a state official or a state servant spends more money than he earns. These requirements only extend to the public officials specifically listed for that purposes in the legislation (see, for example, Decree of the President dated 18 May 2009 No. 557).

26 Public official participation in commercial activities

Can a public official participate in commercial activities while serving as a public official?

Commercial activity is directly forbidden to civil servants (article 17 paragraph 1(3) of the Federal Law on the State Civil Service of the Russian Federation). Apart from this, as a general rule any public official who is in a civil service has a right to be engaged in other paid activity (article 14 paragraph 2 of the Federal Law on the State Civil Service of the Russian Federation). This rule is subject to several conditions: such activity should not create a conflict of interest, it can be started only with the preliminary consent of the employer in a state organisation, and such activity should not be in violation of general restrictions on a civil servant's activity (articles 16 to 18 of the Federal Law on the State Civil Service of the Russian Federation and other special laws, see question 23) or in violation of any specific prohibition on being engaged in other paid activity that relates to his or her position or a type of service. Ownership of shares and other corporate interests domestically is, as a general rule, not restricted for public officials in the civil service but in some cases should be reported and is subject to some specific rules, such as a duty to submit securities to trust management in case of a conflict of interest (article 17 paragraph 1(4) and paragraph 2 of the Federal Law on the State Civil Service of the Russian Federation). Ownership of shares abroad is prohibited for most senior state and municipal officials.

The restrictions applicable to civil servants have been extended to most of the other state officers in Russia. Those are, in particular: officers of the prosecution office of the Russian Federation, of the Ministry of Internal Affairs of the Russian Federation, of the Federal Customs Service, of the Drugs Control Service, execution officers

(bailiffs), military personnel (subject to any exceptions introduced by the president's or government's acts) and police officers. As mentioned in question 25, officers of state corporations, state funds and other entities controlled by the state can be treated as state servants for present purposes.

For state public officials, such as judges, members of parliament, federal ministers, the President of the Russian Federation and so on (these are called collectively 'individuals holding state offices of the Russian Federation and of the constituencies of the Russian Federation'), appropriate restrictions are directly provided for by special laws and by the Federal Law on Counteraction against Corruption. In general, apart from performing their public function, such state officials are very limited in the paid activities that they may perform. Normally such permitted activities include teaching, scientific activity and creative activity (eg, painting). Similar restrictions have been introduced for officers and employees of the Federal Security Service of the Russian Federation and of the Central Bank of the Russian Federation.

As mentioned in question 23, in accordance with the Federal Law on monitoring of correspondence between the expenses of the holders of public officers and other persons, and their income (dated 3 December 2012 No. 230-FZ) most public officials, including some senior officials of state companies that perform functions of state agencies, are obliged to report on any acquisition of real estate, vehicles or securities where the consideration that they pay exceeds their aggregate income with their respective spouses for the preceding three years. The information about the sources of funds for such transaction should be made public. Most public officials should also provide information about their income and property in respect of themselves, their spouses and minor children, which information should also be made public (article 8 of the Federal Law on Counteraction against Corruption). The courts have already shown willingness to intervene if the information is not published, despite the legal requirements.

27 Travel and entertainment

Describe any restrictions on providing domestic officials with gifts, travel expenses, meals or entertainment. Do the restrictions apply to both the providing and receiving of such benefits?

See question 28.

28 Gifts and gratuities

Are certain types of gifts and gratuities permissible under your domestic bribery laws and, if so, what types?

Please see the restrictions provided by the Federal Law on the State Civil Service of the Russian Federation and the Civil Code indicated in question 23. It should be noted that only those gifts that are received in connection with the performance of an official's public functions are affected. Unfortunately, the relevant provisions are scattered across various acts and regulations with varying and imperfect formulations. However, it may be argued that in practice the rules are the same for all public officials and all kinds of state service, and that discrepancies between the formulations of various regulations should be ignored for practical purposes. The intended regime appears to be that the no gifts be received in private in connection with the performance of an official's public functions and that those gifts received officially be surrendered by the recipient within three days to the state body where he or she works. If the gift does not exceed 3,000 roubles in value, it is returned to the recipient. Otherwise is can be purchased back within two months.

All that has been said above about gifts applies equally to any other advantages, apart from the 3,000-rouble allowance, which applies only to those transactions that can be classified as gifts in accordance with the Civil Code.

29 Private commercial bribery

Does your country also prohibit private commercial bribery?

Commercial bribery is also prohibited in the Russian Federation. Article 204 of the Criminal Code criminalises both giving and receiving commercial bribes (see question 3). An official in the private sector is defined in the note to article 201 of the Criminal Code as any person performing the functions of CEO, member of the board of directors or any other executive board or a person performing on a permanent or temporary basis or by special authority organising, regulatory, administrative and economic functions in any organisation.

Liability for legal entities is provided for in the Administrative Offences Code (see question 23).

30 Penalties and enforcement

What are the sanctions for individuals and companies violating the domestic bribery rules?

On sanctions, liability and enforcement of penalties for acts of bribery in Russian law, see questions 23, 25, 27 and 29. Bribe giving and taking is mostly punished by fines and deprivation of liberty. Since 2011 the fines are linked to the amounts of bribes given or received. In the most serious cases of bribe taking a fine can be as high as 100 times the amount of the bribe.

For public officials that are in the civil state service or municipal service, acts of bribery or other violations of anti-corruption provisions (such as failure to provide full reports of funds and assets, failure to address conflicts of interest) can cause disciplinary liability on the basis of the Federal Law on the State Civil Service of the Russian Federation (articles 19, 20, 37 and 57) or the Federal Law on Municipal Service in the Russian Federation (dated 2 March 2007 No. 25-FZ) (articles 14.1, 15, 27, 27.1). Moreover, even the failure to inform an employer of any offer of a bribe constitutes a disciplinary offence for all the state and municipal servants (article 9 of the Federal Law on Counteraction against Corruption).

The forms of disciplinary liability for state civil officers are as follows: admonition; reprimand, warning about partial ineptitude and release from the office. Disciplinary liability for municipal officers can

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ensue in fewer forms: admonition, reprimand and release from service. Most violations of anti-corruption law would result in dismissal from office.

31 Facilitating payments

Have the domestic bribery laws been enforced with respect to facilitating or 'grease' payments?

See questions 5, 7 and 23; no special facilitating payments are allowed, and bribery laws are applicable to them.

32 Recent decisions and investigations

Identify and summarise recent landmark decisions and investigations involving domestic bribery laws, including any investigations or decisions involving foreign companies.

See question 14.

The Russian authorities continue to investigate and prosecute corruption-related offences.

According to the statistics recently made public by the head of the Investigations Committee, in the course of the last five years the Committee sent 44,000 corruption cases to court of which 257 were related to organised crime. Out of 90 billion roubles lost by the state in corruption damages, around 22 billion were compensated and property of the perpetrators was confiscated to approximately for the same amount. One important investigation concerning corruption revealed at the construction of a space launching site for more than 5 billion roubles.

It is important that the public officials at all levels get investigated, including investigators of various law enforcement authorities, advocates and judges. The investigations were also conducted against politicians at the level of regional legislatures and one former federal senator (who was eventually accused). One former governor and several mayors have been accused of corruption-related offences in recent years. Two other former governors are under investigation.

Singapore

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1 International anti-corruption conventions

To which international anti-corruption conventions is your country a signatory?

Singapore became a signatory to the United Nations Convention against Corruption (UNCAC) on 11 November 2005 (ratification on 6 November 2009) and to the United Nations Convention against Transnational Organized Crime on 13 December 2000 (ratification on 28 August 2007).

Singapore has been a member of the Financial Action Task Force since 1992, was one of the founding members of the Asia-Pacific Group on Money-Laundering in 1997 and was admitted as a member of the Egmont Group of Financial Intelligence Units in 2002. Singapore is also a member of the ADB/OECD Anti-Corruption Initiative for Asia and the Pacific, which it endorsed on 30 December 2001.

2 Foreign and domestic bribery laws

Identify and describe your national laws and regulations prohibiting bribery of foreign public officials (foreign bribery laws) and domestic public officials (domestic bribery laws).

The primary Singapore statutes prohibiting bribery are the Prevention of Corruption Act (PCA) (Cap 241, 1993 Rev Ed) and the Penal Code (Cap 224, 2008 Rev Ed).

Sections 5 and 6 of the PCA prohibit bribery in general. Section 5 makes active and passive bribery by individuals and companies in the public and private sectors an offence. Section 6 makes it an offence when an agent is corruptly offered or corruptly accepts gratification in relation to the performance of the principal's affairs or for the purpose of misleading the principal. The term 'gratification' is interpreted broadly (see question 5).

Sections 11 and 12 of the PCA prohibit the bribery of domestic public officials such as members of parliament and members of a public body. A 'public body' is defined as 'any corporation, board, council, commissioners or other body which has power to act under and for the purposes of any written law relating to public health or to undertakings or public utility or otherwise to administer money levied or raised by rates or charges in pursuance of any written law'. The Singapore Interpretation Act defines the term 'public officer' as 'the holder of any office of emolument in the service of the [Singapore] Government'. The PCA does not specifically target bribery of foreign public officials, but such bribery could fall under the ambit of the general prohibitions, namely section 6 on corrupt transactions with agents.

The Penal Code also contains provisions that relate to the bribery of public officials (sections 161 to 165). Public officials are referred to in the Penal Code as 'public servants', which have been defined in the Penal Code to include mainly domestic public officials. Sections 161 to 165 describe the following scenarios as constituting bribery:

- a public servant taking a gratification, other than legal remuneration, in respect of an official act;
- a person taking a gratification in order to influence a public servant by corrupt or illegal means;
- a person taking a gratification for exercising personal influence over a public servant;
- abetment by a public servant of the above offences; and
- a public servant obtaining anything of value, without consideration or with consideration the public servant knows to be inadequate, from a person concerned in any proceedings or business conducted by such public servant.

In addition to the above, the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (the CDSA) (Cap 65A, 2000 Rev Ed) – Singapore's key anti-money laundering statute – provides for the confiscation of the benefits derived from corruption and other criminal conduct.

Foreign bribery

3 Legal framework

Describe the elements of the law prohibiting bribery of a foreign public official.

As mentioned in question 2, there are no provisions in the PCA or the Penal Code which specifically prohibit bribery of a foreign public official. However, the general prohibition against bribery in the PCA, in particular on corrupt transactions with agents, read together with section 37 of the PCA, prohibits, in effect, the bribery of a foreign public official outside Singapore by a Singapore citizen. Section 37 of the PCA gives the anti-corruption legislation extraterritorial effect because if the act of bribery takes place outside Singapore and the bribe is carried out by a Singapore citizen, section 37 of the PCA states that the offender would be dealt with as if the bribe had taken place in Singapore.

Under section 5 of the PCA, it is an offence for a person (whether by himself or herself, or in conjunction with any other person) to:

- corruptly solicit, receive, or agree to receive for himself or for any other person; or
- corruptly give, promise, or offer to any person, whether for the benefit of that person or of another person any gratification as an inducement to or reward for or otherwise on account of:
- any person doing or forbearing to do anything in respect of any matter or transaction whatsoever, 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 whatsoever, actual or proposed, in which such public body is concerned.

It is also an offence under section 6 of the PCA for:

- an agent to corruptly accept or obtain any gratification as an inducement or reward for doing or forbearing to do any act in relation to his or her principal's affairs;
- a person to corruptly give or offer any gratification to an agent as an inducement or reward for doing or forbearing to do any act in relation to his or her principal's affairs; or
- a person to knowingly give to an agent a false or erroneous or defective statement, or an agent to knowingly use such statement, to deceive his or her principal.

Section 4 of the Penal Code also creates extraterritorial obligations for all Singapore public servants and states that any act or omission committed by a public servant outside of Singapore in the course of his or her employment that would constitute an offence in Singapore will be deemed to have been committed in Singapore. Accordingly, if

the public servant accepted a bribe overseas, he or she would be liable under Singapore law.

The extraterritorial effects of the PCA and Penal Code are limited in the respect that they only apply to Singapore citizens and Singapore public servants respectively. In *Public Prosecutor v Taw Cheng Kong* [1998] 2 SLR 410, a case involving a constitutional challenge to the extraterritoriality of section 37 of the PCA, the court upheld the provision and concluded that it was 'rational to draw the line at citizenship and leave out non-citizens so as to observe international comity and the sovereignty of other nations'. The court further observed that the language of the provision was wide and 'capable of capturing all corrupt acts by Singapore citizens outside Singapore, irrespective of whether such corrupt acts have consequences within the borders of Singapore or not'. As regards non-citizens committing corruption outside Singapore that could cause harm in Singapore, the court opined that section 29 of the PCA, which deals with the abetment of a corrupt act abroad, could be wide enough to address that scenario.

The CDSA, which primarily deals with the prevention of laundering of the proceeds of corruption and other serious crimes, also has extraterritorial application. The CDSA expressly applies to property whether situated in Singapore or elsewhere. In particular, section 47 of the CDSA provides that any person who knows or has reasonable ground to believe that any property represents another person's benefits from criminal conduct is guilty of an offence if he or she conceals, disguises, converts, transfers or removes that property from the jurisdiction for the purposes of assisting any person to avoid prosecution. Criminal conduct is defined to include any act constituting a serious crime in Singapore or elsewhere.

4 Definition of a foreign public official

How does your law define a foreign public official?

As the PCA and the Penal Code do not specifically deal with the bribery of a 'foreign public official', the statutes do not define this term.

5 Travel and entertainment restrictions

To what extent do your anti-bribery laws restrict providing foreign officials with gifts, travel expenses, meals or entertainment?

There are no express restrictions in the PCA or Penal Code on providing foreign officials with gifts, travel expenses, meals or entertainment. However, any gift, travel expense, meal or entertainment provided with the requisite corrupt intent will fall foul of the general prohibition under the PCA, and would constitute an offence.

As noted in question 3, the PCA prohibits (among other things), the offer or provision of any 'gratification' if accompanied with the requisite corrupt intent. The term 'gratification' is broadly defined under the PCA to include money, gifts, loans, fees, rewards, commissions, valuable security, property, interest in property, employment contract or services or any part or full payment, release from or discharge of any obligation or other liability; and any other service, favour or advantage of any description whatsoever (see *Public Prosecutor v Teo Chu Ha* [2014] SGCA 45).

Under the Penal Code, the term 'gratification' is used but not expressly defined. The explanatory notes to the relevant section stipulate that the term is not restricted to pecuniary gratifications or those with monetary value. The Singapore courts have also held that questionable payments made pursuant to industry norms or business customs will not constitute a defence to any prosecution brought under the PCA (see *Public Prosecutor v Soh Cham Hong* [2012] SGDC 42) and any evidence pertaining to such customs will be inadmissible in any criminal or civil proceedings under section 23 of the PCA (see *Chan Wing Seng v Public Prosecutor* [1997] 1 SLR(R) 721).

6 Facilitating payments

Do the laws and regulations permit facilitating or 'grease' payments?

Neither the PCA nor the Penal Code expressly permits facilitating or 'grease' payments. Such payments would technically constitute an act of bribery under the general prohibitions of both the PCA and the Penal Code. Notably, section 12(a)(ii) of the PCA prohibits the offer of any gratification to any member of a public body as an inducement or reward for the member's 'expediting' of any official act, among other prohibited acts.

7 Payments through intermediaries or third parties

In what circumstances do the laws prohibit payments through intermediaries or third parties to foreign public officials?

Corrupt payments through intermediaries or third parties, whether such payments are made to foreign public officials or to other persons, are prohibited. Section 5 of the PCA expressly provides that a person can commit the offence of bribery either 'by himself or by or in conjunction with any other person'.

8 Individual and corporate liability

Can both individuals and companies be held liable for bribery of a foreign official?

Both individuals and companies can be held liable for bribery offences, including bribery of a foreign official. The various provisions in the PCA and Penal Code set out certain offences that may be committed by a 'person' if such person were to engage in certain corrupt behaviour. The term 'person' has been defined in the Singapore Interpretation Act to include 'any company or association of body of persons, corporate or unincorporated'.

In addition, Singapore case law indicates that corporate liability can be imposed on companies for crimes committed by their employees, agents, etc (see *Tom Reck Security Services Pte Ltd v PP* [2001] 2 SLR 70). A test for establishing corporate liability is whether the individual who committed the crime can be regarded as the 'embodiment of the company', or whose acts 'are within the scope of the function of management properly delegated to him'. This test, known as the identification doctrine, was derived from English case law (see *Tesco Supermarkets Ltd v Natrass* [1971] 2 All ER 127). The identification doctrine was subsequently broadened in the Privy Council case of *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500, which held that the test for attributing mental intent should depend on the purpose of the provision creating the relevant offence. This broader approach has been affirmed in Singapore (see *The Dolphina* [2012] 1 SLR 992) in a case involving shipping and conspiracy but not in the context of bribery offences. However, the test for corporate liability is different in relation to money laundering offences. Section 52 of the CDSA introduces a lower threshold of proof for corporate liability. It provides that where it is necessary to establish the state of mind of a body corporate in respect of conduct engaged by the body corporate it shall be sufficient to show that a director, employee or agent of the body corporate acting within the scope of his or her actual or apparent authority, had that state of mind. Likewise, any conduct engaged in or on behalf of a body corporate by a director, employee or agent of the body corporate acting within the scope of his or her actual or apparent authority, or by any other person at the direction or with the consent or agreement of the above, shall be deemed, for the purposes of the CDSA, to have been engaged in by the body corporate.

Generally, individual directors and officers of a company will not be held strictly liable for offences found to have been committed by the company if they were not personally responsible for, or otherwise involved in, that particular offence. However, section 59 of the CDSA provides that where an offence under the CDSA committed by a body corporate is proved to have been committed with the consent or connivance of an officer or to be attributable to any neglect on his or her part, the officer as well as the body corporate shall be guilty of the offence. It is also possible that an individual such as a director or officer of a company, although not personally guilty of committing a corrupt act, may be held liable for consequential offences including money-laundering or failure to report a suspicion that certain property or the transfer of assets was connected to criminal conduct. In addition, individual directors who ignore red flags of criminal misconduct committed by employees of the company may also find themselves liable for failing to use reasonable diligence in performing their duties under the Companies Act (Cap 50). An ex-president of a shipyard was recently prosecuted for this infraction (see question 32).

Ultimately, the decision on whether to pursue an individual or a corporate entity for criminal conduct is a matter of prosecutorial

discretion. In this regard, an opinion-editorial written by Singapore's attorney general, Mr VK Rajah S C, in November 2015 sheds some light on Singapore's approach on such matters. In his opinion-editorial, Mr Rajah stated that in Singapore both individuals and corporate entities should expect prompt enforcement action for financial misconduct. However, he pointed out that, '[t]he emphasis, if there is one, is placed on holding accountable the individuals who perpetuated the misconduct'. In addition, he stressed that 'significant attention is also given to the culpability of corporations ... especially if the offending conduct is institutionalised and developed into an established practice in an entity over time'.

9 Successor liability

Can a successor entity be held liable for bribery of foreign officials by the target entity that occurred prior to the merger or acquisition?

In a situation where the acquiring entity purchases shares in the target entity, the acquiring entity is not legally liable for bribery of foreign officials by the target entity that occurred prior to the acquisition. This is because of the common law doctrine of separate legal personality.

Likewise, there is no change to the legal liability or otherwise of the target entity following the change of identity of its shareholder or shareholders.

Subsequent to the acquisition, the commercial value of the acquiring entity may be adversely affected in the event that the target entity is investigated, prosecuted or ultimately held liable for bribery of foreign officials occurring prior to the acquisition. The target entity may be liable for investigation costs, suffer business disruptions and loss of revenue and may have to bear financial penalties or debarment consequences. These may adversely impact the value of the shares in the target entity, which are in turn owned by the acquiring entity.

10 Civil and criminal enforcement

Is there civil and criminal enforcement of your country's foreign bribery laws?

Yes, criminal enforcement against corrupt activities is provided for in both the PCA and the Penal Code. In particular, if the court rules that there has been a violation of the general prohibitions on bribery in the PCA, a penalty of a fine, imprisonment, or both will be imposed on the offender. The offender may also have to pay the quantum of the bribe received.

With regard to civil enforcement, a victim of corruption will be able to bring a civil action to recover the property of which it has been deprived. Section 14 of the PCA expressly provides that, where gratification has been given to an agent, the principal may recover, as a civil debt, the amount or the money value thereof either from the agent or the person paying the bribe. This provision is without prejudice to any other right and remedy that the principal may have to recover from his agent any money or property. The objective of imposing this additional penalty is to disgorge the offender's proceeds from the corrupt transaction.

The case *Ho Kang Peng v Scintronix Corp Ltd* (*formerly known as TTL Holdings Ltd*) [2014] SGCA 22 provides an example of a company successfully bringing a civil claim against its former CEO and director, Ho Kang Peng, for engaging in corrupt activities. The Court of Appeal dismissed Ho's appeal from the High Court, holding that he had breached his fiduciary duties owed to the company by making and concealing unauthorised payments in the name of the company. The Court of Appeal found that although the payments were for the purpose of securing business for the company, Ho could not be said to be acting in the bona fide interests of the company because the payments were, in effect, gratuities and thereby ran the unjustified risk of subjecting the company to possible criminal liability.

11 Agency enforcement

What government agencies enforce the foreign bribery laws and regulations?

The main government agency that enforces bribery laws in Singapore is the Corrupt Practices Investigation Bureau (CPIB). The CPIB derives its powers from the PCA and is responsible for investigating and preventing corruption in Singapore, focusing on corruption-related offences arising under the PCA and the Penal Code.

Under the PCA, the CPIB has extensive powers of investigation, which include powers to require the attendance of witnesses for interview, to investigate a suspect's financial and other records and the power to investigate any other seizable offence disclosed in the course of a corruption investigation. Special investigative powers can be granted by the public prosecutor, such as the power to investigate any bank account, share account, purchase account, expense account or any other form of account or safe deposit box and to require the disclosure of all information, documents or articles required by the officers.

The CPIB carries out investigations into complaints of corruption but does not prosecute cases itself. It refers the cases, where appropriate, to the public prosecutor for prosecution. The PCA provides that no prosecution under the PCA shall be instituted except by or with the consent of the public prosecutor.

The Commercial Affairs Department (the CAD) is the principal white-collar crime investigation agency in Singapore that investigates complex fraud, white-collar crime, money-laundering and terrorism financing. The CAD's Financial Investigation Division is specially empowered to combat money-laundering, terrorism financing and fraud involving employees of financial institutions in Singapore and works closely with financial institutions, government agencies and its foreign counterparts.

The Financial and Technology Crime Division (the FTCD) was established within the Attorney-General's Chambers (AGC) in November 2014, as part of a redesignation of the Economic Crimes and Governance Division (the EGD) to bring the prosecution of cybercrime under the division's purview. The EGD had been responsible for the enforcement, prosecution and all related appeals in respect of financial crimes and corruption cases within and outside of Singapore. The reorganised division focuses on financial crimes ranging from securities fraud and money laundering to corruption and criminal breach of trust, as well as a broad range of cybercrimes. It is one of two divisions in AGC's crime cluster, with the Criminal Justice Division being the other.

The Monetary Authority of Singapore (the MAS) is responsible for issuing guidelines on money-laundering and terrorist financing to financial institutions and conducting regulatory investigations on such matters. The MAS may also refer potential criminal offences to the CAD for further investigations.

12 Leniency

Is there a mechanism for companies to disclose violations in exchange for lesser penalties?

The PCA and the Penal Code do not expressly provide for a formal mechanism for companies to disclose violations of bribery laws in exchange for leniency. While there are no formal legislative mechanisms in place, an informal plea bargaining process with the public prosecutor is available. Where charges have not yet been filed, an accused can submit letters of representation to the public prosecutor pleading for leniency and seeking issuance of a stern warning or a conditional stern warning in lieu of prosecution for the offending conduct, highlighting any merits of the case that may warrant the favourable exercise of the public prosecutor's discretion. Even after charges have been filed, an accused can still submit letters of representation to the public prosecutor to negotiate the possible withdrawal, amendment or reduction of the charges, similarly highlighting any merits of the case that may warrant the exercise of the public prosecutor's discretion to do so. At this stage, a withdrawal of the charges may be accompanied by a stern warning or a conditional stern warning. It should be noted that the public prosecutor retains the sole discretion to accede to the requests in such letters of representation.

Apart from the informal plea bargaining process set out above, the Singapore courts introduced a voluntary Criminal Case Resolution programme in 10 October 2011 where a senior district judge functions as a neutral mediator between the prosecution and defence with a view to parties reaching an agreement. If the mediation is unsuccessful, the judge will not hear the case. Once proceedings have been initiated, the accused may, having reviewed the evidence in the prosecution's case, choose to plead guilty and enter a plea mitigation to avoid a public trial. In appropriate cases, the judge may also provide an indication of

sentence. However, such indication will only be provided if requested by the accused.

In October 2010 there was a court ruling involving the CEO of AEM-Evertech, a Singapore-listed company, who exposed corrupt practices by the company's top management, including himself (see *Public Prosecutor v Ang Seng Thor* [2010] SGDC 454 – the *AEM-Evertech* case). In sentencing the CEO, the district judge took into consideration the fact that his whistleblowing helped to secure the conviction of other members of the company's management and consequently did not impose a prison sentence. However, in May 2011, the prosecution successfully appealed against this decision. It was held by the Court of Appeal that the judge in the first instance, had, on the facts, incorrectly found that the CEO's role in the matter demonstrated a low level of culpability (see *Public Prosecutor v Ang Seng Thor* [2011] 4 SLR 217). It also found that the CEO was not an archetypal whistle-blower, owing to the fact that he only admitted personal wrongdoing when placed under investigation by the CPIB in May 2007 and had failed to approach the authorities directly with evidence of unauthorised activities. The sentence imposed at first instance was therefore set aside and substituted with a sentence of six weeks' imprisonment and a fine of S$25,000 on each of the two charges, with each prison sentence to run consecutively. Although the Court of Appeal overruled the first instance decision, the case confirms that a genuine whistle-blower would potentially be treated with a degree of leniency during sentencing. The exercise of judicial discretion will depend, in part, on the motivation of the whistle-blower and the degree of cooperation during the investigation.

13 Dispute resolution

Can enforcement matters be resolved through plea agreements, settlement agreements, prosecutorial discretion or similar means without a trial?

The public prosecutor has the discretion to initiate, conduct or discontinue any criminal proceedings. It may be possible for a person under investigation to convince the public prosecutor not to initiate criminal proceedings against him or her or, as described in question 12, if criminal proceedings have already been initiated, an accused person may submit letters of representation (on a 'without prejudice' basis) to the public prosecutor to negotiate the possible withdrawal, amendment, or reduction of charges. The public prosecutor may also direct the enforcement agency to issue a stern warning or a conditional stern warning in lieu of prosecution. A stern warning does not result in a conviction; the accused person will not have any criminal record for the infraction. The public prosecutor has sole discretion whether to accede to such letters of representation. It may also be possible for an accused person to plead guilty to certain charges, in return for which the public prosecutor will withdraw or reduce certain other charges. The accused may also plead guilty to the charges brought against him or her so as to resolve a particular matter without a trial, and then enter a mitigation plea.

In March 2013, the AGC and the Law Society issued the Code of Practice for the Conduct of Criminal Proceedings by the Prosecution and Defence, which is a joint code of practice that sets out the duties of prosecutors and lawyers during criminal trials and deals with various matters including plea bargaining.

14 Patterns in enforcement

Describe any recent shifts in the patterns of enforcement of the foreign bribery rules.

Significantly, in January 2015 the Singapore prime minister announced that the capabilities and manpower of the CPIB will be strengthened by more than 20 per cent as corruption cases have become more complex, some with international links. This announcement follows the establishment and reorganisation of the EGD to the FTCD (see question 11) signalled an intent by the AGC to actively enforce and prosecute complex bribery offences, including cybercrime, committed outside Singapore that may involve foreign companies and foreign public officials.

The Mutual Assistance in Criminal Matters Act was revised in July 2014 to improve Singapore's ability to provide mutual legal assistance to other countries and demonstrates a commitment to cross-border cooperation. The amendments primarily ease requirements that foreign countries would need to satisfy to make requests for legal assistance and widen the scope of mutual legal assistance that Singapore can provide.

Public sector complaints and prosecutions remain consistently low due, in part, to the aggressive enforcement stance taken by the CPIB, as well as to the high wages paid to public servants that reduce the financial benefit of taking bribes as compared to the risk of getting caught. The majority of the CPIB's investigations relate to the private sector, which for 2015 made up 89 per cent of its investigations registered for action (a 4 per cent increase from the previous year).

There is a trend of law enforcement agencies using anti-money laundering laws and falsification of accounts provisions (in the form of section 477A of the Penal Code) to prosecute foreign bribery cases (see further details at question 18). This is because it is often difficult to prove the predicate bribery offences in such cases, owing to the fact that key witnesses are often located overseas. An example of this approach can be seen in the prosecution of Thomas Philip Doerhman and Lim Ai Wah (the *Questzone* case), who were sentenced to 60 and 70 months' jail respectively on 1 September 2016, for falsifying accounts under section 477A and money laundering offences under the CDSA. Doerhman and Lim, who were both directors of Questzone Offshore Pte Ltd (Questzone), were prosecuted for conspiring with a third individual, Li Weiming, in 2010 to issue a Questzone invoice to a Chinese telecommunications company seeking payment of US$3.6 million for a fictitious subcontract on a government project in a country in the Asia-Pacific. Li was the chief representative for the Chinese company in that country. A portion of the monies paid out by the Chinese company to Questzone pursuant to its invoice was then subsequently redistributed by Doerhman and Lim to Li and the then the prime minister of that Asia-Pacific country in 2010.

Even though no corruption charges were brought under the PCA against the parties, it is plainly conceivable that Questzone functioned as a corporate conduit for corrupt payments to be made. On the facts, some key witnesses were overseas – with Li having absconded soon after proceedings against him commenced. The use of section 477A and money-laundering charges under the CDSA allowed the prosecution to proceed against Doerhman and Lim as they only needed to prove that the invoice was false, in respect of the section 477A charge; and that the monies paid out pursuant to the invoice – which would be proceeds of crime or property used in connection with criminal conduct – were transferred to Li and the then the prime minister of the Asia-Pacific country, in respect of the money-laundering offences.

The use of section 477A of the Penal Code was also employed in the case relating to a Singapore shipyard (see details at question 32), which involved senior executives of the shipyard conspiring to bribe employees of its customers in order to obtain business from these customers. The bribes were disguised as bogus entertainment expenses that were paid out from petty cash vouchers as approved by the senior executives. It is pertinent to note that these senior executives did not carry out the actual payment of the bribes but had approved the fraudulent petty cash vouchers, which they knew did not relate to genuine entertainment expense claims.

15 Prosecution of foreign companies

In what circumstances can foreign companies be prosecuted for foreign bribery?

Under the general offences of the PCA, foreign companies can be prosecuted for the bribery of a foreign public official if the acts of bribery are committed in Singapore (see question 2). In addition, section 29 of the PCA read together with section 108A of the Penal Code allows foreign companies to be prosecuted for bribery that was substantively carried out overseas, if the aiding and abetment of such bribery took place in Singapore.

16 Sanctions

What are the sanctions for individuals and companies violating the foreign bribery rules?

The PCA provides for a fine, a custodial sentence, or both for the contravention of the general anti-corruption provisions under sections 5 and 6 (which include the bribery of foreign public officials in Singapore, and the bribery of foreign public officials overseas by a Singapore citizen

when read with section 37). The guilty individual or company may be liable to a fine not exceeding S$100,000 or imprisonment for a term not exceeding five years, if appropriate. Where the offence involves a government contract or bribery of a member of parliament, the maximum custodial sentence has been extended to seven years (see question 30). There are also civil remedies and penalties for the restitution of property pursuant to the PCA (see question 10). A person convicted of an offence of bribery under the Penal Code may be sentenced to a fine and a custodial sentence of up to three years.

There are other statutes imposing sanctions on the guilty individuals or companies. For example, under the CDSA, where a defendant is convicted of a 'serious offence' (which includes bribery), the court has the power, under section 4, to make a confiscation order against the defendant in respect of benefits derived by him from criminal conduct. Under the Companies Act (Cap 50, 2006 Rev Ed), a director convicted of bribery offences may be disqualified from acting as a director.

17 Recent decisions and investigations

Identify and summarise recent landmark decisions or investigations involving foreign bribery.

It has been reported that two Singapore-based companies in the shipbuilding industry and their affiliates may be implicated in relation to transactions entered into with Brazilian national oil company Petróleo Brasileiro SA (Petrobras) and rig builder Sete Brasil Participações SA. These issues arise from a wider investigation by Brazilian authorities – called Lava Jato or 'carwash'. Specifically, it was alleged in US court documents that US$9.5 million in bribes were paid by agents of the two companies to officials of Petrobras, its unit Sete Brasil and Brazil's Workers' Party to procure 12 contracts to build drillships.

In another ongoing case involving foreign bribery, two executives from Glenn Defense Marine Asia (GDMA) were extradited from Singapore to stand trial in the US in a bribery scandal involving GDMA's CEO and chair, nicknamed 'Fat Leonard', and numerous high-ranking US Navy officials. 'Fat Leonard' is a Singapore-based businessman who was arrested in San Diego, US, while on a business trip in September 2013, for allegedly bribing US naval officers to reveal confidential information about the movement of US Navy ships and defrauding the US Navy through numerous contracts relating to support services for US naval vessels in Asia. The US authorities claim that the US Navy has been defrauded of nearly US$35 million. The US government has barred GDMA from any new contracts and terminated nine contracts worth US$205 million that it had with the US Navy. To-date, some 16 defendants, including top US Navy officials and a naval criminal investigative service investigator have been indicted; 'Fat Leonard' and some of the other defendants have also pleaded guilty to various charges involving bribery. In December 2015, a former US Navy employee, who was the lead contract specialist at the material time, was reportedly charged in court in Singapore with (among others) seven counts of corruptly receiving cash and paid accommodation. The allegation was that she had received a total of S$130,278 in the form of cash and paid accommodation in luxury hotels from GDMA as a reward for the provision of non-public US Navy information.

In connection with the transnational money-laundering investigation linked to a Malaysian state investment fund, the MAS ordered the closure of BSI and Falcon Bank for serious lapses in anti-money laundering requirements. Several other major banks in Singapore were also censured and fined for their role in the scandal. In connection with the investigation, several individuals have been charged in court. A former BSI banker, Yak Yew Chee, pleaded guilty to four criminal charges of forgery and failing to report suspicious transactions in November 2016. He was sentenced to 18 weeks' jail and a fine of S$24,000. The trial of another former BSI banker, Yeo Jiawei, for witness tampering also began in November 2016. During the course of the trial, details emerged as to how the banker allegedly facilitated the flow of illicit funds through Singapore's financial system. Falcon Bank's branch manager, Jens Sturzenegger was also prosecuted and sentenced to 28 weeks' jail and a fine of S$128,000. Among other things, Sturzenegger was charged with consenting to the bank's failure to file a suspicious transaction report to the MAS. The investigation by Singapore authorities is ongoing and is likely to develop further in 2017.

Financial record keeping

18 Laws and regulations

What legal rules require accurate corporate books and records, effective internal company controls, periodic financial statements or external auditing?

The Companies Act is the main statute that regulates the conduct of Singapore-incorporated companies. Among other things, the Companies Act requires the keeping of proper corporate books and records as will sufficiently explain the transactions and financial position of the company and enable true and fair profit and loss accounts and balance sheets for a period of at least five years, the appointment of external auditors, and filing of annual returns. It was amended in October 2014 to reduce the regulatory burden on companies, provide for greater business flexibility and improve corporate governance. Amendments include revised requirements for audit exemptions, inclusion of a requirement that CEOs disclose conflicts of interest and the removal of the requirement that private companies keep a register of members.

Apart from the requirements set out under the Companies Act, section 477A of the Penal Code also criminalises the falsification of a company's accounts by a clerk or a servant of the company with intent to defraud.

Singapore-listed companies are also subject to stringent disclosure, auditing and compliance requirements as provided by the Securities and Futures Act, the SGX Listing Rules, the Code of Corporate Governance and other relevant rules. The SGX Listing Rules state that a company's board 'must provide an opinion on the adequacy of internal controls'. The Code of Corporate Governance provides that the board 'must comment on the adequacy and effectiveness of risk management and internal control system'. Companies that do not comply with the laws and regulations may be investigated by the CAD, the Accounting and Regulatory Authority of Singapore or other regulatory bodies.

19 Disclosure of violations or irregularities

To what extent must companies disclose violations of anti-bribery laws or associated accounting irregularities?

Section 39 of the CDSA imposes reporting obligations on persons who know or have reasonable grounds to suspect that there is property that represents the proceeds of, or that was used or intended to be used in connection with, criminal conduct. Criminal conduct includes acts of bribery (which potentially extends to acts of bribery overseas) and falsification of accounts under section 477A of the Penal Code. A breach of these reporting obligations attracts a fine of up to S$20,000. Section 424 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) (the CPC) also imposes reporting obligations on every person aware of the commission of or the intention of any other person to commit most of the corruption crimes (relating to bribery of domestic public officials) set out in the Penal Code. Section 69 of the CPC allows the police to conduct a formal criminal discovery exercise during the course of corruption investigations, empowering them to search for documents and access computer records.

Apart from these express reporting and disclosure obligations under the CDSA and the CPC, the requirements imposed by the Companies Act, Securities and Futures Act, Listing Rules, regulations and guidelines issued by the MAS may also impose obligations on a company or financial institution to disclose corrupt activities and associated accounting irregularities.

On 2 May 2012, MAS issued a revised Code of Corporate Governance, which, in conjunction with the Listing Rules, sets out a number of obligations that listed companies are expected to observe. The revised Code has introduced more stringent requirements relating to the role and composition of the Board of Directors (Principles 1 and 2), risk management and internal controls (Principle 11) and the need to have an adequate whistleblowing policy in place (Principle 12). The Listing Rules require listed companies to disclose, in their annual reports, board commentary assessing the companies' internal control and risk management systems. On 10 May 2012, MAS issued Risk Governance Guidance for Listed Boards to provide practical guidance for board members on managing risk.

20 Prosecution under financial record keeping legislation

Are such laws used to prosecute domestic or foreign bribery?

No. The laws primarily used to prosecute domestic or foreign bribery are the PCA and the Penal Code.

21 Sanctions for accounting violations

What are the sanctions for violations of the accounting rules associated with the payment of bribes?

Falsifying accounts in order to facilitate the payment of bribes is a violation of section 477A of the Penal Code. The penalty for violating section 477A of the Penal Code is imprisonment for a term of up to 10 years, or a fine, or a combination of both.

Apart from section 477A, sanctions for violations of the laws and regulations relating to proper account-keeping, auditing, etc, include fines and terms of imprisonment. The amount of any fine and length of imprisonment will depend on the specific violation in question. Liability may be imposed on the company, directors of the company and other officers of the company.

22 Tax-deductibility of domestic or foreign bribes

Do your country's tax laws prohibit the deductibility of domestic or foreign bribes?

Tax deduction for bribes (whether domestic or foreign bribes) is not permitted. Bribery is an offence under the PCA and the Penal Code.

Domestic bribery

23 Legal framework

Describe the individual elements of the law prohibiting bribery of a domestic public official.

The general prohibition on bribery in the PCA (see question 2) specifically states, at section 5, that it is illegal to bribe a domestic public official. Where it can be proved that gratification has been paid or given to a domestic public official, section 8 provides for a rebuttable presumption that such gratification was paid or given corruptly as an inducement or reward. The burden of proof in rebutting the presumption lies with the accused on a balance of probability. In *Public Prosecutor v Ng Boon Gay* [2013] SGDC 132 (*Ng Boon Gay* case), the prosecution argued that the threshold to establish the presumption was very low and ultimately any 'gratification' given to a public official by someone intending to deal with the official or government would be enough to create the rebuttable presumption. On the facts of the case, however, the defence succeeded in rebutting the presumption. Prohibition of the bribery of a domestic public official is also set out in sections 11 and 12 of the PCA as outlined below. Section 11 relates to the bribery of a member of parliament. It is an offence for any person to offer any gratification to a member of parliament as an inducement or reward for such member's doing or forbearing to do any act in his capacity as a member of parliament. It will also be an offence for a member of parliament to solicit or accept the above gratification. Section 12 relates to the bribery of a 'member of a public body'. For the definition of 'public body', see questions 2 and 25. It is an offence for a person to offer any gratification to a member of such a public body as an inducement or reward for:

- the member's voting or abstaining from voting at any meeting of the public body in favour of or against any measure, resolution or question submitted to that public body;
- the member's performing, or abstaining from performing, or aid in procuring, expediting, delaying, hindering or preventing the performance of, any official act; or
- the member's aid in procuring or preventing the passing of any vote or the granting of any contract or advantage in favour of any person.

It will, correspondingly, be an offence for a member of a public body to solicit or accept such gratification described above.

The Penal Code also sets out a number of offences relating to domestic public officials (termed 'public servant'). The prohibited scenarios are outlined in question 2. The Singapore government also issues the Singapore Government Instruction Manual (Instruction Manual) to all public officials. The Instruction Manual contains stringent guidelines regulating the conduct of public officials.

24 Prohibitions

Does the law prohibit both the paying and receiving of a bribe?

Yes. Singapore law prohibits both the paying and receiving of a bribe. In particular, sections 5, 11 and 12 of the PCA prohibit both the paying of a bribe to, and receiving of a bribe by, a domestic public official.

25 Public officials

How does your law define a public official and does that definition include employees of state-owned or state-controlled companies?

A public official is referred to as a 'member, officer or servant of a public body' under the PCA. There are also specific provisions at section 11 of the PCA in respect of members of parliament. 'Public body' has been defined in section 2 of the PCA to mean any 'corporation, board, council, commissioners or other body which has power to act under and for the purposes of any written law (ie, Singapore legislation) relating to public health or to undertakings or public utility or otherwise administer money levied or raised by rates or charges in pursuance of any written law'.

In the *Ng Boon Gay* case and *Public Prosecutor v Peter Benedict Lim Sin Pang* DAC 2106-115/2012 (*Peter Lim* case) (in which the former Singapore Civil Defence Force Chief was found guilty and sentenced to six months jail for corruptly obtaining sexual favours in exchange for the awarding of contracts), both the Central Narcotics Bureau and the Singapore Civil Defence Force were unsurprisingly held by the courts to be public bodies. In *Public Prosecutor v Tey Tsun Hang* [2013] SGDC 164 (*Tey Tsun Hang* case) (where the former law professor at National University of Singapore was convicted for obtaining sex and gifts from one of his students but was later acquitted on appeal), despite the arguments of defence counsel, the National University of Singapore (NUS) was also found to be a public body, being a 'corporation which has the power to act ... relating to ... public utility or otherwise to administer money levied or raised by rates or charges', since 'public utility' included the provision of public tertiary education. The receipt by NUS of funds from the government and its function as an instrument of implementing the government's tertiary education policy further supported the finding that NUS was a 'public body'.

The provisions in the Penal Code pertaining to domestic public officials use the term 'public servant'. This has been defined in section 21 to include an officer in the Singapore Armed Forces, a judge, an officer of a court of justice, an assessor assisting a court of justice or public servant, an arbitrator, an office-holder empowered to confine any person, an officer of the Singapore government, an officer acting on behalf of the Singapore government and a member of the Public Service Commission (PSC) or Legal Service Commission.

It would appear from the above definitions under the PCA and the Penal Code that an employee of a state-owned or state-controlled company may not necessarily be a domestic public official. Such employees of state-owned or state-controlled companies may be considered domestic public officials if they fall within the definitions set out in the PCA and the Penal Code. It should also be noted that the Singapore Interpretation Act defines the term 'public officer' as 'the holder of any office of emolument in the service of the [Singapore] Government'.

26 Public official participation in commercial activities

Can a public official participate in commercial activities while serving as a public official?

The Instruction Manual, which applies to all Singapore public officials, is a comprehensive set of rules that govern how public officials should behave in order to avoid corruption. The Instruction Manual allows public officials to participate in commercial activities but sets out certain restrictions, such as public officials not being allowed to profit from their public position. The Instruction Manual details how public officials can prevent conflicts of interest from arising and when consent must be obtained. Consent is required for various investment activities such as holding shares in private companies, property investments and entering into financial indebtedness.

The CPIB also advises domestic public officials not to undertake any paid part-time employment or commercial enterprise without the written approval of the appropriate authorities. Subject to such

Update and trends

In a development that will have a significant impact on the anti-corruption landscape in Singapore, the prime minister announced in January 2015 that steps will be taken to boost the manpower of the CPIB by more than 20 per cent, establish a central reporting centre for complaints to be lodged and review and amend the PCA. Although it remains to be seen which aspects of the law will be revamped, there are some key areas that may be the subject of legal reform. These could be the lowering of the evidential threshold for the establishment of corporate criminal liability for bribery offences, the introduction of a compliance defence, the broadening of the extraterritorial effect of the PCA, the establishment of senior officers' liability and the enactment of whistle-blower protection and incentivisation laws. Further details on the review of the PCA are to be announced.

In mid-October 2016, ISO 37001 on anti-bribery management systems was published. It is anticipated that the CPIB will be promoting the adoption of compliance programmes by the private sector in general and the ISO 37001 in particular. The CPIB is also developing an integrity package – called PACT (which stands for pledge, assess, control and communicate and track) – to help business owners learn more about corruption issues and implement a practical, integrity-based anti-bribery management framework in their companies.

There is an increase in instances of anti-money laundering laws and section 477A of the Penal Code being deployed by the authorities in Singapore to bring senior executives to account for their role in foreign bribery schemes. This approach can be seen in the *Questzone* case and the case involving the Singapore shipyard, where the authorities brought CDSA charges and section 477A of the Penal Code charges against senior executives for their role in such schemes.

safeguards and approvals, a public official is allowed to participate in commercial activities while in service.

In September 2015, Singapore's prime minister issued a letter to members of parliament (MPs) of the ruling party, the People's Action Party (PAP), on rules of prudence. Among other things, PAP MPs were told to separate their business interests from politics and not to use their parliamentary position to lobby the government on behalf of their businesses or clients. PAP MPs were also told to reject any gifts that may place them under obligations that may conflict with their public duties, and are directed to declare any gifts received other than those from close personal friends or relatives to the clerk of Parliament for valuation. Like public servants, ruling party MPs are required to pay the government the valuation price of the gifts if they wish to retain such gifts.

27 Travel and entertainment

Describe any restrictions on providing domestic officials with gifts, travel expenses, meals or entertainment. Do the restrictions apply to both the providing and receiving of such benefits?

The analysis in question 5 will apply to both the giving and receiving of such benefits to and by domestic officials. It should also be noted that domestic public officials are not permitted to receive any money or gifts from people who have official dealings with them, nor are they permitted to accept any entertainment, etc, that will place them under any real or apparent obligation.

28 Gifts and gratuities

Are certain types of gifts and gratuities permissible under your domestic bribery laws and, if so, what types?

There are no specific types of gifts and gratuities that are considered permissible under the PCA and the Penal Code. Any gift or gratuity is potentially caught by the PCA and Penal Code if it meets the elements required by the statutes and is accompanied with the requisite corrupt intent.

Domestic public officials are also subject to the requirements of the Instruction Manual, which details the circumstances in which gifts and entertainment can be accepted and when they must be declared. As a matter of practice, public servants are generally not permitted to accept gifts or entertainment given to them in their capacity as public servants or in the course of their official work unless it is not practicable for them to reject the gift. Upon acceptance of the gift, the public servant is required to disclose the gift to his or her permanent secretary, and only gifts under S$50 can be accepted. Any gift valued at more than S$50 can only be kept by the public official if it is donated to a governmental department or independently valued and purchased from the government by the public official. By comparison, in the *Tey Tsun Hang* case, the court heard that the NUS Policy on Acceptance of Gifts by Staff requires consent to be sought for all gifts over S$100.

29 Private commercial bribery

Does your country also prohibit private commercial bribery?

Yes. The PCA contains provisions that prohibit bribery in general, and these prohibitions extend to both private commercial bribery as well as bribery involving public officials.

30 Penalties and enforcement

What are the sanctions for individuals and companies violating the domestic bribery rules?

The sanctions for individuals and companies violating the domestic bribery rules are similar to those set out in question 16, apart from the following.

The penalties for bribery of domestic public officials under the PCA are more severe than those for general corruption offences. While the general bribery offences under sections 5 and 6 are punishable by a fine not exceeding S$100,000, imprisonment not exceeding five years, or both, the bribery of a member of parliament or a member of a public body under sections 11 and 12 respectively may result in a fine not exceeding S$100,000, imprisonment for a term not exceeding seven years, or both.

In addition, the domestic public official involved in corruption would be exposed to departmental disciplinary action, which could result in punishment such as dismissal from service, reduction in rank, stoppage or deferment of salary increment, fine or reprimand and/or involuntary retirement.

Furthermore, the Instruction Manual debars companies that are guilty of corruption involving public officials from public contract tenders. Other measures include the termination of an awarded contract and the recovery of damages from such termination.

31 Facilitating payments

Have the domestic bribery laws been enforced with respect to facilitating or 'grease' payments?

As stated in question 6, facilitating or 'grease' payments are technically not exempt under Singapore law. In particular, as regards domestic public officials, section 12 of the PCA prohibits the offering of any gratification to such officials as an inducement or reward for the official's 'performing, or … expediting … the performance' of any official act. Accordingly, it is also an offence under section 12 of the PCA for the domestic public official to accept any gratification intended for the purposes above.

32 Recent decisions and investigations

Identify and summarise recent landmark decisions and investigations involving domestic bribery laws, including any investigations or decisions involving foreign companies.

In *Public Prosecutor v Syed Mostafa Romel* [2015] 3 SLR 1166, the Singapore High Court made clear that private sector bribery was as abhorrent as public sector bribery, tripling the jail term (from two to six months) of a marine surveyor convicted on corruption charges relating to the receipt of bribes to omit safety breaches in his reports. The case is significant for the guidance it gives on sentencing of corruption

charges. More importantly, it dispels any perceived distinction between corruption in the private and public sectors.

A Singapore shipyard providing shipbuilding, conversion and repair services worldwide was embroiled in a corruption scandal in which seven senior executives, including three presidents, a senior vice president, a chief operating officer and two group financial controllers, were implicated in conspiracies to bribe agents of customers in return for contracts between 2000 and 2011. A total of at least S$24.9 million in bribes were paid out during the period. An integral part of this scheme involved disguising the bribes as bogus entertainment expenses that were paid out from petty cash vouchers as approved by the accused persons. It should be noted that none of these executives carried out the actual bribe payments. Rather, they approved the fraudulent petty cash vouchers, which they knew were not genuine entertainment expense claims that were presented to them. Between December 2014 and June 2015, the senior executives, were charged with corruption for conspiring to pay bribes, and for conspiring to defraud the company through the falsification of accounts and the making of petty cash claims for bogus entertainment expenses. The prosecution of the case is presently ongoing. To date, the cases against four senior executives have concluded. The former senior vice president and former chief operating officer/deputy president were both sentenced to imprisonment and a fine. The former group financial controller, who was the first to plead guilty and had committed to testifying against his co-conspirators, was handed a S$210,000 fine for his role in the conspiracy. The ex-president of the company, who was not alleged to be privy to the conspiracy, was also prosecuted. He was prosecuted under section 157 of the Companies Act for failing to use reasonable diligence to perform his duties and was sentenced to 14 days' jail under a detention order. In this case, the prosecutor alleged that he had ignored information that pointed to criminal wrongdoing in the company.

In *Public Prosecutor v Leng Kah Poh* [2014] SGCA 51 (the *IKEA* case), the Court of Appeal clarified that inducement by a third party was not necessary to establish a corruption charge under the PCA. In doing so, the Court of Appeal overturned an acquittal by the High Court of Leng Kah Poh, the former IKEA food and beverage manager in Singapore, who had originally been sentenced to 98 weeks of jail for 80 corruption charges. Leng had reportedly received a S$2.4 million kickback for giving preference to a particular product supplier. The High Court had overruled the conviction of the trial court and acquitted Leng, holding that the conduct did not amount to corruption because he had not been induced by a third party to carry out the corrupt acts. The High Court held that an action for corruption would only succeed when there are at least three parties: a principal incurring loss; an agent evincing corrupt intent; and a third party inducing the agent to act dishonestly or unfaithfully. The High Court held that in this case no third party existed and therefore the conduct alleged was not considered to amount to corruption under the PCA. However, in overturning the decision of the High Court, the Court of Appeal noted that if inducement by a third party were necessary, it would lead to absurd outcomes and undermine the entire object of the PCA.

In *Teo Chu Ha v Public Prosecutor* [2014] SGCA 45, a former director at Seagate Technology International (Seagate) received shares in a trucking company and subsequently assisted that company to secure contracts to provide trucking services for Seagate. The High Court held that the conduct did not amount to corruption as the rewards were not given for the 'purpose' or 'reason' of inducement because they were not causally related to the assistance Teo had rendered. Furthermore, Teo had paid consideration for the shares. The Court of Appeal overruled the High Court decision, finding that a charge of corruption could still be made out when consideration was paid and it was not necessary to prove that consideration was inadequate or that the transaction was a sham. The Court of Appeal noted in particular that the purpose of the PCA would be undermined if it were interpreted to have such a narrow scope that could be circumvented by sophisticated schemes such as the one in the present case.

In a high-profile case involving six leaders of a mega-church in Singapore, City Harvest Church, church founder Kong Hee and five leaders were found guilty by the Singapore state courts of conspiring to misuse millions of dollars of church funds to further the music career of singer Sun Ho, who is also Kong's wife. The six had misused some S$50 million in church building funds earmarked for building-related expenses or investments. Five of the six, including Kong, were found guilty of misusing S$24 million towards funding Ho's music career by funnelling church funds into sham investments in a company controlled by Kong. Four of the six were also found guilty of misappropriating a further S$26 million of church funds by falsifying accounts to cover up the first sum and defrauding the church's auditors. They were sentenced to jail terms ranging from 21 months to eight years. Both the prosecution and the respective accused persons have appealed against the judgment. The appeals were heard in September 2016. A decision is anticipated in early 2017.

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Spain

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1 International anti-corruption conventions

To which international anti-corruption conventions is your country a signatory?

Spain is a signatory to the following conventions:

European Union
The Convention on the Fight against Corruption Involving Officials of the European Union or Officials of Member States of the European Union, Brussels, 26 May 1997 (Convention on European Officials).

Council of Europe
- The Criminal Law Convention on Corruption signed by Spain on 10 May 2005 and ratified on 28 April 2010.
- The Civil Law Convention on Corruption signed by Spain on 10 May 2005 and ratified on 16 December 2009.
- Additional Protocol to the Criminal Law Convention on Corruption signed by Spain on 27 May 2009 and ratified on 17 January 2011.

Other international organisations
- The OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions, Paris, 17 December 1997, ratified on 14 January 2000 (OECD Anti-Bribery Convention).
- The United Nations Convention against Corruption, New York, 31 October 2003, ratified on 19 June 2006.

2 Foreign and domestic bribery laws

Identify and describe your national laws and regulations prohibiting bribery of foreign public officials (foreign bribery laws) and domestic public officials (domestic bribery laws).

Foreign bribery laws
Article 286-ter of the Spanish Criminal Code (CC) establishes corruption in international business transactions as an autonomous crime.

Specific provisions also exist for bribery of European Union officials under article 427 CC.

Domestic bribery laws
The relevant legislation on domestic bribery is contained in articles 419 to 426 CC. The provisions regarding passive bribery of domestic public officials are contained in articles 419 to 422 CC. In a case of 'passive bribery' the criminal legislation punishes domestic public officials who commit bribery when asking for or receiving a bribe. It includes cases in which a bribe is made in order to ensure that any official acts contrary to his or her duties (article 419) but also an act inherent to his or her office (article 420).

Article 424 CC punishes 'active bribery', which refers to the individual or entity that gives the bribe to the domestic public official.

Foreign bribery

3 Legal framework

Describe the elements of the law prohibiting bribery of a foreign public official.

Since 2010, the CC includes an autonomous offence of bribery a foreign public official (article 286-ter). Thus, Spanish criminal law punishes those who bribe or try to bribe foreign public officials so that they act or refrain from acting in relation to the performance of official duties. The aforementioned article of the CC refers to the definition of 'foreign public official' found in article 427, which matches the definition provided by the OECD Anti-bribery Convention. In addition to this, article 286-ter CC requires an undue benefit (pecuniary or otherwise) and covers promises, bribes through intermediaries and bribes to third parties.

4 Definition of a foreign public official

How does your law define a foreign public official?

As mentioned above, article 427 CC contains a definition of foreign public official:
- any person who holds a legislative, administrative or judicial office in a country of the European Union or any other foreign country, either by appointment or by election;
- any person who exercises a public duty for a country of the European Union or any other foreign country, including a public body or a public company; and
- any officer or agent of the European Union and an international public organisation.

5 Travel and entertainment restrictions

To what extent do your anti-bribery laws restrict providing foreign officials with gifts, travel expenses, meals or entertainment?

Literally, the CC does not foresee exceptions to gifts, travel expenses, meals or entertainment. Any goods or compensations, despite its economic value, would fall under the scope of the legislation against bribery.

6 Facilitating payments

Do the laws and regulations permit facilitating or 'grease' payments?

Facilitating payments – even if these are small – are not allowed, and they fall under the scope of the acts prohibited by the legislation against bribery.

7 Payments through intermediaries or third parties

In what circumstances do the laws prohibit payments through intermediaries or third parties to foreign public officials?

Article 286-ter of the CC expressly covers promises, bribes through intermediaries and bribes paid for the benefit of a third party. However, the lack of cases reaching the Spanish courts demonstrates the

difficulties in proving whether an accused party had knowledge that a third party was going to divert payments to pay bribes.

8 Individual and corporate liability

Can both individuals and companies be held liable for bribery of a foreign official?

According to Spanish criminal legislation, both individuals and entities may be prosecuted for bribery of a foreign official, but there is a controversial exception to corporate criminal liability for state public entities (article 31-quinquies CC).

9 Successor liability

Can a successor entity be held liable for bribery of foreign officials by the target entity that occurred prior to the merger or acquisition?

Article 130.2 CC includes that the transformation, merger, takeover or division of a legal person does not extinguish criminal liability, which will move to the new entity arising after any of these operations. In these cases, the court may mitigate the punishment transfer to the legal person according to the proportion that the originally responsible legal person retains in it.

However, no criminal liability shall be extinguished if it is proven that the resolution of the legal person is merely apparent. It is merely apparent when economic activity is continuing and substantial identity of customers, suppliers and employees is maintained.

10 Civil and criminal enforcement

Is there civil and criminal enforcement of your country's foreign bribery laws?

Bribery is a criminal offence, thus, enforcement of bribery laws will take place through criminal laws (mainly, the CC and the Spanish Criminal Procedure Act). In cases of damages caused by bribery offences, damaged parties may solicit compensation in the course of criminal procedures as civil parties.

11 Agency enforcement

What government agencies enforce the foreign bribery laws and regulations?

There is no specific government agency in Spain responsible for the enforcement of bribery laws. There is, however, a Special Public Prosecutor's Office against Corruption and Organised Crime that performs a central role in the fight against corruption and domestic bribery. As mentioned in question 17, the activity of the Special Public Prosecutor's Office regarding cases of foreign bribery is currently quite low despite the fact that the offence of foreign bribery came into existence in 2000.

12 Leniency

Is there a mechanism for companies to disclose violations in exchange for lesser penalties?

Article 31-quater CC foresees several activities that companies may carry out after the commission of the crime and through their legal representatives, which may be considered as mitigating their criminal liability of legal persons:

- confessing the offence to the authorities, before any criminal procedure against the legal person has been brought;
- collaborating in the investigation of the action, and producing, at any time during the proceedings, new evidence that is decisive to clear up the criminal liability arising from the facts;
- proceeding, at any moment within the proceedings and before the hearing, to repair or diminish the damage caused by the crime; and
- establishing, before the beginning of a hearing, effective measures to anticipate and detect crimes that could be committed in the future within the ranks of the legal person.

13 Dispute resolution

Can enforcement matters be resolved through plea agreements, settlement agreements, prosecutorial discretion or similar means without a trial?

According to the Spanish Criminal Procedure Act, it is possible to reach an agreement and avoid trial. This agreement is known as conformidad and means the acceptance of liability by the accused party before the trial in order to obtain a reduction of the penalty. Conformidad is available for offences foreseeing a penalty of up to six years' imprisonment (articles 787 of the Spanish Criminal Procedure Act), and could theoretically apply to foreign bribery. This type of settlement, however, has never been used in foreign bribery cases for the time being so it is not possible to provide information about the Public Prosecutor's and courts' policies in this regard.

14 Patterns in enforcement

Describe any recent shifts in the patterns of enforcement of the foreign bribery rules.

Since the amendment of the CC mentioned above, which entered into force in 2010, only a few foreign bribery investigations have been initiated and all of them have been filed during the preliminary investigation phase. As a result, we cannot provide patterns of enforcement of these rules against foreign bribery.

15 Prosecution of foreign companies

In what circumstances can foreign companies be prosecuted for foreign bribery?

In general terms, the jurisdiction of the Spanish courts is restricted to crimes committed in Spain or in a territory outside Spain by Spanish citizens. In addition, there are some specific crimes that might be prosecuted outside Spanish frontiers even if these are committed by foreigners (treason, terrorism, piracy, etc). According to article 23 of the Spanish Organic Act of the Judicial Power, however, the Spanish authorities have no jurisdiction to prosecute foreign companies for bribing a foreign officer.

16 Sanctions

What are the sanctions for individuals and companies violating the foreign bribery rules?

The CC foresees the following sanctions: penalties of imprisonment from three to six years and an economic fine based on a figure per month (to be determined) lasting for 12 to 24 months, except when the benefit obtained was greater than the resulting sum, in which case the fine will be an amount ranging from the value to twice the value of the benefit. Besides the aforementioned penalties, the person liable will be punished by a ban on contracting with the public administration, as well as a ban on obtaining public subsidies or grants and of the right to have benefits or incentives from taxes or social security, and the prohibition on taking part in commercial transactions with the public sector for between seven and 12 years.

Penalties will imposed be in the higher range if the objects of the business were humanitarian goods or services, or other essential goods.

17 Recent decisions and investigations

Identify and summarise recent landmark decisions or investigations involving foreign bribery.

Only a few cases related to foreign bribery have been investigated in Spain and, as a result, no individual or company has been prosecuted or sanctioned for this offence.

Since the amendment of the CC mentioned above, which entered into force in 2010, no cases of foreign bribery have been finalised or given rise to prosecution. Spain has three ongoing foreign bribery investigations, one of which is at the initial prosecutorial investigation stage and two of which are at the judicial investigation stage (follow-up report made by the OECD Working Group on Bribery on March 2015).

Financial record keeping

18 Laws and regulations

What legal rules require accurate corporate books and records, effective internal company controls, periodic financial statements or external auditing?

Legal rules requiring accurate company information are established in articles 25 to 49 of the Spanish Commercial Code. This information must be submitted in order to provide a clear image of the company's assets, financial situation and profits or losses. When this information is not enough to provide such clear picture of the company, additional supplementary information must be submitted.

From a criminal perspective, articles 290 to 297, and article 310 of the CC establish that a crime is committed when any of the documents required by the Commercial Code is false or does not correctly reflect the real legal or economic situation of the company and that may cause damage to the company itself, or any shareholders or third parties.

It is not necessary that any specific damage occurs. If the false information provided is potentially harmful, the crime is considered to have been committed. Sanctions will be increased accordingly in the event that any damage actually occurs.

19 Disclosure of violations or irregularities

To what extent must companies disclose violations of anti-bribery laws or associated accounting irregularities?

As a matter of law, in accordance with article 259 of the Spanish Criminal Procedure Act, there is a general obligation to inform a judge or prosecutor about the committing of any crime. As a matter of practice, however, in our experience there have never been any sanctions imposed for breaching this duty.

20 Prosecution under financial record keeping legislation

Are such laws used to prosecute domestic or foreign bribery?

The financial record keeping legislation, as mentioned in question 18, is included in both the Commercial Code and the CC and it is intended to provide a faithful picture of the company as a whole, as well as the sanctions in the event any crime is committed.

Likewise, the articles regulating bribery are also included in the CC, as will be further explained in questions 23 and 30.

21 Sanctions for accounting violations

What are the sanctions for violations of the accounting rules associated with the payment of bribes?

The sanctions for violations of the accounting rules range from six months to three years' imprisonment in its most basic form, as well as a fine that is determined taking into account the amount of the benefit.

22 Tax-deductibility of domestic or foreign bribes

Do your country's tax laws prohibit the deductibility of domestic or foreign bribes?

Spanish tax laws state that bribes to foreign public officials are not tax-deductible. In addition to this, the Spanish Supreme Court has established the non-deductibility of expenses incurred in connection to any unlawful conduct.

Domestic bribery

23 Legal framework

Describe the individual elements of the law prohibiting bribery of a domestic public official.

The CC regulates domestic bribery in articles 419 to 427. The CC was amended on 22 June 2010, when all articles regarding domestic bribery were either amended or newly introduced.

The concept of bribery differs depending on the individual case. A public official falls within the scope of the anti-bribery law when receiving compensation in the following cases:

- by carrying out an illegal act;
- by carrying out a legal but unfair act; and
- by omission, meaning simply not doing and letting go.

Each case carries a different sanction.

The common elements are the following:

- the offender must be a public official (see question 25);
- the objective element requires that the action be related to the post of public official; and
- the aforementioned action must be the act of requesting or receiving any sort of compensation, as well as the offer or promise, as a consequence of his or her behaviour.

The anti-bribery law helps to maintain the efficacy and reputation of the Public Administration. In order to achieve this fundamental goal, it is also intended to guarantee the impartiality of public officials.

Although the bribery of a public official might be considered as bilateral in nature, under the more strict new regulation no agreement is required in order to commit bribery; therefore, it may be considered a unilateral crime. In other words, the crime is committed just by the mere request or offering.

24 Prohibitions

Does the law prohibit both the paying and receiving of a bribe?

The anti-bribery articles of the CC are clear about this question. The law prohibits not only the payment and receiving of a bribe, but also the demand, offer or promise of any sort of compensation as a payment due related to a certain act.

The spirit of the law is to treat all persons involved in bribery equally. As a consequence, the sanctions are the same for both the public official and any third party.

25 Public officials

How does your law define a public official and does that definition include employees of state-owned or state-controlled companies?

The definition of public official is very broad and, therefore, affects any single person working in the public interest. More specifically, the definition of public official includes any person that, by law or appointed by the competent authority, participates in the development of the public interest. Authorities, such as members of the parliament, the senate, legislative chambers of the autonomous regions, the European Parliament and prosecutors, inter alia, are also considered public officials as regards the law of bribery.

26 Public official participation in commercial activities

Can a public official participate in commercial activities while serving as a public official?

Law 53/1984 of 26 December regulates conflicts of interest for public officials. A public official is not allowed to be involved in any private activity related to his or her public activity in the event that person is currently working in the public sector, or worked in the public sector in the last two years or intends to work in the public sector in the future in that particular activity.

This limitation includes being a member of the board of directors of private entities directly related to the position of the public official. It also includes any position in any licensed company, as well as any stockholding of more than 10 per cent in any of the aforementioned companies.

Update and trends

A new amendment of the CC came into force on 1 July. The amendments affecting the anti-bribery regulation are not substantial. However, they provide more coherence and clearness on the regulation related to domestic and foreign bribery. This chapter has been duly updated according to the renewed CC.

27 Travel and entertainment

Describe any restrictions on providing domestic officials with gifts, travel expenses, meals or entertainment. Do the restrictions apply to both the providing and receiving of such benefits?

There are no specific provisions restricting the giving of gifts, travel expenses, meals or entertainment to domestic officials.

28 Gifts and gratuities

Are certain types of gifts and gratuities permissible under your domestic bribery laws and, if so, what types?

See question 5.

29 Private commercial bribery

Does your country also prohibit private commercial bribery?

Yes. The amendment of the CC in 2010 introduced article 286-bis, which specifically prohibits private commercial bribery.

The sanctions imposed will range from six months to four years' imprisonment with a special ban from any commercial activity for one to six years and a fine that can be up to three times the monetary benefits received. These sanctions can be adjusted by the judge by taking into account the benefit received and the responsibilities of the person involved in the bribery.

30 Penalties and enforcement

What are the sanctions for individuals and companies violating the domestic bribery rules?

As mentioned and explained in question 23, there are different forms of bribery. Therefore, depending on whether the behaviour of the public official was illegal, legal but unfair, or by omission, there will be different sanctions. In relation to the other party to the bribery that is not a public official, the same sanctions will be imposed, as the law treats all parties equally and homogeneously in this regard.

The sanctions imposed range from six months' to six years' imprisonment, fines and special disqualifications depending on the seriousness of the crime committed.

31 Facilitating payments

Have the domestic bribery laws been enforced with respect to facilitating or 'grease' payments?

See question 6.

32 Recent decisions and investigations

Identify and summarise recent landmark decisions and investigations involving domestic bribery laws, including any investigations or decisions involving foreign companies.

In relation to the efficiency of the anti-bribery laws, the perception is that enough rules exist to combat bribery issues, but the implementation of such law is considered to have been affected by serious flaws.

Having said this, corruption cases are arising at an increasing rate. In particular, there are currently cases under investigation that affect members of the Spanish royal family, as well as politicians at the highest level, independently of the party in which they serve. In addition to this, and taking into account the economic crisis affecting Spain in particular, this is now one of the main concerns for Spanish society, and therefore an improvement is expected with regard to the implementation and effective application of the rules set out to address the issue.

In relation to investigations or decisions involving foreign companies, see question 17.

* *The content of this chapter is accurate as of February 2016.*

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Switzerland

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Lalive

1 International anti-corruption conventions

To which international anti-corruption conventions is your country a signatory?

Switzerland is a signatory to three international anti-corruption conventions.

Switzerland ratified the 2003 United Nations Convention against Corruption on 24 September 2009, with no reservation.

Switzerland is also party to the 1999 Council of Europe Criminal Law Convention on Corruption and its 2003 Additional Protocol, both ratified on 31 March 2006. However, Switzerland made several reservations regarding this convention. In particular, it reserved the right not to apply section 12 of the convention (trading in influence) – to the extent that this offence is not punishable under Swiss law – as well as its right to apply section 17(1)(b) and (c) (applying to extraterritorial jurisdiction) only where an act is also punishable in the country where it was committed, the offender is in Switzerland and will not be extradited to a foreign state. Switzerland is also a member of the Council of Europe's Group of States against Corruption (GRECO).

Switzerland is also a party to the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, ratified on 31 May 2000.

In addition to these conventions, on 31 May 2000, Switzerland has also ratified the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of Proceeds of Crime. This Convention allows for the restraining of assets suspected to be the proceeds of crime and provides for the confiscation of those assets and the recognition of foreign judgments ordering confiscation.

Moreover, Switzerland is a party to a number of bilateral treaties in matters of mutual legal assistance that facilitate the seizure, confiscation and repatriation of proceeds of crimes (which include corruption).

2 Foreign and domestic bribery laws

Identify and describe your national laws and regulations prohibiting bribery of foreign public officials (foreign bribery laws) and domestic public officials (domestic bribery laws).

The Swiss Criminal Code (the SCC) has seven provisions prohibiting acts of bribery.

The SCC first prohibits the active and passive corruption of domestic officials under articles 322-ter and 322-quater, respectively. These provisions prohibit the offering, promising or giving of an undue advantage (respectively soliciting, receiving a promise of or accepting such an advantage) to a member of a judicial or other authority, a public official, an officially-appointed expert, translator or interpreter, an arbitrator or a member of the armed forces, for that persons' benefit or for anyone else's benefit, in order to cause him or her to carry out or to fail to carry out an act in connection with his or her official activity, which is contrary to his or her duty or dependent on his or her discretion.

Furthermore, articles 322-quinquies and 322-sexies of the SCC prohibit the granting of an advantage to a public official as well as the acceptance by public officials of an advantage, which is not due to them, in order to make them carry out their official duties (facilitating or 'grease' payments).

Active and passive corruption of foreign public officials are prohibited under article 322-septies of the SCC.

Articles 322-octies and 322-novies of the SCC prohibit the active and passive bribery of private individuals. These provisions prohibit the offering, promising or giving (respectively the demanding and acceptance) of an undue advantage to an employee, partner or shareholder, agent or other auxiliary person of a third party in the private sector, for an act or omission in its duty or discretion in the offender's or a third party's favour.

Foreign bribery

3 Legal framework

Describe the elements of the law prohibiting bribery of a foreign public official.

Bribery of a foreign public official is prohibited by article 322-septies of the SCC. The application of this provision requires an unlawful payment or an undue advantage (ie, any other measurable improvement of the beneficiary's situation, whether in economic, legal or personal terms) or the offer or promise of such an undue payment or advantage in order to cause that official to act in breach of his or her public duties or to act or take a decision within his or her discretion. The assessment of whether the 'advantage' given represents an 'undue advantage' for the foreign official shall be made based on the terms of the legislation of the country concerned. It is important to specify that a bribe paid to cause a foreign official to act in accordance with his or her public duties (facilitating or 'grease' payments) is not prohibited under this provision.

4 Definition of a foreign public official

How does your law define a foreign public official?

Under Swiss law, the definition of foreign public officials includes, as required by the OECD Convention, the officials of a foreign state or a foreign authority, the officials of international organisations, regardless of their nationality. The definition of a 'public official' under article 322-ter of the SCC also applies for article 322-septies; it therefore includes all foreigners acting as members of a judicial or other authority, public officials, officially appointed experts, translators or interpreters, arbitrators and members of the armed forces. It is important to specify here that private persons performing official duties shall be treated as public officials (article 322-octies of the SCC), including when they act for public companies active in the private sector. The Federal Criminal Court held that a member of an autocratic regime who is not exercising an official function but who has the power to take decisions on behalf of the regime is considered a (de facto) public official.

5 Travel and entertainment restrictions

To what extent do your anti-bribery laws restrict providing foreign officials with gifts, travel expenses, meals or entertainment?

Swiss law prohibits offering any 'undue advantage' to a public official, which is any ascertainable enhancement (legal, economical or personal) in the beneficiary situation. It can take any form, in particular: a payment, (more or less hidden, for example an excessive fee for a service), a benefit in kind (for example a gift of a valuable object, including travel), the promise of a promotion, supporting an election, etc. It must, however, be paid or given to induce the foreign official to act in breach

of his or her public duties or to exercise his or her discretion in favour of the corrupting party or of a third party.

However, advantages are not undue if permitted by staff regulations or if they are of minor value in conformity with social customs (article 322-decies(1) SCC).

6 Facilitating payments

Do the laws and regulations permit facilitating or 'grease' payments?

Switzerland does not prohibit facilitating or 'grease' payments to foreign public officials. Swiss criminal law distinguishes between prohibited corruption, which induces public officials to breach their duty, and, on the other hand, the permitted granting of advantages, which induces public officials to perform a lawful act that does not depend on their discretionary power. However, granting of advantages to Swiss public officials (as well as receipt of payment by these officials) constitutes a criminal offence under Swiss law.

7 Payments through intermediaries or third parties

In what circumstances do the laws prohibit payments through intermediaries or third parties to foreign public officials?

Swiss criminal law prohibits indirect corrupt payments through intermediaries under the following conditions: the person offering, promising or giving an undue advantage via an intermediary must, under the circumstances, recognise the risk of an indirect corrupt payment and accept or turn a blind eye on the likelihood of a corrupt advantage.

8 Individual and corporate liability

Can both individuals and companies be held liable for bribery of a foreign official?

Both individuals and companies can be held liable for bribery of a foreign official. Indeed, in accordance with article 102(2) SCC, a company can be convicted for organisational weakness, irrespective of a criminal conviction of an employee but only in the presence of evidence for an act of bribery, provided the company is responsible for failing to take all the reasonable and necessary organisational measures that were required in order to prevent such offences.

In a decision of 11 October 2016, the Swiss Supreme Court specified the requirements for corporate criminal liability pursuant to article 102(2) SCC. The Swiss Post Ltd was acquitted because of lack of an offence committed by an employee. According to the Swiss Supreme Court, mandatory prerequisite for a company to be liable under article 102(2) SCC is the commission of a criminal offence within a company in the exercise of its commercial activities and if employees, even if their identity is unknown, fulfilled the objective and subjective elements of the criminal offence of bribery (or money laundering, etc). The predicate criminal offence must furthermore be a result of the organisational compliance failure of the company. In the absence of strong (yet not full) evidence for at least one predicate offence, there is no corporate criminal liability under article 102(2) SCC.

9 Successor liability

Can a successor entity be held liable for bribery of foreign officials by the target entity that occurred prior to the merger or acquisition?

Article 102 SCC does not make any reference to such a situation. However, as article 102(4) construes the term 'undertaking' as a legal (and not an economic) term, Swiss courts are likely to deny the liability of a successor entity after a merger or acquisition if employees of the target undertaking (or business unit) had committed bribery of foreign officials prior to the merger. The main reason for the preponderant view within the legal doctrine is that according to the concept of a legal entity, such entity can only be held liable for a criminal offence that took place within and by employees of that specific legal entity.

10 Civil and criminal enforcement

Is there civil and criminal enforcement of your country's foreign bribery laws?

There is criminal enforcement of Switzerland's foreign bribery laws. Civil enforcement exists indirectly by way of disgorgement of profits under articles 70 and 71 SCC.

In case of mutual legal assistance requests by foreign enforcement agencies regarding bribery of foreign officials, Switzerland does not enforce foreign bribery laws, but it can accept the delegation of prosecution by foreign states (article 85 Law on Mutual Legal Assistance). Swiss law pursues anyone who committed a corruption offence abroad if the act is also liable to prosecution at the place of performance or no criminal law jurisdiction applies at the place of performance; and if the person concerned remains in Switzerland and is not extradited to the foreign country (article 7(1) SCC). Furthermore, the Federal Act on International Mutual Assistance in Criminal Matters (IMAC) provides that a state may obtain urgent interim relief prior to the transmission to Switzerland of a formal request for mutual assistance, provided that it announces its intent to forward such a request (article 18 IMAC).

According to civil law, a foreign judgment will be recognised and enforced if the conditions of the Swiss Private International Law Act (the PILA) are fulfilled (article 25 et seq PILA). Additionally, the PILA provides that the law of the market where the effects of the unfair act occurred determines the law applicable to the claims (article 136 PILA).

11 Agency enforcement

What government agencies enforce the foreign bribery laws and regulations?

In matters of international cooperation, the central authority appointed in Switzerland, in accordance with article 29 of the Council of Europe Corruption Treaty, is the Federal Office of Justice (the FOJ), an agency of the Federal Department of Justice and Police. The FOJ is the central authority that cooperates with national and international authorities in matters involving legal assistance and extradition.

Bribery and money laundering offences are investigated by the Federal Office of the Attorney General (the OAG) if the offence has mainly been committed in a foreign country or in several cantons with none of them being clearly predominant (article 24(1) of the Swiss Criminal Procedure Code (the SCPC)). The cantonal prosecutors are competent with regard to all other (domestic) investigations into bribery and money laundering. On 1 January 2016, a Memorandum of Understanding concerning the cooperation based on article 38 of the Federal Act on the Swiss Financial Market Supervisory Authority (FINMASA) between the Swiss Financial Market Supervisory Authority (FINMA) and the OAG came into force. The Memorandum highlights the importance of collaboration between federal enforcement agencies in combating corruption. FINMA's main mandate consists in the administrative prudential supervision of regulated financial institutions, whereas the OAG is competent for the prosecution of criminal offences in the competence of the Swiss Confederation.

12 Leniency

Is there a mechanism for companies to disclose violations in exchange for lesser penalties?

There is no statutory mechanism or established practice (yet) regarding corporate self-reporting. However, the OAG welcomes and promotes corporate self-reporting of suspected or actual corruption (and other predicate offences under article 102 SCC). Since 2015, the attorney general and senior prosecutors of the OAG have been making public statements inviting companies to self-report misconduct. In case of self-reporting, companies shall benefit from their full cooperation.

According to the public statements, companies that self-report shall not be blocked from doing business with public bodies and shall not be put out of business. Essentially, the forthcoming practice of the OAG seems to mean that companies that self-report, fully cooperate and remediate and disgorge illicit profits may in principle benefit from a declination under article 53 SCC – release from penalty in case of redress – and/or may see the monetary sanctions mitigated in consideration of their cooperation and taking into account their economic capacity.

In practice, companies, through their external counsel, can seek informal guidance from the OAG on a 'no-name' basis with a view to filing a self-report. However, once the OAG has gained evidence of suspected or actual misconduct on its own, self-reporting is not possible any more, and the company, in the event an investigation is opened, may face a subpoena, dawn raids and custody of officers (all this was for instance the case in the Alstom investigation).

The Office of the Attorney General is receiving more and more suspicious activity reports from banks and information from the public anti-corruption whistle-blowing site of the Swiss Federal Police. Also, mutual legal assistance has gained significant importance as a source of information in recent years.

Once an investigation has been opened, companies and individuals can ask for the application of a simplified procedure, which allows the defendant to negotiate a plea bargain with the prosecutor. The prerequisite is that the defendant agrees on facts, offences and the fine with the prosecutor and recognises (where applicable) civil claims (article 358 et seq SCPC). Subsequently, the plea bargain has to be approved by a court in a summary trial. If no settlement agreement can be reached with the prosecutor or if the court refuses to approve the settlement, all evidence provided by the company or the individual within this special procedure is put aside and cannot be used within an ordinary criminal procedure to be plead by a newly appointed prosecutor.

In a normal criminal proceeding, the company's conduct in the course of the proceedings can be taken into account by the court when determining the appropriate sanction.

13 Dispute resolution

Can enforcement matters be resolved through plea agreements, settlement agreements, prosecutorial discretion or similar means without a trial?

See question 12.

Bribery cases may also be resolved by:

- release from penalty or abandonment of proceedings if the case is of minor relevance within the meaning of article 52 SCC;
- release from penalty or abandonment of proceedings if the offender has made good for the loss, damage or injury or has made every reasonable effort to do good the wrong that has been caused, provided that the interests of the public and, where applicable, of the victims are preserved (article 53 SCC);
- way of summary penalty order, which is a procedure without a court trial. This procedure is applicable only if the defendant accepts liability for the offence or if his or her responsibility has otherwise been established (article 352 et seq SCPC) and if the sentence is either a monetary fine, a limited monetary penalty of 540,000 Swiss francs maximum, community service of no more than 720 hours or a custodial sentence of no more than six months.

14 Patterns in enforcement

Describe any recent shifts in the patterns of enforcement of the foreign bribery rules.

Switzerland substantially contributed to the drafting of the OECD Convention of 1997 on Combating Bribery of Foreign Public Officials in International Business Transactions. Between 2000 and 2006, Switzerland extended and further tightened its anti-bribery rules.

Switzerland has been active in freezing and spontaneously returning to states the assets belonging to former heads of states or politicians, in particular after the Arab Spring.

Switzerland has also been particularly active in fighting money laundering in its territory, including in seizing and confiscating the proceeds of bribery. For this purpose, Switzerland is using the statutory system for the filing of suspicious activity reports by banks and other financial intermediaries and mutual legal assistance by prosecutors to foreign states, once assets obtained illegally or by improper means are discovered in Switzerland.

Since 2015, the Federal Criminal Police and the OAG also rely on information received through the web-based platform www.fightingcorruption.ch, which enables anyone to report suspected or actual corruption.

From 1 January 2016, new rules against money laundering have been in force. They widened the scope of application of the rules on PEPs (politically exposed persons) and introduced material tax offences as predicate offense of money laundering (article 305-bis SCC), strengthening the message to financial intermediaries that in Switzerland all proceeds of crime, including corrupt payments, must be reported to the Federal Money Laundering Reporting Office (MROS).

15 Prosecution of foreign companies

In what circumstances can foreign companies be prosecuted for foreign bribery?

Under Swiss criminal law, article 102(2) SCC, it is an offence if a company does not take all necessary and reasonable organisational (compliance) measures required to prevent (among other offences) active bribery of domestic and foreign officials by its employees. Foreign companies are subject to Swiss jurisdiction if they are ultimately responsible for compliance with the law by a Swiss subsidiary.

16 Sanctions

What are the sanctions for individuals and companies violating the foreign bribery rules?

Any person who offers a bribe to a foreign public official to obtain an advantage which is not due to him or her is liable to a custodial sentence not exceeding five years or to a monetary penalty up to 1 million Swiss francs, or both. The sanction may include prohibition from practising a profession (article 67 SCC), publication of the judgment (article 68 SCC), and expulsion from Switzerland for foreigners as an administrative sanction (article 62(b) and article 63(1)(a) of the Federal Act on Foreign Nationals). The court shall order the forfeiture of those assets that have been acquired through the commission of an offence (article 70 SCC).

A company that has not taken all the reasonable and necessary precautions to prevent bribery within its internal organisation is penalised irrespective of the criminal liability of any natural persons and is liable to a fine not exceeding 5 million Swiss francs (article 102 SCC). In corruption cases, de facto the fines for companies are disgorgement of profits and the public statement by the OAG on its investigation and the outcome (declination, criminal order or indictment).

17 Recent decisions and investigations

Identify and summarise recent landmark decisions or investigations involving foreign bribery.

In 2016, a large number of bribery cases, mainly regarding bribery of foreign officials, were under investigation by the OAG. The cases mainly relate to Brazil, Malaysia, Greece, Kenya, Kazakhstan and Ukraine. Also, the Office of the Attorney General of Switzerland opened a number of criminal investigations against Swiss banks in 2016 for suspected organisational compliance failures to prevent the laundering of corrupt monies (1MDB, Petrobras, etc).

Against the background of the substantial number of Petrobras/Lava Jato-related investigations, the Brazilian and Swiss attorney generals deepened the cooperation between their respective agencies with the aim of speeding up the ongoing proceedings.

On 21 December 2016, the Office of the Attorney General convicted the Brazilian company Odebrecht SA and one of its subsidiaries, Construtora Norberto Odebrecht SA (CNO), for organisational failure to prevent bribery of foreign officials under article 102(2) SCC and fined Odebrecht 4.5 million Swiss francs and ordered disgorgement of more than 200 million Swiss francs' illicit profits.

Odebrecht SA and its subsidiary CNO were convicted for not taking all reasonable and necessary organisational measures required to prevent bribery of foreign public officials (article 322-septies SCC) and money laundering (article 305-bis SCC). As a result, the conviction, which took the form of a summary penalty order, compromised a fine of 4.5 million Swiss francs, the forfeiture of assets and compensation payments.

The OAG held that Odebrecht created slush funds in order to pay bribes. The bribes were made to government officials, their representatives and political parties in order to win business and projects. The criminal conduct was directed by the highest levels of the company and included a complex, multilevel procedure obscuring the identification of the origin of these funds.

The *Odebrecht* case is important because it demonstrates the OAG's determination to investigate highly complex cases and to also hold large foreign companies accountable for organisational failures under article 102(2) SCC. In its decision, the OAG followed recent case law by the supreme court (in the *Postfinance* case) which requires prosecutorial evidence for at least one predicate offence (without the need though of a conviction of an employee) to hold the company accountable for the organisational compliance failure. Also, the OAG for the first time stated that the economic viability of a company constitutes a limit for the disgorgement of illicit profits under articles 70 and 71 SCC.

On 1 July 2016, the amendment to the Swiss Criminal Code came into force, which applies to all undue payments promised, offered or paid to private sector employees (including individuals employed by international sports organisations, many of which have their headquarters in Switzerland). The new ex officio crime of commercial bribery is regulated in two new articles of the SCC (see also the answer to questions 2 and 29).

In this context it is important to note that the (Anti-)Money Laundering Act has been tightened as well, with effect as of 1 January 2016. Under the new provisions, senior officials of international organisations and senior civil servants of international sports bodies in Switzerland qualify as 'politically exposed persons' (PEPs). This new regulation forces Swiss banks to manage legal risks associated with this group of individuals much more closely.

No decisions have yet been rendered under the new provisions.

The OAG investigation against a Swiss bank regarding suspected laundering of money of a Malaysian political leader in the context of lodging concessions is ongoing. On 30 May 2016, the Federal Supreme Court rendered a decision on the OAG's request for the unsealing of a memorandum seized during the search of the bank's premises. The memorandum had been established on request of FINMA. The bank argues that the memorandum is privileged and should remain sealed. Furthermore, the accused bank claims that the memorandum does not constitute potential relevant evidence. In its decision, the Federal Supreme Court approved the request of the OAG for the unsealing of the memorandum. The prerequisites according to article 197 SCPC are fulfilled. First, there is reasonable suspicion that UBS has committed an offence. The memorandum is of particular relevance for the OAG's investigation since it contains the bank's documents and summarises them with regard to the presumed money laundering case. If the memorandum were not unsealed, the original documents would have to be secured, reviewed, seized and evaluated. This would neither be in the interest of the bank nor in the public interest of an efficient criminal investigation; insofar, the unsealing of the memorandum was qualified as reasonable. Furthermore, the unsealing does not harm UBS's secrecy interests. In particular, the removal of the seal is in accordance with the bank's right not to incriminate itself. The compulsory freezing of evidence, as done in the present case during the search of premises, is, therefore, in accordance with this right. The fact that the document in question was created by UBS upon FINMA's request for information was judged irrelevant.

In December 2015, the Federal Criminal Court heard a case of active and passive bribery of foreign public officials involving four international companies (Siemens, Gazprom, ABB and Alstom) and managers of two companies. In connection with a US$170 million contract for the supply of turbines for compressor stations along the Gazprom Yamal-Pipeline, an ABB subsidiary in Sweden (which was later sold to Alstom and then to Siemens) allegedly paid bribes to two Gazprom managers who allegedly rigged the award of tenders in ABB's favour. ABB – and later the new owners of the Swedish company – allegedly paid bribes amounting to US$7.3 million, covered as consultancy fees, to a shell company in Cyprus. The Cyprus-based company allegedly forwarded part of the fees to the Gazprom managers and part of the fees to ABB managers. In its decisions of 1 April 2016 and 12 July 2016, the Federal Criminal Court held that three Gazprom managers who received bribes from the former country president of ABB Russia were not guilty of passive bribery of a foreign public official. Likewise, ABB Russia's former country manager was not guilty of active bribery of a foreign public official. The reason for the Criminal Chamber's acquittal was that the ABB and Gazprom managers do not qualify as public officials in a formal sense because they were not involved in a state organisation. Furthermore, they could also not be considered as public officials according to a functional approach as Gazprom did not have its monopoly status back then and could thus not be regarded as an enterprise of the public sector. Accordingly, they did not perform a public task. Gazprom was granted a monopoly on 18 July 2006 and, therefore, only after the recommendations for gas turbines were made. The private report of Golovko et al illustrates that the Russian Law on the Supply of Gas of 31 March 1999 contains rules on the government's competence to establish the reliability and quality data for the gas transport via gas distribution networks. Thus, only the latter was regulated by the state, meaning Gazprom had an autonomous scope within this limit.

On 23 May 2016, the OAG opened criminal proceedings against BSI SA bank and on 12 October 2016 against Falcon Private Bank Ltd for corporate criminal liability under article 102(2) SCC. The decision to open proceedings was based on information disclosed in the criminal proceedings in the 1MDB case and on regulatory offences sanctioned by FINMA in its decision of 23 May 2016. The OAG suspects organisational compliance failures to prevent money laundering at both banks permitted the bribery and/or money laundering offences to occur.

Financial record keeping

18 Laws and regulations

What legal rules require accurate corporate books and records, effective internal company controls, periodic financial statements or external auditing?

All legal entities and all sole proprietorships and partnerships that have achieved sales revenues of at least 500,000 Swiss francs in the past financial year are obliged to keep accounts and file financial reports in accordance with the provisions of articles 957 et seq of the Code of Obligations. The accounting principles and requirements are complete, truthful and systematic recording of transactions and circumstances, documentary proof for individual accounting procedures, clarity, fitness for purpose given the form and size of the undertaking and verifiability of the financial information.

The accepted accounting standards are IFRS, IFRS for SMEs, Swiss GAAP FER, US GAAP and IPSAS (the latter for public sector entities). In regulated sectors such as financial services, special rules apply.

Effective internal controls are explicitly and implicitly required by a number of statutes. The most important is article 716a of the Code of Obligations which states that the board of directors of a Swiss stock corporation bears (among others) responsibility for the organisation of the accounting, for financial control and financial planning systems as required for the management of the company and must supervise the persons entrusted with managing the company, in particular with regard to compliance with the law and internal directives.

Articles 727 et seq of the Code of Obligations on external auditors apply to all enterprises regardless of their legal organisation and state a general duty to appoint external auditors. However, the scope of the external audit depends on the type (publicly traded versus private) and size of the enterprise. The auditors must examine whether:

- the annual (consolidated) accounts comply with the statutory provisions, the articles of association and the chosen set of financial reporting standards;
- the motion made by the board of directors to the general meeting on the allocation of the balance sheet profit complies with the statutory provisions and the articles of association; and
- there is an internal control system.

19 Disclosure of violations or irregularities

To what extent must companies disclose violations of anti-bribery laws or associated accounting irregularities?

A statutory reporting duty regarding violations of anti-bribery laws and related accounting irregularities does not exist under Swiss law. General reporting duties regarding legal or compliance, reputational and operational risks do, however exist in regulated sectors, such as the financial services sector. In addition, under the Federal Act on Combating Money Laundering and Terrorist Financing in the Financial Sector, financial intermediaries must notify the authorities if they suspect money-laundering activities.

Should the external auditors find that there have been infringements of the law, they must give notice to the board of directors in

writing and inform of any material infringements at the general shareholders' meeting.

20 Prosecution under financial record keeping legislation

Are such laws used to prosecute domestic or foreign bribery?

The violation of bookkeeping laws is a criminal offence (article 251 of the SCC – falsification of documents) and a violation of ancillary provisions aimed at ensuring proper bookkeeping. The violation of bookkeeping duties may trigger administrative sanctions in regulated industries, such as financial services.

21 Sanctions for accounting violations

What are the sanctions for violations of the accounting rules associated with the payment of bribes?

The falsification of documents in the sense of article 251 of the SCC may result in imprisonment for up to five years or a fine of up to 1 million Swiss francs, or both.

22 Tax-deductibility of domestic or foreign bribes

Do your country's tax laws prohibit the deductibility of domestic or foreign bribes?

Switzerland's federal and cantonal tax laws explicitly exclude tax deductibility of bribes paid to domestic or foreign public officials. With the entry into force of the new articles of the SCC relating to commercial bribery, bribes paid to commercial persons are not tax deductible any longer.

Domestic bribery

23 Legal framework

Describe the individual elements of the law prohibiting bribery of a domestic public official.

Articles 322-ter et seq of the SCC prohibit bribery of domestic public officials. The elements of (active) bribery of domestic public officials are:

(i) a person offers, promises or gives an undue advantage
(ii) to a member of a judicial or other authority, a public official, an officially appointed expert, translator or interpreter, an arbitrator, or a member of the armed forces or to a third party,
(iii) in order to cause that public official to carry out or to fail to carry out an act in connection with his official activity which is contrary to his duty or dependent on his discretion.

Minor advantages that are common social practice do not qualify as undue advantages.

According to article 322-quinquies of the SCC, the elements of the (lesser) offence of granting an undue ('facilitating') advantage to a domestic public official are:

(i) a person offers, promises or gives
(ii) to a member of a judicial or other authority, a public official, an officially-appointed expert, translator or interpreter, an arbitrator or a member of the armed forces
(iii) an advantage which is not due to him in order that he carries out his official duties.

All criminal offences, including the offence of bribery of a Swiss public official, require mens rea, namely, either intent or wilful blindness (dolus eventualis).

24 Prohibitions

Does the law prohibit both the paying and receiving of a bribe?

Both active and passive bribery and granting of undue advantages to domestic public officials are prohibited by the SCC and are subject to the same level of fines. The same applies with regard to commercial bribery.

25 Public officials

How does your law define a public official and does that definition include employees of state-owned or state-controlled companies?

The law defines public officials as members of an authority who pursue an official activity. Employees of state-owned or state-controlled companies may qualify as public officials, if and to the extent they pursue an official activity. The Federal Supreme Court recently confirmed this view in a case regarding the manager of the public servants' pension fund of the Canton of Zurich. In light of the *Gazprom* case mentioned in question 17, the Criminal Chamber held that public officials can be defined in a formal or a functional way. The former refers to a person who is involved in a state organisation, while the latter confirms the definition above (ie, that an individual who pursues an official activity with the public authorities or in public enterprises can also be defined as a public official). It thus confirmed that employees of state-owned or state-controlled companies are qualified as such. In order for a company to be state-controlled, the majority of shares must be state-owned. This prerequisite was not fulfilled in the case of Gazprom at the time of the alleged bribery.

26 Public official participation in commercial activities

Can a public official participate in commercial activities while serving as a public official?

Yes, to the extent that the participation is financial only and does not create a conflict of interest. No, or within narrow limits, if the participation in commercial activities involves employment of labour.

27 Travel and entertainment

Describe any restrictions on providing domestic officials with gifts, travel expenses, meals or entertainment. Do the restrictions apply to both the providing and receiving of such benefits?

According to article 322-decies of the SCC, minor and commonly accepted social advantages and which are authorised by administrative regulations are licit. Under the Ordinance on Federal Employees and the guidance of the Federal Office of Personnel regarding prevention of corruption, staff members of the Federal Administration may not accept gifts in the course of their work, unless they are small in nature (valued no more than 200 Swiss francs) and are socially or traditionally motivated. During procurement or decision-making processes, even small and socially or traditionally motivated benefits are not permitted.

28 Gifts and gratuities

Are certain types of gifts and gratuities permissible under your domestic bribery laws and, if so, what types?

Yes (see answer above). Giving a chocolate box worth 50 Swiss francs or US$50 to a public official for his or her speech at a public seminar would be a commonly accepted social practice. However, meals at expensive restaurants or any kind of entertainment are not commonly accepted social practice and may qualify as bribery or the granting of an undue advantage (ie, the illicit granting of a facilitation payment). The Federal Criminal Court held in autumn 2015 that a public official who accepts 40 lunch invitations from long-standing suppliers is culpable for accepting undue advantages.

29 Private commercial bribery

Does your country also prohibit private commercial bribery?

Until 1 July 2016, private bribery used to be prosecuted only in case of a restriction of competition under the Unfair Competition Act (UCA) as a misdemeanour based on article 4a UCA and only upon complaint by a competitor. Since 1 July 2016, private bribery is prosecuted ex officio under article 322-octies SCC (active private bribery) and article 322-novies SCC (passive private bribery). The elements of (active) private bribery are the following:

(i) a person offers, promises or gives

Update and trends

The fight against domestic and international corruption remains a high priority of regulators and prosecutors in Switzerland. The OAG publicly stated that it is not only continuing to investigate companies for suspected organisational failures to prevent the bribery of foreign officials but that it will also investigate the individuals who bribed foreign officials as well as intermediaries, including banks, for money laundering and organisational failures to prevent bribery of foreign officials and money laundering. At the same time, the OAG is promoting self-reporting by companies suspecting bribery of foreign officials by their managers. The advantages to companies that self-report are that they shall not be blocked from doing business with public bodies and shall not be put out of business. Essentially, the emerging practice of the OAG seems to indicate that companies that self-report, fully cooperate, remediate and disgorge the illicit profits may under certain conditions benefit from a declination (under article 53 SCC – release from penalty in case of redress – or by way of a lenient criminal order) and may see the monetary sanctions mitigated in consideration of their cooperation and their economic capacity.

Under the Swiss Criminal Code, companies are criminally liable if because of poor organisational compliance measures they failed to prevent money laundering and bribery. Recent case law requires that prosecutors establish the organisational failure and – on a strong (yet not full) evidential basis – causal individual criminal conduct. In ongoing and future corporate criminal investigations, prosecutors are thus likely to benchmark the organisational compliance measures against accepted best compliance practice and investigate individual criminal conduct even more.

In summary, companies facing bribery risks should review the effectiveness of their overall and in particular their anti-bribery organisational compliance measures. They can benchmark their anti-bribery compliance health status against international standards such as ISO 19600 – Compliance management systems and ISO 37001 – Anti-bribery management systems. In its introduction, ISO 19600 says: 'In a number of jurisdictions, the courts have considered an organisation's commitment to compliance through its compliance management system when determining the appropriate penalty to be imposed for contraventions of relevant laws. Therefore, regulatory and judicial bodies can also benefit from this International Standard as a benchmark.' Inevitably, companies in Switzerland will be held accountable to international compliance management best practices and standards, and members of corporate bodies and managers will be even more exposed to investigations into their acts and omissions in case of suspected corporate misconduct.

Given the clear statements made by senior representatives of the OAG in 2016 and in the light of the *Odebrecht* order, companies confronted with actual or suspected bribery should assess the option of self-reporting to take advantage of the benefits of the emerging settlement process and to treat the legal risks.

(ii) an employee, a partner or shareholder, an agent or other auxiliary to a third party in the private sector,
(iii) an undue advantage for an act or omission in its duty or discretion in the offender's or a third party's favour.

Article 322-novies covers the passive offence, that is, if the aforementioned persons working in the private sector request, elicit the promise of or accept such undue advantage. Active and passive bribery in the private sector is considered a misdemeanour, and in consequence Switzerland cannot prosecute acts of money laundering in Switzerland of the proceeds of private corruption committed abroad, as money laundering in Switzerland can only be prosecuted for the proceeds of a felony (statutory sentence of five years or more).

30 Penalties and enforcement

What are the sanctions for individuals and companies violating the domestic bribery rules?

As regards corruption of public officials, bribery sanctions for individuals are imprisonment for up to five years or a monetary fine of up to 1.08 million Swiss francs, or both. Other criminal and administrative law measures are: prohibition from practising a profession, forfeiture of assets that have been acquired through the commission of an offence and expulsion from Switzerland for foreigners. According to the aforementioned newly passed laws described under answer 29, private commercial bribery can be punished by a maximum of a three-year jail sentence or by a monetary penalty. In minor cases, the offence can only be prosecuted if a complaint is filed. 'Minor cases' refer to cases where the crime sum amounts to only a few thousand Swiss francs, where the security and health of third parties is not in jeopardy and where there is no connection to offences including the falsification of documents.

Under article 102 of the Criminal Code, companies are responsible for failing to take all reasonable organisational measures required in order to prevent bribery (and certain other criminal offences) by their directors and employees. Companies can be fined up to 5 million Swiss francs. As a rule, illicit profits are forfeited (see question 16).

31 Facilitating payments

Have the domestic bribery laws been enforced with respect to facilitating or 'grease' payments?

Yes. In about a dozen instances, courts have sentenced individuals for granting or accepting undue advantages. In a recent case involving the Federal Administration, the Office of the Attorney General on 16 April 2014 opened an investigation against a public official for accepting bribes and undue advantages, and the Federal Criminal Court held in 2015 that a public official who accepts 40 lunch invitations from long-standing suppliers is culpable for accepting undue advantages.

32 Recent decisions and investigations

Identify and summarise recent landmark decisions and investigations involving domestic bribery laws, including any investigations or decisions involving foreign companies.

On 16 September 2015, the Federal Criminal Court sentenced a Swiss public official responsible for IT procurement at the Federal Government for the offence of acceptance of undue advantages by accepting 40 invitations to lunch from a supplier (*Insieme* case). The main defendant was sanctioned with a custodial sentence of 16 months and a monetary penalty of 27,000 Swiss francs. The Federal Criminal Court upheld its strict approach in a decision dated 6 December 2016, sentencing a Swiss public official responsible for IT procurement at the Federal Office for the Environment for active and passive bribery and misconduct in public office with a custodial sentence of two-and-a-half years and a monetary fine. The main defendant being an external project manager was also held liable for passive bribery of a public official because of the fact that he had crucial influence in the discharge of the federal government's office and was paid by the government.

On 18 November 2014, the International Federation of Football Associations (FIFA), filed a criminal complaint with the Office of the Attorney General, submitting to the Office the report of the investigatory chamber of the FIFA Ethics Committee together with a criminal (bribery) complaint. The Office of the Attorney General expressed its intention to inform the public in due time about further steps. In May 2015, the Office of the Attorney General opened criminal proceedings against unknown persons based on the suspicion of criminal mismanagement and money laundering in connection with the assignments of the 2018 and 2022 Football World Championships. In the course of these proceedings, electronic data and documents were seized at FIFA's headquarters in Zurich.

In 2015, US federal prosecutors disclosed cases of corruption by officials and associates related to FIFA. In May 2015, 14 people were indicted in connection with an investigation conducted by the Federal Bureau of Investigation and the Internal Revenue Service Criminal Investigation Division concerning wire fraud, racketeering and money laundering. The OAG initiated a criminal procedure against unknown for money laundering by way of transactions through Swiss bank accounts. On 27 May 2015, several FIFA officials were arrested at the Hotel Baur au Lac in Zurich. On 24 September 2015, a criminal procedure against FIFA's then president was initiated, being suspected of having committed criminal mismanagement according to article 158 SCC and potential misappropriation pursuant to article 138 SCC.

In the context of the FIFA corruption procedure, the Swiss Supreme Court upheld the decision of the US Department of Justice on 2 May 2016, authorising the extradition of a Nicaraguan FIFA official to the United States as well as the subsequent extradition to the Nicaraguan authorities on the grounds that he was involved in a corruption conspiracy and had committed passive bribery.

As mentioned in the answer to question 17, the criminal order of the OAG against Odebrecht SA of 21 December 2016 confirms that Swiss and foreign companies with activities in Switzerland that systematically fail to prevent the bribery of foreign officials by their employees risk being investigated by the OAG for the criminal corporate offence of organisational failure under article 102(2) SCC. They are therefore more than ever exposed to fines and disgorgement of profits.

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1 International anti-corruption conventions

To which international anti-corruption conventions is your country a signatory?

Turkey is a signatory to or has ratified the following European and international anti-corruption conventions.

Council of Europe

- Council of Europe Criminal Law Convention on Corruption of 27 January 1999 (signed 27 September 2001; ratified 29 March 2004);
- Council of Europe Civil Law Convention on Corruption of 4 November 1999 (signed 27 September 2001; ratified 17 September 2003); and
- Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism of 8 November 1990 (signed 28 March 2007; ratified 18 February 2016).

International

- OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 17 December 1997 (including OECD Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions) (signed 17 December 1997; ratified 26 July 2000);
- the United Nations Convention against Transnational Organized Crime, 15 November 2000 (signed 13 December 2000; ratified 25 March 2003); and
- the United Nations Convention against Corruption, 31 October 2003 (signed 10 December 2003; ratified 9 November 2006).

In addition to multilateral treaties, Turkey has also been a member of the Group of States against Corruption (GRECO) since 1 January 2004, the Financial Action Task Force since 1991 and the OECD Working Group on Bribery.

2 Foreign and domestic bribery laws

Identify and describe your national laws and regulations prohibiting bribery of foreign public officials (foreign bribery laws) and domestic public officials (domestic bribery laws).

The main legislation applying to acts of corruption is the Turkish Criminal Code No. 5237 (the Criminal Code), which entered into force on 1 June 2005 and which prohibits bribery, malversation, malfeasance, embezzlement and other forms of corruption such as negligence of supervisory duty, unauthorised disclosure of office secrets, fraudulent schemes to obtain illegal benefits, etc.

Apart from the Criminal Code, the core statutory basis of Turkish anti-corruption legislation can briefly be summarised and categorised as follows:

- Turkish Criminal Procedure Law No. 5271;
- Law No. 657 on Public Officers;
- Law No. 3628 on Declaration of Property and Fight Against Bribery and Corruption;
- Regulation No. 90/748 on Declaration of Property (Regulation No. 90/748);
- Law No. 5326 on Misdemeanours; and
- the Regulation on Ethical Principles for Public Officers and Procedures and Principles for Application (published in the Official Gazette No. 25,785 of 13 April 2005) (the Regulation on Ethical Principles).

Foreign bribery

3 Legal framework

Describe the elements of the law prohibiting bribery of a foreign public official.

Prior to 2003, bribing foreign public officials was not considered a crime in Turkish law. In 2003, Turkish Criminal Code No. 765 (the former Criminal Code) was amended so that offering, promising or giving advantages to foreign public officials or officials who perform a duty of an international nature, in order that the official 'act or refrain from acting or to obtain or retain business in the conduct of international business' was also considered bribery (Law No. 4782 on Amending Certain Laws for Combating Bribery of Foreign Public Officials in International Business Transactions). The provision regulating bribery in the Criminal Code (article 252) was amended in July 2012 so as to broaden the scope of this amendment. The provision now provides that bribery is committed if a benefit is provided, offered or promised directly or via intermediaries, or if the respective individuals request or accept such benefit directly or via intermediaries (both of which would be in relation to the execution of that individual's duty to perform or not to perform) (article 252(9), Criminal Code):

- in order to obtain or preserve a task or an illegal benefit due to international commercial transactions to public officials who have been elected or appointed in a foreign country;
- judges, jury members or other officials who work at international or supranational courts or foreign state courts;
- members of the international or supranational parliaments; individuals who carry out a public duty for a foreign country, including public institutions or public enterprises;
- a citizen or foreign arbitrators who have been entrusted with a task within the arbitration procedure resorted to in order to resolve a legal dispute; and
- officials or representatives working at international or supranational organisations that have been established based on an international agreement.

If bribery of foreign public officials is committed abroad by a foreigner, and if this type of bribery is committed in order to perform or not to perform an activity in relation to a dispute to which Turkey, a public institution in Turkey, a private legal person incorporated pursuant to Turkish laws or a Turkish citizen is a party to, or in relation to an authority or individuals, then an ex officio investigation and prosecution will be conducted into those individuals:

- who provide, offer or promise to bribe;
- who accept, request, or agree to the offer or promise for the bribe;
- who mediate such; and
- to whom a benefit is provided due to this relationship.

This is contingent on these individuals being present in Turkey (article 252(10), Criminal Code).

4 Definition of a foreign public official

How does your law define a foreign public official?

According to article 252 of the Criminal Code, the below are considered as foreign public officials:

- public officials who have been elected or appointed in a foreign country;
- judges, jury members or other officials who work at international or supranational courts or foreign state courts;
- members of the international or supranational parliaments;
- individuals who carry out a public duty for a foreign country, including public institutions or public enterprises;
- a citizen or foreign arbitrators who have been entrusted with a task within the scope of arbitration procedure resorted to in order to resolve a legal dispute; and
- officials or representatives of international or supranational organisations that have been established based on an international agreement.

5 Travel and entertainment restrictions

To what extent do your anti-bribery laws restrict providing foreign officials with gifts, travel expenses, meals or entertainment?

The Criminal Code does not make any differentiation between facilitating payments or bribes. Accordingly, any gift, travel expense, meal or entertainment payments could potentially be deemed as bribery under Turkish law.

6 Facilitating payments

Do the laws and regulations permit facilitating or 'grease' payments?

Unlike the anti-bribery provisions of the US Foreign Corrupt Practices Act, the relevant provisions of the Criminal Code clearly dictate the provisions of bribery and do not provide any exceptions regarding the facilitating payments. Facilitating payments, or grease payments, would constitute a crime in Turkey, even if they were to be done the way that is regulated as an exception under the US Foreign Corrupt Practices Act. To that end, compliance officers and in-house counsel would be well advised to hesitate in recognising a facilitating payment exception in Turkey.

7 Payments through intermediaries or third parties

In what circumstances do the laws prohibit payments through intermediaries or third parties to foreign public officials?

As of July 2012, the Criminal Code sanctions an individual (as joint perpetrator) who acts as an intermediary for conveying the offer or the request of a bribe for accommodating the bribery agreement or for providing bribery (article 252(5), Criminal Code).

8 Individual and corporate liability

Can both individuals and companies be held liable for bribery of a foreign official?

The Criminal Code accepts the principles of personal criminal liability. Therefore, real persons can be held criminally liable for crimes, while companies can be subject to certain security measures, as described in detail in question 15. Further, Law No. 5326 on Misdemeanours (Law No. 5326) also regulates administrative liability of legal persons, which provides that administrative fines (from 15,804 to 3,161,421 Turkish lira) may be imposed on legal persons in case, inter alia, the crime of bribery or bid-rigging is committed to the benefit of the company by the organs or representatives of the legal person or anybody who is acting within scope of the activities of the legal person (article 43/A of Law No. 5326).

Individual liability under the Criminal Code is subject to the general principle of the individuality of the penalties under Turkish law (article 20, Criminal Code). This means that the sanctions that are applicable to natural persons under the Turkish criminal law framework can only be imposed on individuals who have committed the crime, and not to anyone else (including the company who may be the employer of an employee committing a crime). While lacking criminal capacity, legal persons, as per article 20(2), may be subject to security measures (article 60, Criminal Code).

9 Successor liability

Can a successor entity be held liable for bribery of foreign officials by the target entity that occurred prior to the merger or acquisition?

The enforcement of successor liability for anti-corruption offences is not a frequently observed legal phenomenon in the Turkish jurisdiction. This being said, the legislation allows for a form of successor liability. Article 202 of the Turkish Code of Obligations No. 6098 provides that a person who takes over an enterprise with its active and passive assets will be liable for that enterprise's debts. Therefore, an acquiring company would be liable for the unpaid debts of the acquired company, arising from article 43/A of Law No. 5326, because of the corruption offence perpetrated by the representatives of the acquired company for the benefit of the acquired company.

10 Civil and criminal enforcement

Is there civil and criminal enforcement of your country's foreign bribery laws?

Turkish laws that regulate bribery are subject to criminal enforcement, as the primary legislation regulating bribery (more specifically foreign bribery) is the Criminal Code. Hence, civil enforcement is not observed in the Turkish legal framework for bribery and corruption. This being said, those injured by the crimes of the perpetrators can always file for damages before a civil court of law.

11 Agency enforcement

What government agencies enforce the foreign bribery laws and regulations?

There is no particular government agency that is responsible for enforcing foreign bribery laws in Turkey. The judiciary has full powers to apply the provisions stipulated under the relevant laws, as described in question 2, in relation to bribery and corruption.

12 Leniency

Is there a mechanism for companies to disclose violations in exchange for lesser penalties?

Pursuant to the Criminal Code, a person who gives or receives a bribe, but then informs the investigating authorities about the bribe before the initiation of an investigation, shall not be punished for the crime of bribery (article 254(1) and article 254(2)). However, this rule shall not be applicable to the person who gives a bribe to foreign public officials (article 254(4)).

13 Dispute resolution

Can enforcement matters be resolved through plea agreements, settlement agreements, prosecutorial discretion or similar means without a trial?

Turkish criminal enforcement does not allow for any dispute resolution mechanism other than through a litigious approach.

14 Patterns in enforcement

Describe any recent shifts in the patterns of enforcement of the foreign bribery rules.

Not applicable.

15 Prosecution of foreign companies

In what circumstances can foreign companies be prosecuted for foreign bribery?

The general principle under Turkish criminal law is that penal sanctions cannot be imposed on legal entities (article 20 of the Turkish Criminal

Law), save for the analyses provided under question 8. In other words, the provisions of the Turkish Criminal Code are applicable to legal persons who have committed a crime as stipulated under the Criminal Code in the Republic of Turkey.

If a bribe creates an unlawful benefit to a legal entity, the entity shall be punished through three measures: invalidation of the licence granted by a public authority; seizure of the goods which are used in the commitment of, or the result of, a crime by the representatives of a legal entity; and seizure of pecuniary benefits arising from or provided for the commitment of a crime (article 253).

The principle of territoriality, hence, is a natural outcome of the applicability of sanctions under the Turkish Criminal Law regime. The Criminal Code has adopted the principle of the place where the crime is committed when determining whether a crime has been committed in Turkey, and hence, whether the Turkish Criminal Code is applicable. According to this principle, if the behaviour and the result that constitute the material elements of a crime are realised in Turkey, the crime is deemed to have been committed in Turkey (article 8(1) of the Criminal Code). Consequently, foreign companies (where they are subject to the above measures) and their legal personal representatives will be subject to the provisions of the Criminal Code only in the event that they commit a crime in the Republic of Turkey.

16 Sanctions

What are the sanctions for individuals and companies violating the foreign bribery rules?

As per the Turkish criminal law regime, only acts that are committed in Turkey or that are deemed to have been committed in Turkey, as described in question 15, are subject to sanctioning. Therefore acts that are punishable as per the principle of territoriality regime, that are committed by individuals and companies and that would constitute a crime pursuant to domestic bribery rules (ie, the Turkish Criminal Code) will also be subject to certain sanctions.

The penalties for acts of corruption under the Turkish Criminal Code can be summarised as follows.

Fraud is punished by (article 157, Criminal Code) one to five years' imprisonment and up to 5,000 days of judicial monetary fine. Qualified fraud is punished by (article 158, Criminal Code) two to seven years' imprisonment and up to 5,000 days of judicial monetary fine. The judicial monetary fine can vary between 20 and 100 Turkish lira. The judge determines the rate of the fine depending on the individual's economic and other personal status. Generally, penalties for fraud can only be imposed on natural persons, as companies, as legal entities, do not attract criminal liability (article 20, Criminal Code).

Bribery (articles 252 et seq) warrants imprisonment of four to 12 years for the incumbent government official and bribe-giver, and appropriate measures (such as confiscation of property, cancellation of licences, etc) against legal entities benefiting from bribery, subject to attenuating and aggravating circumstances as set forth in the Criminal Code. In addition to the foregoing, the length of potential imprisonment can be increased by one-third to one-half if the individual who receives a bribe or offers bribe or agrees to act as such conducts judicial duty, or is an arbitrator, expert, notary public, or sworn financial consultant (article 252(7), Criminal Code).

Malversation (articles 250 et seq) warrants imprisonment from five to 10 years for the defendant government official, subject to attenuating and aggravating circumstances as set forth in the Criminal Code.

Depending on the form of the specific act, malfeasance (articles 255, 257, 259, 260, 261 et seq) may warrant various penalties against the defendant government official.

Embezzlement (articles 247 et seq) warrants imprisonment from five to 12 years for the defendant government official, subject to attenuating and aggravating circumstances as set forth in the Criminal Code.

17 Recent decisions and investigations

Identify and summarise recent landmark decisions or investigations involving foreign bribery.

To date, there have not been any foreign bribery cases under Turkish law. The following is an account of recent foreign bribery cases that involve corruption crimes committed under Turkish jurisdiction and internal investigations by Turkish companies.

In December 2010, the German media reported allegations that the German state-owned HSH Nordbank made payments to Turkish judges in 2009 to influence an action for damages filed against it by a Turkish company. According to reports, the bribes allegedly were paid via the German security company Prevent. These allegations reportedly resulted from an audit carried out by KPMG.

Siemens AG paid a fine of US$800 million to the SEC and the American Ministry of Justice and €395 million to the German Ministry of Justice for the bribes given in order to win international tenders in December 2008. Daimler AG, the manufacturer of Mercedes, paid a fine of US$93.6 million to the Ministry of Justice and US$91.4 million to the SEC for the bribes made by its subsidiaries in China, Croatia, Egypt, Greece, Hungary, Indonesia, Iraq, Ivory Coast, Latvia, Montenegro, Nigeria, Russia, Serbia, Thailand, Turkey, Turkmenistan, Uzbekistan and Vietnam in April 2010.

In 2014 Smith & Wesson paid a fine of US$2 million to the SEC for the bribes to win gun sales to military and police forces in Pakistan, Indonesia and other countries. In addition the company made illegal payments to third parties for them to convey the payments to government officials in Turkey, Nepal and Bangladesh.

Financial record keeping

18 Laws and regulations

What legal rules require accurate corporate books and records, effective internal company controls, periodic financial statements or external auditing?

Accurate corporate books and records

Article 64(1) of the Turkish Commercial Code No. 6102 (Law No. 6102) stipulates that every merchant has to keep commercial books, within which it would have to show explicitly as per Law No. 6102, its commercial acts and the economic and fiscal status of its commercial business and its accounts receivable and accounts payable along with the results it obtains in each accounting period. Books have to be kept so as to allow third-party experts to gain insight into the activities and financial status of the relevant commercial business, through an audit they would carry out in a reasonable period of time. Except for the types of books mentioned explicitly under article 64 of Law No. 6102 and Regulation on Commercial Books, additional books to be kept shall be determined as per the Turkish Tax Procedure Law No. 213, through reference to article 64(5) of Law No. 6102.

Article 65(1) and (2) of the Turkish Commercial Code No. 6102 (Law No. 6102) stipulates that commercial books and other relevant records shall be kept in the Turkish language and the recordings shall be in full, accurate, of a regular manner and on time.

Furthermore, article 88(1) of Law No. 6102 stipulates that natural and legal persons, in preparing their individual and consolidated financial tables, should comply with and apply Turkish Accounting Standards (TAS), accounting principles found within the conceptual framework, and commentary, which is an integral part thereof. Pursuant to article 88(2) of Law No. 6102 and its reasoning, TAS are identical with International Financial Reporting Standards (IFRS).

Effective internal company controls and external auditing

Article 392 of (Law No. 6102) stipulates that each board member is entitled to request information, ask questions and make examinations on all works and transactions of the company in joint-stock companies. Providing any corporate book, record, agreement, correspondence and document to the board of directors and examination of these by board members cannot be prevented. The request of a board member to review, discuss records or obtain information from an employee or executive of the company cannot be rejected by the relevant employee or executive. Each member of the board of directors is also entitled to direct to the chairman of the board requests for collecting information, asking questions and making examinations on all transactions of the company outside the board meetings. If the foregoing requests are rejected, the matter that the information request relates to should be discussed at a board of directors' meeting. However, if the board cannot convene or also rejects the information request of the board member, the board member making the request may apply to court to receive the requested information. During board meetings, individuals authorised for the company's day-to-day management and if any, management committees, as well all members of the board of directors, are

obliged to provide information. Unlike above (ie, a request of information outside board meetings), the request of any board member in this respect that is directed during a board meeting cannot be rejected or cannot be left unanswered.

As per article 437 (of Law No. 6102), financial statements, activity reports, auditors' reports (if any) and the board of directors' suggestion as to profit distribution shall be available at headquarters and branches of the company for review by the shareholders starting from at least 15 days in advance of the day of the general assembly meeting in joint-stock companies. Among these documents, financial statements shall be available at headquarters and branches of the company for review of the shareholders for one year. Every shareholder has the right to request a copy of the income statement and balance sheet of the company. Also, each shareholder may request information from the board of directors regarding the company's business and from the auditors (if any) regarding their audit methods and results during a general assembly meeting. The information to be provided to the shareholders should be honest and accurate, in accordance with principles of accountability and good faith. The request for information may only be rejected by the general assembly on the grounds that an explanation to be given will carry the risk of company trade secrets being disclosed, or company interests being jeopardised. For being able to evaluate a certain part of the commercial books and the company's correspondence regarding the questions raised by a shareholder, a clear consent of the general assembly or a specific board resolution is required. If a shareholder's request for information is rejected or not duly answered without any justification at the general assembly, such shareholder may apply to court. The court reviews the file and may order the company to share the information with the shareholder.

Pursuant to articles 438 and 439 of (Law No. 6102), every shareholder has the right during the general assembly to request conduct of an audit in order to clarify certain issues, even though such an audit is not included in the general assembly's agenda, provided that foregoing information rights have already been exercised by the shareholder requesting the audit. In other words, in order to ask a company to appoint a special auditor, the shareholder that requests the audit should have first exercised its right of information. If the general assembly approves this request either the company or each shareholder may apply to court for appointment of a special auditor. If the general assembly does not approve this request of shareholders representing at least one-tenth of the share capital, such shareholders may apply to court for appointment of a special auditor. In order for the court to accept it, the request addressed to court should convince the court that founders or corporate bodies of the company have explicitly violated the articles of association and relevant legislation, and caused damage to company and shareholders.

Article 614 of (Law No. 6102) stipulates that each shareholder is entitled to request information from directors on all works and transactions of the company and make examination on certain matters in limited liability companies. If there is a risk that the shareholder may use the information obtained in a manner to damage the company, the directors may prevent providing information and examination to the extent necessary, and the general assembly shall decide on the matter upon the request of the shareholder. If the general assembly unduly prevents providing information and review, the court decides on the matter upon the request of the shareholder.

As for external auditing; article 397 of Law No. 6102 rules that the companies that will be determined by the Turkish Council of Ministers are subject to independent audit. Accordingly, the Decrees on Determination of Companies Subject to Independent Audit are published in the Official Gazette respectively on 23 January 2013, 14 March 2014, 1 February 2015 and 19 March 2016 and determined such companies and certain criteria as to being subject to independent audit.

Joint-stock companies that do not fall within scope of the Decree on the Determination of the Companies Subject to Independent Audit, thus, ones that are not obliged to appoint an independent auditor, are required to appoint 'statutory auditors' under article 397(5) of Law No. 6102. This said, secondary legislation that will determine the details of statutory audit and auditors has not been published yet. Therefore, requirements regarding the appointment of statutory auditors are not yet applicable as of the date this chapter was written.

In addition to and along with the auditing mechanism explained above, a provision specific to groups of companies, article 207 of Law No. 6102, stipulates that each of the shareholders of a subsidiary company might apply to the commercial courts of first instance, requesting the appointment of a private auditor, in cases where the need to protect the subsidiary company against the parent company arises, as stipulated by the same article. Article 210 of Law No. 6102 and the regulation issued in accordance with the relevant article stipulate that the Ministry of Customs and Commerce might audit companies on its own accord, or upon request, notice or complaint of shareholders or third parties.

Finally, as per article 1524 of Law No. 6102, and Regulation on Opening Website by the Companies, companies subject to independent auditing, as explained above, will be required to set up and maintain a company website, and must allocate a part of the website to the required announcements.

Periodic financial statements

In accordance with article 514 of Law No. 6102, boards of directors have to prepare financial statements and activity reports within three months as of end of the previous financial year. Pursuant to article 515 of Law No. 6102, financial statements have to be prepared in accordance with the TAS to reflect the company's assets, liabilities and obligations, equities and results of business activities in a realistic, honest, full, clear and comparable way and in a transparent and reliable manner to address the requirements and nature of business.

As per article 516 of Law No. 6102, the activity report shall reflect company's flow of activities and financial status in an accurate, full, straightforward, true and fair manner. This report shall address the financial status of company based on the financial statements. The report shall also point out potential risks to be faced by the company. The contents of activity reports have been determined by the Regulation on Minimum Contents of the Annual Activity Reports of Companies.

Publicly held companies should also comply with the rules and regulations, as set out by the Capital Markets Board. Article 14 of the Capital Markets Law No. 6362 stipulates that issuers have to prepare and present financial tables and reports, which are to be disclosed to public or could be requested by the Capital Markets Board, when need be; on time, fully and correctly; and in compliance with the requirements set out by the Board, within scope of TAS, with respect to content and form. Issuers, as per Capital Markets Law No. 6362, are legal persons who issue capital markets instruments, who apply to the Capital Markets Board to issue such instruments or whose capital markets instruments are offered to the public, and the investment funds, who are subject to the Capital Markets Law No. 6362.

Additionally, issuers and capital markets entities, except the investment funds and funds of housing financing and asset financing (collectively 'enterprises'), are also subject to the provisions set out in Communiqué on Financial Reporting in Capital Markets (Communiqué Series No. II, 14.1). According to article 6 of Communiqué Series No. II, 14.1, enterprises are obliged to keep financial reports annually. According to article 7 of Communiqué Series No. II, 14.1, companies that issue capital markets instruments, which are traded in the exchange or some other standardised market, investment companies, investment funds, asset management companies, mortgage financing companies and asset leasing companies are obliged to keep interim financial reports on a quarterly basis. Article 4 of Communiqué Series No. II, 14.1 stipulates that the financial reports consist of financial statements, board of directors' activity reports and responsibility statements. As per article 14 of Communiqué Series No. II, 14.1, enterprises are also obliged to publish their annual and interim financial reports on their websites, once these are publicly announced.

19 Disclosure of violations or irregularities

To what extent must companies disclose violations of anti-bribery laws or associated accounting irregularities?

Section 5 of the Turkish Constitution of 1982, entitled 'Privacy and Protection of Private Life', and in particular article 22, preserves the secrecy of communication. The Turkish Civil Code, article 23 et seq, includes provisions regulating the protection of personal rights in general. Also, according to article 24, an individual whose personal rights are violated unjustly is entitled to file a civil action. Therefore, in practice, corporations place provisions within their employment contracts

that are to be signed by the employee and the officer of the corporation, indicating what items constitute the 'property of the corporation' and these generally include computers, memory disks, and any kind of document, whether printed or not, in order to prevent any ambiguity in relation to employee claims regarding what may constitute personal data.

Additionally, while the principle of confidentiality prevails in matters relating to accounting (article 5 of Turkish Tax Procedure Law No. 213), the disclosure of certain violations, which are established with Turkish Tax Procedure Law No. 213, will not be a breach of the confidentiality principle. The Ministry of Finance is responsible for determining the procedure regarding the disclosure of such information.

The internal actions that could be taken are set out in articles 392, 437, 438, 439 and 614 of Law No. 6102 as described in question 18.

Furthermore, publicly held companies are subject to the provisions of the Communiqué on Financial Reporting in Capital Markets (Series No. II, 14.1) and Material Events Communiqué (Series No. II, 15.1), Material Events Disclosure of Non-Publicly Traded Companies (Series No. II, 15.2) and other applicable legislation of the Capital Markets Board as the case may be, through which they have to inform the public of changes to the internal and continuous information that might impact the value and price of the capital markets instruments and the investment decisions of the investors.

20 Prosecution under financial record keeping legislation

Are such laws used to prosecute domestic or foreign bribery?

All the rules and legislation described above under questions 18 and article 19 shall be applied to each company's record and bookkeeping. A company's failure to perform its obligations under the relevant legislation could lead to the company and its relevant authorised body being liable towards the authorities, if they carry indications of domestic or foreign bribery.

21 Sanctions for accounting violations

What are the sanctions for violations of the accounting rules associated with the payment of bribes?

Article 341 of the Turkish Tax Procedure Law No. 213 defines what must be understood from loss of tax, although the definition does not distinguish between losses of tax as a result of bribery, be it domestic or foreign. Accordingly, loss of tax is when tax is not computed on time or is computed incompletely, as a result of the inability to fulfil or incompletely fulfil the relevant taxation duties borne by the taxpayer or the responsible individual. In this regard, article 343 sets out the minimum penalty for committing a loss of tax as no less than 11 Turkish lira for each document, bond and bill.

Article 112(2) of the Capital Markets Law No. 6362 stipulates that the persons who intentionally prepare financial tables and reports that do not reflect the truth, falsely open an account, conduct any type of accounting fraud or who prepare false or misleading independent auditing and evaluation reports or the responsible board of directors members or responsible managers for issuers who allow for these to be prepared may be punished according to the Criminal Code. The first paragraph of the same article also provides that the persons who intentionally keep books and records as required by the law irregularly, or not within the time periods stipulated by law shall be punished with up to two years' imprisonment and up to 5,000 days of judicial monetary fine.

The General Communiqué on Tax Procedure Law (Series No. 229) regulates, inter alia, the penalty imposed in the event of committing fraud, the description of what is to be understood from gross fault and special irregularities (such as invoicing a service or good that has not been purchased and not issuing a retail sales certificate).

Issuing fake invoices and irregularity on invoices (such as obtaining an invoice for a donation that was not given) are penalised according to the provisions of the Criminal Code (article 207 – imprisonment from one to three years) and the Turkish Tax Procedure Law No. 213 (article 353 – penalty of 10 per cent of the difference between the actual value of the invoice and the value forged, but that is no lower than 210 Turkish lira).

22 Tax-deductibility of domestic or foreign bribes

Do your country's tax laws prohibit the deductibility of domestic or foreign bribes?

In order to assess the net profit, article 40 of the Income Tax Law No. 193 regulates those expenses that can be deducted from income tax. These expenses are: general expenses that are incurred to generate and maintain commercial income, accommodation expenses for staff and employees at the workplace or for the equipment of the workplace, treatment and medical expenses, insurance premium and retirement allowance, damages, costs and compensation that is paid as per an agreement, judicial decision or a legal provision (subject to its being related to the respective work), work and residence expenses that are related to the respective work and that are reasonable in relation to the scope and nature of the relevant work, expenses relating to vehicles used in relation to the work, real tax, duties and charges amortisations indicated in the Turkish Tax Procedural Law. Expenses other than those enumerated under the foregoing article cannot be deducted from tax and any indication of other expenses in company and financial records will violate both the Turkish Tax Procedure Law No. 213 and the Turkish Criminal Law, depending on the facts.

Domestic bribery

23 Legal framework

Describe the individual elements of the law prohibiting bribery of a domestic public official.

Bribing domestic public officials under the Criminal Code is regulated both for individuals who provides benefit to public officials or other persons whom they indicate, as well as for public officials who benefit for themselves or provide benefit to other persons (article 252(1) and article 252(2), Criminal Code). In both cases, bribery takes place in relation to the execution of a public official's duty — in exchange for a bribe the public officials may be asked directly or via intermediaries to perform or not to perform his or her duties. Both the persons granting the benefit and the government official are subject to criminal liability, irrespective of whether the agreement regarding bribery is reached. Sanctions – albeit reduced ones – are imposed on parties proposing to bribe their counterparts, even if the counterparts do not agree to such proposal (article 252(4), Criminal Code).

24 Prohibitions

Does the law prohibit both the paying and receiving of a bribe?

See question 5.

25 Public officials

How does your law define a public official and does that definition include employees of state-owned or state-controlled companies?

The Criminal Code defines 'public official' as any person who performs a public activity through appointment or selection on an unlimited, permanent or temporary basis (article 6(1c)).

26 Public official participation in commercial activities

Can a public official participate in commercial activities while serving as a public official?

Law No. 657 on Public Officials prohibits public officials from being involved in any commercial activity. Therefore, throughout their employment with the government, public officials can neither be employed by nor provide consultancy services to any private entity (article 28).

27 Travel and entertainment

Describe any restrictions on providing domestic officials with gifts, travel expenses, meals or entertainment. Do the restrictions apply to both the providing and receiving of such benefits?

See question 28.

Update and trends

On 30 April 2016, the Turkish Prime Ministry published Circular No. 2016/10 on Increasing Transparency and Strengthening the Fight against Corruption (the Circular) in the Official Gazette. The Circular succeeds the Strategy on Increasing of Transparency and the Fight against Corruption, which was promulgated to be enforced within the period 2010 to 2014. The new Action Plan annexed to the Circular is promulgated to encompass the period between 2016 and 2019.

The action plan is organised under three chapters of precautions, namely:

- precautions aimed at prevention;
- precautions aimed at enforcement of sanctions; and
- precautions aimed at enhancing social awareness.

According to the action plan, some of the precautions aimed at prevention are:

- completing the studies on political ethics;
- the review of the legislation and the effectiveness of the enforcement of the legislation regarding the works that cannot be undertaken by those who leave public service;
- determination of ethics rules for public service professions by the Public Officials Ethics Council;
- increasing the effectiveness of the ombudsman institution;
- a single window system be enforced with regard to customs (which aims to increase the use of technology in customs); and
- review of the Public Procurement Law in light of the European Union legislation, etc.

The action plan prescribes the precautions at enforcement actions as follows:

- the review of the permission system regarding investigations against public officials; and
- preparation of regulations regarding the protection of whistle-blowers within the public sector, private sector and non-governmental organisations.

Increasing the influence of the ethical behaviour principles in the Ministry of National Education curriculum, and supporting social actions regarding fighting against corruption, and clean society are the main elements under the precautions aimed at social awareness.

28 Gifts and gratuities

Are certain types of gifts and gratuities permissible under your domestic bribery laws and, if so, what types?

Article 29 of Law No. 657 explicitly regulates the prohibition of public officials on receiving gifts. According to this article, public officials are prohibited from requesting gifts directly or via intermediaries, accepting gifts for the purpose of providing benefits even if such act does not take place while discharging their duties, or to request to borrow money from business owners or receive such money. Pursuant to the second paragraph of the same article, the Public Officials Council of Ethics is authorised to determine the scope of the prohibition of receiving gifts and, where necessary, request a list, at the end of each calendar year, of gifts that were accepted by public officials who are at least at general director level or an equivalent high-level official.

The Regulation on Ethical Principles prohibits public officials from receiving gifts or obtaining further benefits for themselves, their relatives, third parties or institutions from individuals or legal entities, in relation to their duties. The Regulation on Ethical Principles does not set any monetary limit on such gifts or benefits. According to Resolution No. 2007/1 of the Council of Ethics for Public Officials, the receipt of gift or hospitality, irrespective of its monetary value, constitutes a violation of the rule set forth by both Law No. 657 and the Regulation on Ethical Principles.

However, article 15 of the Regulation on Ethical Principles provides that the following items do not fall within the scope of the rule stipulated thereunder:

- gifts donated to institutions or received on the condition that they are allocated to public service, which will not affect the legal discharge of the institution's duties; registered with the inventory list of the relevant public institution and announced to the public;
- books, magazines, articles, cassettes, calendars, CDs or similar material;
- rewards and gifts received within public contests, campaigns or events;
- souvenirs given in public conferences, symposiums, forums, panels, meals, receptions and similar events;
- advertisement and handicraft products distributed to everyone and having symbolic value; and
- loans extended by financial institutions on market conditions.

In addition to the foregoing, Notice No. 2004/27 on the Public Officials Council of Ethics regulates the duties and obligations of the Council of Ethics, which was established with Law No. 5176 on the Establishment of the Public Officials Council of Ethics and Certain Laws. According to the notice, the Council of Ethics determines the scope of the prohibition on receiving gifts and can request, if need be, at the end of each calendar year, a list of the gifts that have been received by senior-level public officials who are at least of a general manager level or equivalent.

29 Private commercial bribery

Does your country also prohibit private commercial bribery?

The Criminal Code regulates private commercial bribery. Accordingly, if a benefit is provided, offered or promised to the respective individuals; if the respective individuals request or accept such benefit; if such is mediated; and if benefit is provided to another individual because of the foregoing relationship, the general provisions regulating domestic bribery are applicable to individuals acting on behalf of the following entities, irrespective of whether the individual is a public official, and in relation to the execution of the respective individual's duty to directly or, via intermediaries, perform or not perform:

- occupational organisations that are public institutions;
- companies that have been incorporated by the participation of public institutions or entities, or occupational organisations that are public institutions;
- foundations that carry out their activities within a body of public institutions or entities, or occupational organisations that are public institutions;
- associations working in the public interest;
- cooperatives; and
- publicly traded joint-stock companies (article 252(8), Criminal Code).

30 Penalties and enforcement

What are the sanctions for individuals and companies violating the domestic bribery rules?

See questions 15 and 16 respectively for the sanctions imposed on companies and individuals violating domestic bribery rules.

31 Facilitating payments

Have the domestic bribery laws been enforced with respect to facilitating or 'grease' payments?

See question 6.

32 Recent decisions and investigations

Identify and summarise recent landmark decisions and investigations involving domestic bribery laws, including any investigations or decisions involving foreign companies.

One of the most recent cases is a bribery investigation against public authorities working under the Firefighting Department of the Istanbul Metropolitan Municipality and multiple business owners. In October 2014, multiple public authorities and business owners were taken into custody for reasons of soliciting and providing bribes in order for undue work place permits to be provided. The case is ongoing.

In 2015, the adjudication process, against high-level executives of the Turkish Aeronautical Association (the Association) with charges of embezzlement, forgery and bribery started. Allegedly, the president of the Association accepted bribes indirectly, through a shell company that was established by a friend of his son, so that the Association would buy ambulances from a certain company. The case is ongoing.

In June 2016, certain Public Tenders Institute officials were sentenced to imprisonment for abuse of duty. According to the allegations, the sentenced public officials liaised with executives of companies who made complaint applications to the Public Tenders Institute. The public officials allegedly obtained illicit gains through making decisions to the benefit of those companies. Certain executives of the relevant companies were also sentenced to prison for abetting the crime of abuse of duty.

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Ukraine

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1 International anti-corruption conventions

To which international anti-corruption conventions is your country a signatory?

Ukraine has signed and ratified a number of international anti-corruption conventions:

- the Council of Europe Criminal Law Convention on Corruption – entered into force on 1 March 2010;
- the Additional Protocol to the Criminal Law Convention on Corruption – entered into force on 1 March 2010;
- Council of Europe Civil Law Convention on Corruption – entered into force on 1 January 2006;
- the United Nations Convention against Corruption – entered into force on 1 January 2010; and
- the United Nations Convention against Transnational Organized Crime – entered into force on 21 May 2004.

2 Foreign and domestic bribery laws

Identify and describe your national laws and regulations prohibiting bribery of foreign public officials (foreign bribery laws) and domestic public officials (domestic bribery laws).

Legislation prohibiting bribery is spread across a number of Ukrainian laws and regulations, including:

- the Law of Ukraine on Prevention of Corruption of 2014 (the Anti-Corruption Law);
- the Law of Ukraine on the Principles of Preventing and Combating Corruption of 2011;
- the Criminal Code of Ukraine of 2001;
- the Code of Ukraine on Administrative Offences of 1984; and
- the Law of Ukraine on State Civil Service of 1993.

Foreign bribery

3 Legal framework

Describe the elements of the law prohibiting bribery of a foreign public official.

The Criminal Code contains main legal provisions defining which acts constitute bribery and thus are criminal offences.

Receiving a bribe
Under article 368 of the Criminal Code of Ukraine, receiving a bribe is acceptance of an offer, promise or receiving of an unlawful benefit by an official as well as a request for such a benefit in return for taking some action or refraining from it exploiting official authorities vested in this official. Receiving a bribe may be punished by a fine of up to 25,500 hryvnas, by arrest for up to six months, by imprisonment for up to 12 years and by prohibition on being appointed to certain offices or to carrying out certain activity together with confiscation of the briber's property.

Offering or giving a bribe
Article 369 of the Criminal Code of Ukraine defines offering or giving a bribe as offering or promising made to an official to provide him, her or a third person with an unlawful benefit as well as giving such a benefit for taking an action or refraining from it taking advantage of official authorities vested in this official. Such actions may be punished by a fine of up to 12,750 hryvnas, by custodial restraint for up to four years, by imprisonment for up to 10 years together with confiscation or special confiscation.

Provocation of a bribe
According to article 370 of the Criminal Code of Ukraine, provocation of an unlawful benefit is circumstances and conditions deliberately created by an official that provoke offering, promising or giving an unlawful benefit or acceptance of them with the aim to expose the briber thereafter. The penalty for this crime may be custodial restraint for up to five years, by imprisonment for up to seven years and by a fine of up to 12,750 hryvnas.

4 Definition of a foreign public official

How does your law define a foreign public official?

The term 'foreign public officials' is used in Ukraine only in the context of defining the persons liable for crimes related to corruption. Definition of a foreign public official has been borrowed by Ukrainian legislation directly from the UN Convention against Corruption. The main difference between the two lies in considering of foreign arbiter and jury members as foreign public officials by the Ukrainian legislation.

Both the Anti-corruption Law (article 3) and the Criminal Code (articles 18 and 364) contain this definition without any differences between the two sources. The foreign public officials are defined as persons:

- holding a legislative, executive, administrative or judicial office of a foreign country, including members of the jury;
- other persons exercising a public function for a foreign country, including for a public agency or a public enterprise; or
- foreign arbiters authorised to resolve civil, commercial or labour disputes in foreign countries in a process alternative to the court process.

Ukrainian legislation does not count officials of a public international organisations (international civil servant or any person who is authorised by such an organisation to act on behalf of that organisation), members of international parliamentary assemblies where Ukraine is a participant and members and officials of international courts as foreign public officials but just as officials.

5 Travel and entertainment restrictions

To what extent do your anti-bribery laws restrict providing foreign officials with gifts, travel expenses, meals or entertainment?

When determining whether bribery took place, the Anti-Corruption Law and the Criminal Code of Ukraine do not distinguish between types of gifts, considerations and advantages and does not take into account their value. Any such gifts to a foreign public official will be considered as bribes if provided with an intent of bribery.

6 Facilitating payments

Do the laws and regulations permit facilitating or 'grease' payments?

Ukrainian legislation does not permit facilitation or 'grease' payments. Moreover, solicitation of such payments will be considered a bribe.

7 Payments through intermediaries or third parties

In what circumstances do the laws prohibit payments through intermediaries or third parties to foreign public officials?

The offences under the Anti-corruption Law and the Criminal Code do not differentiate between bribery done directly or through intermediaries. Any such payment made through an intermediary will be considered as having been given directly and the intermediary will be considered as an accomplice to the act of bribery in accordance with articles 26, 27, 28 and 29 of the Criminal Code of Ukraine.

8 Individual and corporate liability

Can both individuals and companies be held liable for bribery of a foreign official?

Under the Criminal Code of Ukraine companies are not criminally liable for bribery. However, companies bear civil liability for bribery that is represented in certain negative consequences. In particular, according to the Anti-Corruption Law contracts and other documentation originating from a corrupt offence are considered null and void will lead to other negative consequences defined by civil and commercial legislation (eg, fines, reimbursement of losses, etc).

9 Successor liability

Can a successor entity be held liable for bribery of foreign officials by the target entity that occurred prior to the merger or acquisition?

No, a successor entity cannot be held liable because under the Criminal Code of Ukraine companies are not criminally liable for bribery.

10 Civil and criminal enforcement

Is there civil and criminal enforcement of your country's foreign bribery laws?

Ukrainian legislation provides for both civil and criminal enforcement of foreign bribery laws in Ukraine that are described in other clauses herein.

11 Agency enforcement

What government agencies enforce the foreign bribery laws and regulations?

According to article 216 of the Criminal Procedural Code of Ukraine, the duty to investigate all crimes (with a number of exceptions), including bribery and corruption, lies with the investigators of the Ministry of Internal Affairs.

The one exception stipulated in the same article 216 is investigation of crimes committed by the president of Ukraine, the head of the Supreme Council of Ukraine and his or her deputies, heads of commissions of the Supreme Council of Ukraine and their deputies, members of parliament, the prime minister of Ukraine, members of the Cabinet of Ministers of Ukraine, head and members of the Constitutional, Supreme and High Specialised Courts of Ukraine, attorney general of Ukraine and his or her deputies, other high-ranking (rank 1 to 3) state officials, judges and employees of law enforcement agencies. Crimes committed by the above-mentioned persons are to be investigated by the investigators of the National Anti-Corruption Bureau.

12 Leniency

Is there a mechanism for companies to disclose violations in exchange for lesser penalties?

Speaking about prosecuting for bribing, it should be noted that there is no mechanism for companies to disclose violations in exchange for lesser penalties as companies in Ukraine are not held liable for bribing as was explained in question 8.

13 Dispute resolution

Can enforcement matters be resolved through plea agreements, settlement agreements, prosecutorial discretion or similar means without a trial?

The Criminal Procedure Code of Ukraine provides a possibility of a plea bargain on the recognition of guilt between the prosecutor and the criminal defendant.

Such plea may be made at any time from the moment when a person becomes a suspect until the end of the hearing of the case. Plea bargaining is possible for minor offences, misdemeanours and crimes that resulted in any damage to national or public interests.

Before reaching a settlement the following information is to be taken into account: the defendant's cooperation during the investigation; seriousness of the crime; public interest in a prompt investigation and time to be spent for the relevant criminal proceedings; and public interest in preventing, exposing or putting an end to more crimes.

It should be also noted that the court has to approve the plea agreement reached.

14 Patterns in enforcement

Describe any recent shifts in the patterns of enforcement of the foreign bribery rules.

The establishment of the National Anti-Corruption Bureau may have new impact on enforcement of the foreign bribery rules.

15 Prosecution of foreign companies

In what circumstances can foreign companies be prosecuted for foreign bribery?

According to the legislation of Ukraine, a legal entity may not be prosecuted by itself. Nevertheless, as per amendments to the Criminal Code, a legal entity may be held accountable for actions of its representatives, if they led or potentially could lead to unlawful profit for the legal entity, or were directed at avoiding lawful punishment. In relation to corruption such actions may include committing certain types of bribery (bribery of an official of any legal entity, bribery of a person providing public services, proposal or provision of unlawful benefit, misuse of influence), or non-performance of duties in preventing corruption, if this led to performance of the above-mentioned acts of bribery.

At the same time, the Criminal Code of Ukraine does not provide exceptions for the foreign companies in cases of foreign bribery.

16 Sanctions

What are the sanctions for individuals and companies violating the foreign bribery rules?

Companies involved in bribery may be fined or liquidated, their respective deals can be acknowledged null and void and the profits obtained unlawfully may be confiscated.

As stipulated by the Criminal Code of Ukraine, any losses and damages that took place in connection to involvement of a legal entity in bribery, must be reimbursed in full, the sum of compensation should include the sum of unlawful profit obtained or which could be obtained by the legal entity.

Private individuals may be also fined, arrested and imprisoned, their freedom may be restrained and they can be prohibited from being appointed to certain offices and from carrying out certain activities, and their property relevant to bribery can be confiscated.

17 Recent decisions and investigations

Identify and summarise recent landmark decisions or investigations involving foreign bribery.

One of the latest notorious bribery cases to happen in Ukraine concerns the import of coal from the Republic of South Africa (RSA). There is currently a criminal investigation against officials of Tsentrenergo JSC and State Enterprise Ukrinterenergo and a number of other entities. One of the episodes in this case is entering into an international

contract for purchase of coal from the RSA for Ukrainian thermoelectric power stations. It is reported that the director of State Enterprise Ukrinterenergo entered into a contract with Steel Mont Trading Ltd and bought 1 million metric tons of coal that cannot be used owing to its poor quality. The total amount of the contract was about US$30 million. This deal is considered to be an embezzlement committed in the course of duty. Such an offence is covered by article 191 of the Criminal Code of Ukraine, which provides for a maximum penalty in the form of imprisonment for 12 years.

Considering the fact that the National Anti-Corruption Bureau has recently started its work, there are grounds to expect new foreign bribery cases to be opened in the very near future. For instance, Ukraine's Prime Minister has instructed that an audit of financial and economic activities of the 20 largest state-owned companies is to be conducted. According to the Prime Minister, state-owned enterprises 'remain a wet-nurse' and the foundation of corruption in the country.

He has instructed the checking of the 20 largest state-owned companies, from NJSC Naftohaz Ukrainy and Enerhoatom to Elektrotiazhmash and Odesa Port Plant. According to the Prime Minister, the new State Audit Service should start operating in order to efficiently check on the state companies' activities.

In this case the countries of the European Union and the United States could send law enforcement officers to Ukraine, who would commit themselves to assist Ukrainian colleagues in the organisation of the fight against corruption as well as investigation into certain cases of corruption.

According to the Prime Minister, the members of the mission might open criminal cases abroad regarding the acts of corruption committed beyond the borders of Ukraine.

Financial record keeping

18 Laws and regulations

What legal rules require accurate corporate books and records, effective internal company controls, periodic financial statements or external auditing?

Ukrainian legislation includes a number of laws concerning accurate bookkeeping, audit and submission of financial and tax statements:

- the Tax Code of Ukraine;
- the Commercial Code of Ukraine;
- the Law of Ukraine on Accounting and Financial Reporting in Ukraine;
- the Law of Ukraine on Auditing Activities;
- the Law of Ukraine on Commercial Companies;
- the Law of Ukraine on Joint Stock Companies; and
- the Law of Ukraine on Securities and the Stock Market.

19 Disclosure of violations or irregularities

To what extent must companies disclose violations of anti-bribery laws or associated accounting irregularities?

In general, Ukrainian legislation does not directly oblige companies to disclose violations of anti-bribery or associated accounting irregularities. However, the Anti-Corruption Law, for instance, obliges state and local authorities, legal entities and their subsidiaries to report about known corruption to the relevant authority.

20 Prosecution under financial record keeping legislation

Are such laws used to prosecute domestic or foreign bribery?

On its own, the Ukrainian legislation related to financial record keeping is not used to prosecute domestic or foreign bribery.

21 Sanctions for accounting violations

What are the sanctions for violations of the accounting rules associated with the payment of bribes?

Ukrainian legislation contains general provisions on sanctions for violation of bookkeeping and tax reporting as well as special provisions on sanctions for violation of income-reporting by public officials.

Absence of bookkeeping or violation of bookkeeping rules, non-provision or provision of incorrect financial statements are considered as offences under article 164-1 and article 164-2 of the Code of Ukraine on Administrative Offences and are punished by a fine of up to 340 hryvnas.

Absence of tax reporting or violation of tax-reporting rules are considered as offences under article 163-1 of the Code of Ukraine on Administrative Offences and are punished by a fine of up to 255 hryvnas.

Non-submission or late submission of income reports by public officials are considered as offences under article 172-6 Code of Ukraine on Administrative Offences and are punished by a fine of up to 5,100 hryvnas, confiscation of the income, prohibition from appointment to certain offices or carrying out a certain activity for up to one year.

Update and trends

It should be noted that there is lots of information and allegations about different bribery and corruption cases at all levels of state apparatus and entities, not many of which get to court hearings and even fewer of which end up with passed sentences.

22 Tax-deductibility of domestic or foreign bribes

Do your country's tax laws prohibit the deductibility of domestic or foreign bribes?

The list of deductible expenses is stated in the Tax Code of Ukraine, and expenses on bribe payments are not included in the list.

Domestic bribery

23 Legal framework

Describe the individual elements of the law prohibiting bribery of a domestic public official.

The Code of Ukraine on Administrative Offences contains a number of articles that may apply in bribery cases (they pertain to officials):

- violation of restrictions as to combining offices with other activities (article 172-4);
- violation of restriction as to gift acceptance (article 172-5);
- late submission of tax returns (article 172-6);
- failure to report about conflict of interests (article 172-7);
- illegal use of information available during the course of duty (article 172-8); and
- failure to take actions against corruption offences (article 172-9).

Provisions of the Criminal Code of Ukraine prohibiting bribery have been discussed above. However, a few more cases should be mentioned as regards domestic public officials:

- authority or office abuse (article 364);
- authority abuse committed by management of a private legal entity (article 364-1);
- authority abuse by an official of the law enforcement body (article 365);
- authority abuse by public services providers (auditors, notaries, experts, etc) (article 365-2);
- falsification made by an official (article 366);
- submitting of false tax returns and similar documentation (article 366-1);
- neglect of duty (article 367);
- unlawful enrichment (article 368-2);
- bribery of management of a private legal entity (article 368-3);
- bribery of a public services provider (article 368-4);
- misuse of authority (article 369-2); and
- bribery provocation (article 370).

24 Prohibitions

Does the law prohibit both the paying and receiving of a bribe?

Both paying and receiving of a bribe is prohibited by Ukrainian legislation.

25 Public officials

How does your law define a public official and does that definition include employees of state-owned or state-controlled companies?

For the purposes of prosecution for bribery public officials are defined as persons:

- who permanently, temporarily or under special authority perform functions of representing state or local authorities or permanently or temporarily occupy positions in state or local bodies, state or municipal enterprises, institutions or organisations, related to managerial or business-administrative functions; or
- for whom a special authority to perform such functions was provided by a respective state or local authority, central state executive body with a special authority, authorised body or official of an enterprise, institution or organisation, court or law.

26 Public official participation in commercial activities

Can a public official participate in commercial activities while serving as a public official?

Ukrainian public officials are prohibited by law (article 25 the Anti-Corruption Law) from conducting any paid or commercial activity apart from scholarly, scientific and artistic activities, medical practice, coaching and refereeing practice in sports.

Moreover, the same article 25 stipulates that Ukrainian public officials may not act as members of management or supervisory boards in commercial legal entities (except when they officially manage shares owned by the state or local government).

The same article 25 provides that restrictions mentioned above do not concern deputies of the parliament of the Autonomous Republic of Crimea, deputies of local councils (except those who are elected perpetually), members of the Higher Council of Justice (except those working perpetually), people's assessors and jurors.

27 Travel and entertainment

Describe any restrictions on providing domestic officials with gifts, travel expenses, meals or entertainment. Do the restrictions apply to both the providing and receiving of such benefits?

The existing restrictions apply to both the providing and receiving of such benefits even though they do not differentiate benefits as gifts, meals, etc.

The Anti-Corruption Law provides for prohibition to accept gifts and donations (regardless if done directly or through intermediary) from legal entities or individuals as a reward for decisions, actions or inactions in favour of the giver. This rule applies to a number of potential beneficiaries, such as:

- public officials and officials of local authorities;
- officials in the Ukrainian army and other military units;
- judges, people's assessors and jurors;
- public prosecutors, security service officers, officials of the diplomatic service, customs and tax officers; and
- persons who provide public services (eg, auditors, notaries, experts, etc).

However, there are reasonable exceptions to the aforementioned rules. In particular, these persons may receive and accept gifts that satisfy hospitality and donation customs provided that the gift's cost does not exceed one minimum salary determined on the day the gift or donation is made and total value of gifts or donations within a year by the same person (or group of persons) should not be more than two minimum standards of living determined for one work-capable worker on 1 January of the year in which the gifts are accepted.

28 Gifts and gratuities

Are certain types of gifts and gratuities permissible under your domestic bribery laws and, if so, what types?

See question 26.

29 Private commercial bribery

Does your country also prohibit private commercial bribery?

The following acts punishable under the Criminal Code may be considered as acts of commercial or private bribery:

- bribery of an employee of a legal entity (article 354 of the Criminal Code prohibits offering, promise of provision, provision, transferring or accepting an unlawful benefit to an employee of a legal entity in return for performance or non-performance of certain actions in the interests of the perpetrator or a third party while exercising his or her position);
- bribery of an official of a private legal entity (article 368-3 of the Criminal Code prohibits offering, promising of provision, provision, transferring or accepting an unlawful benefit to an officer of a private legal entity in return for performance or non-performance of certain actions in the interests of the perpetrator or a third party while exercising his or her authority); and
- bribery of a provider of public services (article 368-4 of the Criminal Code prohibits offering, promise of provision, provision, transferring to or accepting an unlawful benefit from a provider of public services in return for the performance or non-performance of certain actions in the interests of the perpetrator or a third party while exercising his or her authority).

30 Penalties and enforcement

What are the sanctions for individuals and companies violating the domestic bribery rules?

See questions 3 and 15 as the law does not differentiate between domestic and foreign bribing in this regard.

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31 Facilitating payments

Have the domestic bribery laws been enforced with respect to facilitating or 'grease' payments?

As was discussed in question 6, Ukrainian legislation does not permit facilitation or 'grease' payments, and solicitation of such payments is bribery. That is why domestic bribery laws are enforced with respect to both facilitating and 'grease' payments.

32 Recent decisions and investigations

Identify and summarise recent landmark decisions and investigations involving domestic bribery laws, including any investigations or decisions involving foreign companies.

Unfortunately, up-to-date statistics on corruption cases in Ukraine are not available. The most recent data shows that in 2012, pursuant to the Plan of the Supreme Court of Ukraine in the first half of 2012 the Supreme Court of Ukraine together with the appellate courts had analysed resolved bribery cases. The task of the analysis was to clarify the nature (essence) of errors that courts make deciding on bribery cases, to investigate conditions and their causes in order to avoid mistakes in the future, and also to ensure implementation of the principles of legality, validity and fairness in determining the sentence for such crimes. According to the State Judicial Administration of Ukraine, there were 767 persons in 2011 convicted for bribery. According to information published by the Supreme Court of Ukraine, the overall analysis showed that the use of anti-corruption legislation by courts in corruption cases is under formation.

At the same time, there are a number of high-profile bribery cases in the news. One of them is a criminal bribery case being investigated now by the state prosecution service. In this example, a state-owned company reportedly sold its products in 2015 to a foreign company under greatly reduced prices that caused damage to the state budget of over 4 billion hryvnas.

United Arab Emirates

Charles Laubach and Tara Jamieson
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1 International anti-corruption conventions

To which international anti-corruption conventions is your country a signatory?

The United Arab Emirates (UAE) ratified the United Nations Convention against Corruption (the Convention) pursuant to Federal Decree No. 8 of 2006. The Arab Convention to Fight Corruption (the Arab Convention) was signed on 21 December 2010 by 21 Arab countries, including the UAE.

2 Foreign and domestic bribery laws

Identify and describe your national laws and regulations prohibiting bribery of foreign public officials (foreign bribery laws) and domestic public officials (domestic bribery laws).

Domestic bribery laws
Bribery is punishable in the UAE according to articles 234 and 236 to 239 of the UAE Penal Code, Federal Law No. 3 of 1987 (the Federal Penal Code), which applies to the UAE as a whole. The Emirate of Dubai also has its own penal code, the Penal Code 1970 (Dubai Penal Code). In addition to the above, two further laws are directly related to bribery. These are Federal Decree-Law No. 11 of 2008 (also known as the 'Federal Human Resources Law') and more recently Dubai Law No. 37 of 2009 on the Procedures for the Recovery of Illegally Obtained Public and Private Funds (Financial Fraud Law). These are each discussed in the relevant sections of this chapter.

Foreign bribery laws
As discussed in question 1, the UAE has ratified the Convention pursuant to Federal Decree No. 8 of 2006 and is a signatory to the Arab Convention. The Arab Convention was entered into with the aim of preventing corruption through the cooperation of the signatories to the Arab Convention, largely in respect of the recovery of assets involved in any circumstances of corruption.

Articles 234 and 236 to 239 of the Federal Penal Code have been amended to extend the bribery provisions to include bribery of foreign public officials.

Foreign bribery

3 Legal framework

Describe the elements of the law prohibiting bribery of a foreign public official.

The Convention as adopted by Federal Decree No. 8 of 2006 requires each state party to adopt such legislative and other measures as may be necessary to establish as a criminal offence the bribery of foreign officials and officials of public international organisations. As noted in question 2, the Federal Penal Code extends to bribery of foreign public officials.

The Federal Penal Code
Articles 234 and 237 of the Federal Penal Code apply to foreign public officials (these provisions also apply to domestic public officials and are discussed in question 23).

In terms of article 234, it is an offence for a foreign public servant to solicit or accept (whether directly or indirectly) for himself, herself or another person, a gift, benefit or other grant that is not due or a promise or anything of the like in order to commit or omit an act in violation of the duties of his or her function. The provisions of this article are stated to apply even if the intent of the said foreign public servant or employee was in fact to refrain from committing or omitting the act or if the request, acceptance or promise is made after fulfilment or omission of such act.

In terms of article 237, it is an offence for any individual who offers (whether directly or indirectly) to a foreign public servant, a gift, benefit or grant that is not due, whether to the benefit of the employee himself or herself or for another person or entity, in order for such employee to commit or omit an act in violation of the duties of his or her function.

Article 237 further provides that it is also an offence for any person who has acted as a mediator between the briber or the receiver in the offering, soliciting, accepting, receiving or promising of bribery.

Article 237 (repeated) provides that it is an offence for any person to promise, offer, grant or give (whether directly or indirectly) a public officer or any other person, a gift, benefit or grant that is not due, to abet such person to abuse his or her power, whether actual or presumed, in order to obtain, from a public department or authority, an unlawful benefit for the benefit of the original abettor of such act or for the benefit of any other person. This article further provides that it is an offence for any public officer or any other person to request or accept a benefit, gift or grant that is not due, whether for himself or herself or for another person (whether directly or indirectly), so that such person abuses his power, whether actual or presumed, in order to obtain, from a public department or authority, that unlawful benefit.

4 Definition of a foreign public official

How does your law define a foreign public official?

Article 6 of the Federal Penal Code defines a foreign public official as 'any person in a legislative, executive, administrative or judicial position at another country, whether permanently or temporarily, be elected or appointed, and whether with or without pay and any person entrusted with a public service'.

5 Travel and entertainment restrictions

To what extent do your anti-bribery laws restrict providing foreign officials with gifts, travel expenses, meals or entertainment?

See question 3.

6 Facilitating payments

Do the laws and regulations permit facilitating or 'grease' payments?

None, in the context of a foreign public official.

7 Payments through intermediaries or third parties

In what circumstances do the laws prohibit payments through intermediaries or third parties to foreign public officials?

See question 3.

8 Individual and corporate liability

Can both individuals and companies be held liable for bribery of a foreign official?

The relevant provisions of the Federal Penal Code apply to any person who bribes a foreign official, whether an individual or otherwise.

9 Successor liability

Can a successor entity be held liable for bribery of foreign officials by the target entity that occurred prior to the merger or acquisition?

This would be possible if there were corporate continuity, but no such instances are known to have been brought before the local courts.

10 Civil and criminal enforcement

Is there civil and criminal enforcement of your country's foreign bribery laws?

Federal Penal Code

Article 234: An offence under this article is punishable by temporary imprisonment. The provisions of the present article shall apply even if the intent of the foreign public servant was in fact to refrain from committing or omitting the act or if the request, acceptance or promise is made after fulfilment or omission of such act.

Article 237: An offence under this article is punishable by confinement for a period of not more than five years. The article further provides that it is punishable by confinement for a period of not more than five years for any person who has acted as a mediator between the briber or the receiver in the offering, soliciting, accepting, receiving or promising of bribery.

Article 237 (repeated): An offence under this article is punishable with a fine equal to what is requested, offered or accepted, but no less than 5,000 dirhams.

Article 238: This article provides that the offender shall, in all the cases mentioned in the preceding paragraphs, be punished with a fine equal to what he or she requested, offered or accepted, provided that such fine shall not be less than 5,000 dirhams. Furthermore, the gift accepted by or offered to the public officer or the individual to whom a public service is assigned shall be confiscated.

Article 239: This article provides that the briber or the mediator shall be exempted from penalty if he or she informs the judicial or administrative authorities of the crime before it is discovered. This article further provides that the Federal Penal Code shall apply to any person who commits, outside of the UAE, any of the crimes detailed in articles 234 and 237, if the criminal or the victim is a UAE citizen or if such crime is committed by an employee of the public or private sector of the UAE, or it involves public property. Article 6 of the Federal Penal Code defines public property as:

(i) property that is fully or partially owned by any of the federal or local authorities, federal or local public establishments or institutions or companies owned, either wholly or partially, by the federal Government, local governments, societies and associations of public welfare and

(ii) any property that is subject to the management or supervision of any of the entities set forth in paragraph (i) or of which it has the right to use or exploit.

Any criminal or civil lawsuit will not be terminated, and the punishment will not be extinguished, because of the expiry of any time period limitation.

11 Agency enforcement

What government agencies enforce the foreign bribery laws and regulations?

As the UAE has yet to promulgate laws in implementation of the Convention, there is presently no government agency that has been appointed to enforce foreign bribery laws and regulations.

12 Leniency

Is there a mechanism for companies to disclose violations in exchange for lesser penalties?

None, in the context of bribery of foreign public officials.

13 Dispute resolution

Can enforcement matters be resolved through plea agreements, settlement agreements, prosecutorial discretion or similar means without a trial?

No, in the context of bribery of foreign public officials, given the absence of relevant legislation.

14 Patterns in enforcement

Describe any recent shifts in the patterns of enforcement of the foreign bribery rules.

The Federal Penal Code provisions relating to foreign bribery rules only entered into force in 2016, so there is no information yet available to discuss patterns of enforcement of such rules.

15 Prosecution of foreign companies

In what circumstances can foreign companies be prosecuted for foreign bribery?

The Federal Penal Code now applies to foreign entities so would apply to any company or individual involved in corruption in the UAE, and such persons would be held liable even if they were not resident in the UAE.

16 Sanctions

What are the sanctions for individuals and companies violating the foreign bribery rules?

See question 10.

17 Recent decisions and investigations

Identify and summarise recent landmark decisions or investigations involving foreign bribery.

There are no decisions or investigations that we are aware of involving foreign bribery.

Financial record keeping

18 Laws and regulations

What legal rules require accurate corporate books and records, effective internal company controls, periodic financial statements or external auditing?

Federal Law No. 2 of 2015 on Commercial Companies (the Commercial Companies Law) contains general provisions with respect to financial statements and the appointment of external auditors with respect to UAE companies. The following are required to be fulfilled with respect to the appointment of external auditors:

- they must be listed in the Register of Auditors and Accountants in accordance with Federal Law No. 12 of 2014 Regarding Organisation of Auditing Profession (Federal Law No. 12 of 2014), which regulates the professions of auditing and accountancy, and have at least five years' experience auditing private and public joint stock companies;
- the auditors appointed by the company may not hold positions as a participant in the company's establishment, be a member of the board of directors of the company or hold any technical, administrative or executive positions; and
- the auditors must not be partners or agents of any of the founders of the company or of any of the members of the board of directors of the company or related to any member of the board of directors up to the fourth degree.

Article 153 of the Commercial Companies Law (which applies to public joint-stock companies and private joint-stock companies) restricts

a company from offering any type of loan to a member of the board of directors. This prohibition extends to the spouse, children and relatives to the second degree of the director and to any company that is at least 20 per cent owned by the director or his spouse, children or relatives to the second degree. In terms of article 242 of the Commercial Companies Law, a company (ie, a public joint-stock company or a private joint-stock company) is also restricted from making any donations within two years of incorporation of the company. In order that a donation be valid, a special resolution is required, the donation must not be in excess of 2 per cent of the average net profits of the company during the two financial years preceding the year in which the donation is made, the donation is for the benefit of society and the beneficiary of the donation must be disclosed in the company's audited financial report and balance sheet.

Article 222 of the Commercial Companies Law prohibits a private or public joint stock company from providing financial aid to any shareholder to enable him or her to hold shares, bonds or sukuks issued by the company, whether such financial aid takes the form of a loan, gift or donation, collateral security or third party guarantee.

Further, Ministerial Resolution No. 518 of 2009 Concerning Governance Rules and Corporate Discipline Standards applies to all companies and institutions whose securities have been listed on a securities market in the UAE and to their board members. The said Ministerial Resolution contains detailed provisions for internal control, the formation of an audit committee and the appointment of external auditors.

19 Disclosure of violations or irregularities

To what extent must companies disclose violations of anti-bribery laws or associated accounting irregularities?

The Federal Money Laundering Law (Federal Law No. 9 of 2014) imposes a general requirement on all parties to report suspected incidents of money laundering offenses to a unit in the Central Bank of the UAR known as the Anti-Money Laundering and Suspicious Cases Unit (AMLSCU). This obligation applies to companies and their auditors. The Federal Money Laundering Law also grants protection from retaliation to parties making such reports. This aside, there is no general obligation to report bribery offences and associated accounting irregularities.

20 Prosecution under financial record keeping legislation

Are such laws used to prosecute domestic or foreign bribery?

There are no known instances of such prosecutions under the bribery laws. However, the Dubai Financial Services Authority (DFSA) has imposed sanctions recently on parties licensed in the Dubai International Financial Centre (DFIC) for failure to observe the record keeping and accounting requirements imposed by the DFSA in implementation of the Federal Money Laundering Law.

21 Sanctions for accounting violations

What are the sanctions for violations of the accounting rules associated with the payment of bribes?

There are no specific sanctions against violations of accounting rules which are associated with the payment of bribes. However, the Federal Money Laundering Law provides that any individual who perpetrates or assists in the commission of any of the following acts in respect of property (as defined by article 2(e) of the Federal Money Laundering Law, which includes, inter alia, assets obtained through an offence of bribery, embezzlement and damage to public property) will be considered to have committed an act of money laundering:

- transfer, conveyance or depositing of the proceeds with intention to conceal or camouflage the illicit source thereof;
- concealment or camouflaging of the nature, source, location, disposition, movement, pertinent rights or ownership of the proceeds; or
- acquisition, possession or usage of such proceeds.

Pursuant to this provision, it can be inferred that any auditor who commits or assists in committing any of the aforementioned acts would be liable under the Federal Money Laundering Law. Unlike the predecessor statute, the Federal Money Laundering Law now contains a long and 'open' list of predicate offences.

22 Tax-deductibility of domestic or foreign bribes

Do your country's tax laws prohibit the deductibility of domestic or foreign bribes?

The UAE is a tax-free regime and does not have provisions in law regulating any tax-deductibility in the country.

Domestic bribery

23 Legal framework

Describe the individual elements of the law prohibiting bribery of a domestic public official.

The Federal Penal Code

Provisions are contained in articles 234 and 236 to 239 of the Federal Penal Code.

In terms of article 234, it is an offence for any public officer or person to whom a public service is assigned, or a foreign public servant or employee of an international organisation to solicit or accept (whether directly or indirectly) for himself or for another person, a gift, benefit or other grant that is not due or a promise or anything of the like in order to commit or omit an act in violation of the duties of his function. The provisions of this article are stated to apply even if the intent of the said public officer, individual entrusted with a public service, foreign public servant or employee was in fact to refrain from committing or omitting the act or if the request, acceptance or promise is made after fulfilment or omission of such act.

In terms of article 236, it is an offence for any person who administers an entity or establishment that pertains to the public sector, or who is employed by either one in any capacity, who solicits or accepts (whether directly or indirectly) for himself, herself or for another person, a gift, benefit or other grant that is not due or a promise of anything of the like in order to commit or omit an act which is not part of his or her function. The provisions of this article are stated to apply even if the intent of the said person was in fact to refrain from committing or omitting the act or if the request, offer or promise is made after fulfilment or omission of such act.

Article 236 further provides that it is an offence for any person who promises another person managing an entity or establishment of the private sector, or who is employed by him or her in any capacity, with a gift, benefit or grant that is not due, or who offers or grants the same (whether directly or indirectly) whether for his or her benefit or for the benefit of another person, to perform or stop performing any of his or her duties or violating thereof.

In terms of article 237, it is an offence for any individual who offers (whether directly or indirectly) to a public officer or to any person to whom a public service is assigned, a foreign public servant or employee of an international organisation, a gift, benefit or grant that is not due, whether to the benefit of the employee himself or herself or for another person or entity, in order for such employee to commit or omit an act in violation of the duties of his or her function.

Article 237 further provides that it is also an offence for any person who has acted as a mediator between the briber or the receiver in the offering, soliciting, accepting, receiving or promising of bribery.

Article 237 (repeated) provides that it is an offence for any person to promise, offer, grant or give (whether directly or indirectly) a public officer or any other person, a gift, benefit or grant that is not due, to abet such person to abuse his or her power, whether actual or presumed, in order to obtain, from a public department or authority, an unlawful benefit for the benefit of the original abettor of such act or for the benefit of any other person. This article further provides that it is an offence for any public officer or any other person to request or accept a benefit, gift or grant that is not due, whether for himself, herself or another person (whether directly or indirectly), so that such person abuses his or her power, whether actual or presumed, in order to obtain, from a public department or authority, that unlawful benefit.

Articles 238 and 239 of the Federal Penal Code are discussed in question 30.

The Dubai Penal Code

The Dubai Penal Code 1970 (the Dubai Penal Code) contains provisions on the offences of corruption and the abuse of public office. These provisions prohibit the following:

- article 118 – the taking of a gratification by a public servant in respect of an official act;
- article 119 – taking a gratification in order, by corrupt or illegal means, to influence a public servant in respect of an official act;
- article 120 – offering or giving a gratification to a public servant in respect of an official act;
- article 121 – the obtaining of any valuable thing by a public servant, without consideration, from a person concerned in any proceeding or business transacted by such public servant; and
- article 122 – the offering of a valuable thing to a public servant without consideration, by a person concerned in any proceeding or business transacted by that public servant.

Financial Fraud Law

The Financial Fraud Law came into force on 31 December 2009. The provisions of this law are applicable to any person who is convicted of a crime in Dubai in relation to improperly obtaining public funds or illicit monies (or both). The aim of the Financial Fraud Law is to impose tougher sentences for financial crimes but simultaneously to be set aside upon repayment of funds. The Financial Fraud Law identifies two punishable acts:

- the receipt of illicit monies (monies earned whether directly or indirectly as a result of an action which constitutes a punishable crime); and
- the receipt of public funds (funds owned by the government, government authorities or institutions or companies owned by the government or government authorities or in which they hold shares).

The Financial Fraud Law also allows for the release of those convicted once the illegally obtained funds are returned or settlement agreements are concluded. In furtherance of this aim, the Financial Fraud Law allows accused persons access to all necessary external communications to facilitate the settlement of illicit monies or to reach a settlement with creditors.

Federal Human Resources Law

The Federal Human Resources Law governs most aspects of public service employment with the federal government of the UAE.

The Federal Human Resources Law sets forth specific provisions concerning the personal conduct of federal government employees generally, and more specifically in relation to gifts, bribes and conflicts of interest.

In addition to the federal law, local government employees are subject to local counterparts of the Federal Human Resources Law. For example, employees of the Dubai government are governed by the provisions of the Dubai Human Resources Management Law No. 27 of 2006 (the Dubai Human Resources Law). Generally, while not described below, the bribery and conflict of interest provisions of local government human resources law differ more in scope (ie, they affect only local government employees rather than federal employees) than substance from the provisions of the Federal Human Resources Law.

Article 70 of the Federal Human Resources Law prohibits an employee from accepting, requesting or offering bribes. The said law defines the term 'bribes' to mean offering any amount of money, or a particular service, or anything of material or moral value for an employee in exchange for the employee:

- accelerating any work that the employee is required by his work to do;
- failing to do assigned work; or
- to mediate to another to finish an application or take any procedure in violation of the applicable laws of the UAE.

The term 'employee' is defined in the said law to mean anyone who occupies one of the jobs contained in the general budget of the government of the UAE.

Code of Professional Conduct and Ethics

Cabinet Resolution No. 15 of 2010 Approving the Code of Professional Conduct and Ethics (the Code) was promulgated during 2010. The stated objective of the Code is to create and develop a corporate culture for the public servant, enhancing the professional values and the sense of responsibility as well as abiding by the highest ethics in dealing with superiors, colleagues or service beneficiaries according to the basic values of human resources and providing the best services to beneficiaries and strengthening the confidence and credibility in the government sector.

The term 'public servant' is defined in the Code to mean any person holding a position in one of the federal authorities. The term 'federal authority' in turn is defined to include ministries or federal public entities and institutions. The Code addresses the basic values and rules of professional conduct and ethics of public servants, commitments of the public servant, the federal authority's obligations towards its employees (ie, public servants) and certain general guidelines.

In the present context, the general guidelines are of particular interest. They provide that the public servant may not abuse his position, duties or relations established in the course of his work, position or powers to obtain any service, benefit or interest from any person for his or her personal interest or for the interest of any relative up to the fourth degree.

The general guidelines also provide that the public servant must avoid any actual or potential conflict of interest. The term 'conflict of interest' is defined by the Code to mean any official procedure, situation or decision taken by the employee causing a conflict of interest between his personal activities and the government interests. In particular, the Code provides as follows:

- the public servant shall not undertake any actions or tasks that are likely to give an impression of the existence of conflict of interest;
- neither the public servant nor any relative up to the fourth degree shall accept any gifts, hospitalities, or services from any person if it results in any obligation, if it has a direct or indirect effect on his or her objectivity in implementing his duties, if it might affect his or her decisions, or if it might make him or her subject to obligations in consideration of what he or she accepted;
- the public servant shall not participate in any official operation or decision which directly or indirectly affects the awarding of any procurement contract to any contractor or supplier related to him or her up to the fourth degree;
- the public servant shall not take part in any official operation or decision that is likely to cause the granting of any benefits, lands or licences to any of his or her relatives up to the fourth degree;
- the public servant shall not be involved in any operation or decision that might directly or indirectly affect the success of any supplier, contractor or business enterprise through obtaining a percentage, share or any material interest; and
- the public servant must not use his or her position to promote any product or service that does not form a part of the function of his or her employment contract, or reveal any information which he or she gains in the course of performing the duties of his or her position to attain certain goals or obtain any benefit or special consideration from any person.

24 Prohibitions

Does the law prohibit both the paying and receiving of a bribe?

As already mentioned in question 23, the Federal Penal Code and the Dubai Penal Code make punishable both the act of receiving a bribe as well as paying a bribe. The Federal Penal Code also provides for punishment of any individual who acts as an intermediary in the giving or receiving of the bribe. However, under the Federal Penal Code, the briber or the mediator is exempted from such punishments if the briber or the mediator informs the judicial or the administrative authorities of the crime before it is discovered.

25 Public officials

How does your law define a public official and does that definition include employees of state-owned or state-controlled companies?

Turning first to the Federal Penal Code, the term 'public official' is not defined but the term 'public servant' is defined as any person in a

federal or local position, whether legislative, executive, administrative or judicial, whether appointed or elected such as:

- individuals who are entrusted with public authority and employees working in ministries and government departments;
- members of the armed forces;
- employees of security bodies;
- members of the judiciary, chairs and members of legislative, advisory and municipal boards;
- any individual assigned to a certain task by a public authority, to the extent of the delegated task;
- chairs and members of the boards of directors, directors and other employees of public authorities and institutions, as well as companies owned, wholly or partially by the federal government or local government; and
- chairs and members of the boards of directors, directors and other employees of societies and associations of public welfare.

The Federal Penal Code further provides that, as entrusted with a public service, any individual who does not belong to any of the above categories and performs a job relating to public service by virtue of a mandate given to him or her by a public servant who is authorised to do so by the laws and regulations within the limits of the job assigned to him or her is also considered a public servant.

Turning to the Dubai Penal Code, the term 'public official' is not defined, but the term 'persons employed with public service or public servant' is defined as any person holding any of the following offices or performing the duty thereof, whether as deputy or otherwise and whether with pay or without it:

- any office of any kind, the power of appointing a person to which or of removing from which is vested in the ruler or in any government department of the ruler or in any committee or council appointed by the ruler or by his order or under or in pursuance of any law;
- any office to which a person is appointed or nominated by law;
- any civil office, the power of appointing to which or removing from which is vested in any person or persons holding an office of any kind, included in either of the two prior bullet points;
- any office of any kind, the power of appointing a person to which or of removing from which is vested in the Trucial States Council or in any department or other organisation thereof; or
- any office of arbitrator or umpire in any proceeding or matter submitted to arbitration by order or with the sanction of any court, or in pursuance of any law, and the said term further includes:
  - any person employed to execute any process of a court;
  - all persons employed in any department of the Municipal Council; and
  - a person acting as a minister of religion of whatever denomination insofar as he perform functions in respect of the notification of intending marriage or in respect of solemnisation of marriage, or in respect of making or keeping of any register or certificate of marriage, birth, baptism, death, or burial, but not in any other respect.

The above definitions in the Federal Penal Code and the Dubai Penal Code would cover employees of state-owned or state-controlled companies.

26 Public official participation in commercial activities

Can a public official participate in commercial activities while serving as a public official?

The UAE Constitution

Article 62 of the UAE Constitution provides that during the term of office, the Prime Minister, his or her representatives or any federal minister may not exercise any professional, commercial or finance business, or engage in any commercial transaction with the federation's government or the UAE governments, or hold more than one official position in a UAE government.

The Federal Human Resources Law

The Federal Human Resources Law sets forth specific provisions concerning the personal conduct of federal government employees generally, and more specifically in relation to gifts, bribes and conflicts of interest.

Further, government employees are subject to prohibitions on performing any work or conducting any business other than that prescribed by official duties.

Article 66 of the Federal Human Resources Law provides a series of rules to guide employee conduct. Among these general rules are the following: to exercise professional functions in good faith; to adhere to the highest ethical standards; and not to exploit information obtained in the course of professional duties.

Article 70 of the Federal Human Resources Law provides that an employee shall not accept gifts unless they are symbolic advertising or promotional gifts and bear the name and emblem of the entity on behalf of whom the gift was presented. The article adds that each ministry shall define the organisational unit permitted to accept gifts on its behalf for distribution in accordance with the regulations and standards adopted by the ministry.

Article 70 goes on to state that an employee shall not distribute gifts received from outside the government except under the name of the ministry and gifts shall only be distributed through the organisational unit approved to do so by the ministry.

Article 71 of the Federal Human Resources Law provides that an employee shall in the course of performing his or her duties avoid any conflict of interest that may occur (or been seen to occur) between his or her interests and those of the government. The article provides that the employee must particularly avoid:

- participating in a formal decision or operation that may directly or indirectly affect the success of a contractor or supplier with whom the employee has a relationship;
- participating in any formal decision or operation that might directly or indirectly affect the ability of a supplier or contractor or a project to which the employee is a partner in any form to obtain a share or a percentage or a material benefit;
- participating in any decision that might lead to granting of benefits or any lands or permits to any of his relatives; and
- exploiting his or her career or divulging any information obtained by his or her work to achieve certain objectives or to obtain a service or special treatment from any party.

Article 72 of the Federal Human Resources Law prohibits a non-national employee of a federal government ministry from having any employment outside that ministry under any circumstances without the prior written consent of the ministry. Non-national employees are further prohibited from owning shares in companies other than public shareholding companies, without the prior written consent of ministry for which he or she works.

Federal Law No. 4 of 1998

Federal Law No. 4 of 1998, as amended by Federal Law No. 9 of 2008, governs a wide range of matters relating to the diplomatic and consular corps of the UAE. Included among these matters are conflict-of-interest rules.

Article 45 prohibits members of the federal diplomatic and consular corps from having any interest in any works or contracts related to the function of the Federal Ministry or office of which the diplomat or consul is a member. The said article also restricts such members from carrying out business in favour of third parties with or without salary even after official working hours, unless by permission of the minister.

Federal Law No. 6 of 2004

Federal Law No. 6 of 2004 (the Federal Armed Forces Law) concerns the service of officers in the armed forces. The law contains certain express provisions relating to the conduct of armed forces personnel with regard to conflicts of interest and gifts.

Article 47 of the Federal Armed Forces Law prohibits an officer from undertaking work for third parties under any circumstances without the permission of the chief of staff.

Article 48 of the Federal Armed Forces Law prohibits an officer from having any interest, whether personally or through an intermediary, in any works or contracts related to the armed forces with the exception to lease of property owned by him or her.

Federal Law No. 7 of 2004

Federal Law No. 7 concerns the service of enlisted personnel in the armed forces. This law prohibits the submission of bids on armed

forces' tenders by members of the armed forces, the awarding of contracts to members of the armed forces and the purchasing of items from members of the armed forces.

Article 47 of this law prohibits an officer from accepting gifts of any sort whatsoever, whether directly or indirectly. No exceptions are specified.

The term 'armed forces' means the armed forces of the United Arab Emirates. The term 'officer' means any military rank holder under the provisions of the law.

Decision No. 12 of 1986

Decision No. 12 of 1986 of the deputy supreme commander of the armed forces prohibits a member of the armed forces from a direct or indirect interest in any works, agreements or contracts relating to the armed forces, with the exception of building tenancy contracts. The regulations also prohibit members of the armed forces from submitting bids on armed forces' tenders.

Ministerial Resolution No. 20 of 2000

Ministerial Resolution No. 20 of 2000, also known as the Federal Tenders Regulation, promulgated regulations restricting ministry employees from having an interest in contracts formed with the government departments of the UAE.

Article 11 of the Federal Tenders Regulation prohibits an employee of a UAE ministry from having a direct or indirect interest in contracting works or contracts pertaining to the ministry in which the employee is employed.

Dubai Law No. 6 of 1997

Dubai Law No. 6 concerns the rules and procedures regarding contracts formed with government departments of the emirate of Dubai.

Contracts to which the requirements of the law apply are: those contracts ensuing expenses on a department and which are entered into for the supply of materials, the execution of works, or the provision of various types of services; or those contracts which are entered into for the generation of revenue to the department and which are entered into for selling or leasing moveable or immoveable assets, or any other contracts generating revenue.

Any person who enters into a contract with a government department must not be an employee of the department and must not be related to the first degree with the officials entrusted with the contracting.

'Department' means any government department including any government establishment, organisation or authority in the Dubai Emirate.

'Contract' means any written text of agreement together with all its appendices, as concluded between a department and any other public or private, natural or artificial person for the supply of materials, the execution of works, or the provision of services including materials purchasing orders and assignment orders issued for works and services on their acceptance.

Dubai Human Resources Law

In addition to the federal law, local government employees are subject to local counterparts of the Federal Human Resources Law. For example, employees of the Dubai government are governed by the provisions of the Dubai Human Resources Law. Generally, the bribery and conflict of interest provisions of local government human resources law differ more in scope (ie, they affect only local government employees rather than federal employees) than substance from the provisions of the Federal Human Resources Law.

27 Travel and entertainment

Describe any restrictions on providing domestic officials with gifts, travel expenses, meals or entertainment. Do the restrictions apply to both the providing and receiving of such benefits?

Given the position in the Federal Penal Code, the Dubai Penal Code, the Federal Human Resources Law and the Dubai Human Resources Law with respect to bribes, gifts and conflicts of interest, we do not believe that gifts, travel expenses, meals or entertainment can be offered to or received by domestic officials.

Update and trends

The amendment to the relevant provisions of the Federal Penal Code in 2016 is a significant change to the anti-corruption law in the UAE as it now covers foreign as well as domestic entities and any individual or company involved in corruption in the UAE, whether or not such persons are resident in the UAE.

28 Gifts and gratuities

Are certain types of gifts and gratuities permissible under your domestic bribery laws and, if so, what types?

The Federal Human Resources Law and the Dubai Human Resources Law both prohibit any government employee from accepting any gifts unless they are symbolic advertising or promotional gifts and bear the name of the emblem of the entity presenting them. The ministry can, however, specify the organisational units that are allowed to accept such gifts and government employees are allowed to accept gifts made in the name of the concerned ministry. A public official is further prohibited from making or distributing gifts except under the name of the ministry and the organisational unit approved by the ministry.

29 Private commercial bribery

Does your country also prohibit private commercial bribery?

Yes. See article 236 of the Federal Penal Code discussed in question 23.

30 Penalties and enforcement

What are the sanctions for individuals and companies violating the domestic bribery rules?

Federal Penal Code

Article 234: An offence under this article is punishable by temporary imprisonment. The provisions of the present article shall apply even if the intent of the said public officer, individual entrusted with a public service, foreign public servant or employee was in fact to refrain from committing or omitting the act or if the request, acceptance or promise is made after fulfilment or omission of such act.

Article 236: An offence under this article is punishable by imprisonment for a period not exceeding five years.

Article 237: An offence under this article is punishable by confinement for a period of not more than five years. The article further provides that it is punishable by confinement for a period of not more than five years for any person who has acted as a mediator between the briber or the receiver in the offering, soliciting, accepting, receiving or promising of bribery.

Article 237 (repeated): An offence under this article is punishable with a fine equal to what is requested, offered or accepted, but no less than 5,000 dirhams.

Article 238: This article provides that the offender shall, in all the cases mentioned in the preceding paragraphs, be punished with a fine equal to what he or she requested, offered or accepted, provided that such fine shall not be less than 5,000 dirhams. Furthermore, the gift accepted by or offered to the public officer or the individual to whom a public service is assigned shall be confiscated.

Article 239: This article provides that the briber or the mediator shall be exempted from penalty if he or she informs the judicial or administrative authorities of the crime before it is discovered. This article further provides that the Federal Penal Code shall apply to any person who commits, outside of the UAE, any of the crimes detailed in articles 234, 236 and 237, if the criminal or the victim is a UAE citizen or if such crime is committed by an employee of the public or private sector of the UAE, or it involves public property. Any criminal or civil lawsuit will not be terminated, and the punishment will not be extinguished, because of the expiry of any time period limitation.

Dubai Penal Code

Article 118 provides for imprisonment for a term not exceeding three years, or a fine not exceeding 5,000 riyals, or both.

Article 119 provides for imprisonment for not more than three years or to a fine not exceeding 5,000 riyals, or to both.

Article 120 provides for imprisonment for a term not exceeding two years or to a fine not exceeding 3,000 riyals or to both.

Article 121 provides for imprisonment for a period not exceeding one year, or to a fine not exceeding 1,000 riyals, or to both.

Article 122 provides for imprisonment for a term not exceeding one year or to a fine not exceeding 1,000 riyals or to both.

(Reference to 'riyals' should be read as UAE dirhams.)

The Financial Fraud Law

Article 2 provides that if it is established through a final and conclusive judgment that the convicted person (debtor) collected illicit monies and failed to settle the same for whatever reason, the judge shall issue an order upon request by the (creditor) to imprison the convicted person for the following periods:

- imprisonment for five years if the illicit monies required to be settled are not less than 500,000 dirhams and not more than 1 million dirhams;
- imprisonment for 10 years if the illicit monies required to be settled are not less than 1 million dirhams and not more than 5 million dirhams;
- imprisonment for 15 years if the illicit monies required to be settled are not less than 5 million dirhams and not more than 10 million dirhams; or
- imprisonment for 20 years if the illicit monies required to be settled are more than 10 million dirhams.

Article 3 provides that if it is established through a final and conclusive judgment that the convicted person (debtor) collected public funds and failed to settle the same for whatever reason, the judge shall issue an order upon a request by the (creditor) to imprison the convicted person according to the periods and amounts set out in article 2 of the Financial Fraud Law.

Article 4 provides that the convicted person (debtor) sentenced under the provisions of this law shall be imprisoned away from those convicted in penal cases. The Prison Administration shall provide the proper communication facilities between the convicted person and others in order to settle the illicit monies or to reach a settlement with the creditors.

Article 5 provides that without prejudice to any other penalty to which the debtor is sentenced under any other law, the convicted person shall be released before the expiry of the imprisonment term if the amounts are settled or if a settlement is reached with the creditor.

Article 6 provides that if the debtor is a legal entity, the imprisonment order shall be issued against the person to whom the failure to pay back the debt is attributed.

31 Facilitating payments

Have the domestic bribery laws been enforced with respect to facilitating or 'grease' payments?

There appears to be a steady stream of incidents involving facilitation payment offences, which are indeed prosecuted and punished when detected. Most of them are not reported, largely in light of the low monetary values involved.

32 Recent decisions and investigations

Identify and summarise recent landmark decisions and investigations involving domestic bribery laws, including any investigations or decisions involving foreign companies.

Several bribery incidents were reported in the local press during 2016, with a substantial range in the amounts of payments that were offered and the types of favours at issue.

In January 2016, a visa officer was jailed for one year and fined 150,000 dirhams for accepting 400,000 dirhams in bribes to rectify the illegal visa status of 319 visitors.

In March 2016, an Indian national (a purchasing manager at an oil firm) was jailed for three years for accepting a bribe of 150,000 dirhams so that a company could win a tender for supplying equipment to his firm.

In April 2016, a Dubai driving examiner was accused of accepting bribes, with one such bribe of 6,000 dirhams from an Indian national to pass his test who had failed his driving test for the third time. The trial was adjourned and no details of the outcome have been reported yet.

In October 2016, the Dubai Criminal Court heard a case where a shipping company manager accepted a bribe of 214,000 dirhams to continue contracting with a client, even though he had been instructed not to as the client owed a significant debt of 8.6 million dirhams to the company in unpaid fees. No details of the outcome have been reported yet.

In October 2016, a Sharjah police officer was jailed for three years and fined 3,000 dirhams for accepting a bribe of 3,000 dirhams to release a prisoner.

In October 2016, three Ministry of Labour employees were accused of forging labour transactions in exchange for a 4.2 million dirhams bribe. The trial was adjourned and no details of the outcome have been reported yet.

UK-based building consultancy Sweett Group was fined 11.9 million dirhams after being convicted of a bribery offence that took place in the UAE. It related to securing a contract with the real estate division of a local insurance company for the building of a hotel in Abu Dhabi (Sweett Group pleaded guilty in December 2015).

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1 International anti-corruption conventions

To which international anti-corruption conventions is your country a signatory?

The United Nations International Convention against Corruption was signed on 9 December 2003 and ratified on 9 February 2006. UK ratification extended to the British Virgin Islands in 2006.

The United Nations Convention against Transnational Organized Crime was signed on 14 December 2000 and ratified on 9 February 2006.

The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-Bribery Convention) was signed on 17 December 1997 and ratified on 14 December 1998. UK ratification extended to the Isle of Man in 2001.

The Council of Europe Criminal Law Convention on Corruption (Criminal Convention) was signed on 27 January 1999 and subsequently ratified on 9 December 2003. The UK made a number of reservations in accordance with article 37 of the Convention; these are available for examination on the Council of Europe's website.

The Additional Protocol to the Criminal Convention was signed on 15 May 2003 and ratified on 12 December 2003. The Group of States against Corruption (GRECO) is responsible for monitoring the implementation of the convention and the additional protocol.

The Council of Europe Civil Law Convention on Corruption (Civil Law Convention) was signed on 8 June 2000 but is not yet ratified.

The EU Convention on the Protection of the European Communities' Financial Interests and Protocols was adopted by member states on 26 July 1995 and entered into force on 17 October 2002, having been ratified by all member states.

The Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States of the European Union (Convention on EU Officials) was adopted by the member states on 26 May 1997 and ratified by the UK in April 1999.

2 Foreign and domestic bribery laws

Identify and describe your national laws and regulations prohibiting bribery of foreign public officials (foreign bribery laws) and domestic public officials (domestic bribery laws).

The Bribery Act 2010 came into force on 1 July 2011, sweeping away the previous UK bribery legislation but retaining the common law offence of misconduct in a public office, as discussed below. It replaced the statutory regime with two general offences of bribery (giving and receiving), a third specific offence of bribing a foreign public official and, finally, a new corporate offence of failing to prevent bribery by not having adequate procedures in place. The Act is not retrospective; and as such, a working knowledge of the old law will be required for the foreseeable future, with many cases likely to straddle both the new and the old regimes.

The current offences can be found in sections 1, 2, 6 and 7 of the Bribery Act. See www.legislation.gov.uk/ukpga/2010/23/contents.

Section 1 creates an offence of 'active' bribery with the section engaged where a person offers, promises or gives a financial or other advantage to another person with the intent to induce or reward improper performance of a relevant function or activity.

Section 2 creates the passive offence where a person requests, agrees to receive or accepts financial or other advantage, either intending to perform improperly, as a reward for so doing or where the request or receipt would of itself amount to improper performance. The offence can be committed without the recipient knowing or believing that their performance would be improper.

Section 6 criminalises the act of bribing a foreign public official where a person directly or indirectly offers, promises or gives an advantage to a foreign public official with the intention to influence them in their official capacity to retain or obtain business or a business advantage.

Section 7 creates a corporate offence of a commercial organisation's failure to prevent bribery. The offence is one of strict liability – there is no need to demonstrate the accused company's knowledge or authorisation of the payment in order to establish guilt. The section does contain a possible defence that adequate anti-bribery procedures were in place within the organisation and its commercial relationships.

These offences are further discussed in the sections below. The Ministry of Justice published statutory guidance about 'adequate procedures' in March 2011 pursuant to section 9 of the Bribery Act (the Ministry of Justice Guidance), which aims to assist organisations to understand the systems they need to ensure are in place to minimise the risk of bribery by their employees or associates.

Previous common law and legislation

The law governing all actions and behaviour prior to 1 July 2011 remains a mixture of the common law bribery offence and a series of statutory offences. The key offences relating to bribery of public officials are outlined below. (All legislation referred to in this chapter can be found at www.legislation.gov.uk.)

Common law

There is a common law offence of bribery that is generally quoted and accepted to be:

> *The receiving or offering [of] any undue reward by or to any person whatsoever, in a public office, in order to influence his behaviour in office, and incline him to act contrary to the known rules of honesty and integrity. (Russell on Crime, 1964, p381.)*

The common law offence of bribery is limited to public sector corruption and depends on the bribee holding a 'public office'. It is an indictable-only offence with no statutory maximum term of imprisonment.

Misconduct in public office is a common law offence triable only on indictment. Public office-holders who act, or fail to act, in a way that constitutes a breach of the duties of that office will commit the offence. The definition of a 'public officer' is an evidential point assessed on a case-by-case basis, taking into account the nature of the role, the duties carried out and the level of public trust involved. For further information see the CPS guidance on misconduct in public office, at https://www.cps.gov.uk/legal/l_to_o/misconduct_in_public_office/.

The Public Bodies Corrupt Practices Act 1889 (the 1889 Act)

The UK has prosecuted the crime of bribery under the common law (unwritten) for many centuries. The crime of corruption only entered statute law (written) in 1889 when Lord Randolph Churchill MP introduced a private member's bill outlawing the bribery of public officials.

The 1889 Act makes the bribery of a member, officer or servant of a public body a criminal offence. The 1889 Act criminalises the recipient of a bribe by prohibiting a person covered by the 1889 Act (see question 23), whether by him or herself, or in conjunction with any other person, from corruptly soliciting or receiving, or agreeing to receive, for him or herself, or any other person, any gift, loan, fee, reward or advantage whatsoever as an inducement to, or reward for, doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed, in which the public body is concerned.

The bribe payer is criminalised in equivalent terms: a person may not corruptly promise or offer any gift, loan, fee, reward or advantage whatsoever to any person, whether for the benefit of that person or of another person, as an inducement to or reward for doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed, in which the public body is concerned.

Both the 1889 and 1906 Acts require the defendant to have acted 'corruptly', but neither provides a definition. The question of whether dishonesty is required has been the subject of conflicting authorities in the past. The current position, favoured by most recent appellate authorities, is that proof of intent to corrupt is required without requiring proof of dishonesty.

The Prevention of Corruption Act 1906 (the 1906 Act)

A report published in 1898 by the Secret Commissions Committee of the London Chamber of Commerce called for the law of corruption to be extended into the private sector. In 1906 a new act was introduced making it a crime to bribe any 'agent'. An agent is anybody employed by or acting for another, whether in the public or private sector. The 1906 Act makes it an offence for:

- an agent to obtain consideration as an inducement or reward for doing any act, or showing favour or disfavour to any person, in relation to his or her principal's affairs;
- any person to give consideration to an agent to induce him or her to do an act in relation to his or her principal's affairs; or
- any person or agent to knowingly falsify receipts, accounts or other documents with the intent to deceive the principal.

The Prevention of Corruption Act 1916 (the 1916 Act)

Under the provisions of the 1916 Act, if any person, or agent of a person, holding or seeking to obtain a contract gives a gift to a public official, that gift shall be presumed to be corrupt unless the accused person can prove otherwise. The Law Commission recommended the abolition of the presumption and its use has been abandoned by the Crown Prosecution Service (CPS), given concerns about its compliance with the Human Rights Act 1998, which incorporates the European Convention of Human Rights into UK domestic law. The reverse burden of proof is arguably inconsistent with the presumption of innocence. The government has previously stated that it would repeal this law but has yet to do so. In its most recent consultation, the Law Commission also questioned whether such a presumption is necessary or desirable.

The definition of a public body was amended by the 1916 Act to include: 'local and public authorities of all descriptions' (section 4(2)).

The Anti-Terrorism, Crime and Security Act 2001

The Anti-Terrorism, Crime and Security Act 2001 introduced new provisions to give UK courts jurisdiction over crimes committed abroad by UK nationals and UK companies. Part 12 extended the laws against bribery to cases where the 'functions of the person who receives or is offered a reward have no connection with the United Kingdom and are carried out in a country or territory outside the United Kingdom'. Part 12 was intended to be a temporary measure, pending the introduction of comprehensive corruption legislation. It extended the laws against corruption to make prosecutions possible for 'acts [that] would, if done in the United Kingdom, constitute a corruption offence'. In summary:

- section 108 renders it immaterial for the purposes of any offence of bribery (whether by virtue of the common law or by statute) if the functions of the person who receives or is offered a reward have no connection with the UK and are carried out in a country or territory outside the UK; and
- section 109 applies where a UK national or a body incorporated under the law of any part of the UK does anything in a country or territory outside the UK, and the act would, if done in the UK, constitute a corruption offence (whether by virtue of the common law, or by statute). In such a case, the act constitutes the offence concerned and proceedings for the offence may be taken in the UK.

In other respects the elements of the offences remain unchanged; the Act makes it clear, however, that the existing presumption of corruption in respect of the statutory offences is not correspondingly extended.

Foreign bribery

3 Legal framework

Describe the elements of the law prohibiting bribery of a foreign public official.

The Bribery Act 2010

Section 6 of the Bribery Act has introduced a 'bespoke offence' of bribing foreign public officials. For the purposes of section 6, 'a person (P) who bribes a foreign public official (F) is guilty of an offence if P's intention is to influence F in F's capacity as a foreign public official. P must also intend to obtain or retain business, or an advantage in the conduct of business'.

Unlike the general bribery offences in sections 1 and 2, the offence of bribery of a foreign public official only covers the offering, promising or giving of bribes, and not the acceptance of them. Also, unlike the general offence of bribing another, culpability is not premised on any intention to elicit 'improper performance'.

It is important to note that, for the purposes of the general offences in sections 1 and 2, a function or activity is a 'relevant function or activity' even if it has no connection with the UK, and is performed outside the UK. Pursuant to section 12 of the Act, the offences in sections 1 and 2, as well as the section 6 bespoke offence, will be committed even if no acts or omissions forming part of the offences take place in the UK, provided a person whose acts or omissions constitute the offences has a 'close connection' with the UK as defined in section 12(4).

What must a person do in order to commit this offence?

The conduct element of the section 6 offence is the direct or indirect offer, promise or gift by a person (P) of any financial or other advantage to a foreign public official (F) or another person. Where the advantage is offered, promised or given to a person other than F, the offence will only be made out if these acts are done at F's request, assent or acquiescence. Section 6(3)(a) makes clear that it is irrelevant whether the offer, promise or gift is made directly to the official or through a third party.

In addition, the written law applicable to F must not permit or require him to be influenced in his capacity as a foreign public official by the offer, promise or gift. Where the performance of F's functions would not be subject to the law of a part of the UK, the 'written law' is either the applicable rules of the appropriate public international organisation, or the law of the country or territory in relation to which F is a foreign public official as contained in its written constitution, provision made by or under legislation or judicial decisions that are evidenced in writing.

The Law Commission had originally proposed a defence for any person who mistakenly, but reasonably, believed that a foreign public official was required or permitted to accept an advantage under the official's local law. The government decided not to include this defence in the Act following objections from the OECD. Its Working Group considered that such a defence would be open to abuse and would contradict the general stance of the UK legal system, under which mistake of law is no excuse. The OECD's legal director, Nicola Bonucci, highlighted the danger of abuse by stating 'it is not difficult ... to get bad legal advice if you want it'. The secretary of state for justice stated that removing the defence represented the 'correct balance' between being fair to defendants and providing 'so many rabbit holes' that they could unduly escape conviction. He highlighted that prosecutorial discretion and the good sense of jurors could be trusted to ensure that genuine mistakes were not punished by conviction.

What must a person 'intend' in order to commit this offence?

There are two fault elements to the offence. First, P must intend to influence F in his capacity as a foreign public official. This means influencing F in the performance of his or her functions as an official, including any omissions to exercise those functions and any use of F's position outside of his or her lawful authority.

Second, P must also intend to obtain or retain business or an advantage in the conduct of business. Subsection 8 clarifies that the term 'business' includes a trade or profession.

Other legislation

For conduct prior to 1 July 2011 the framework outlined in question 2 applies. As already explained, Part 12 of the Anti-Terrorism, Crime and Security Act 2001 extended the scope of the UK law on bribery to 'foreign' bribery. In its recent decision in *R v AIL, GH & RH* [2016] EWCA Crim 2 the Court of Appeal clarified the extraterritorial scope of the 1906 Act, confirming that even prior to 2002, when the amendment in the Anti-Terrorism, Crime and Security Act 2001 came into force, the offence of bribery of an agent or official was not restricted to UK bodies. This may have an impact on investigations involving pre-2002 conduct, which prosecutors had previously been unsure whether to pursue because of lack of clarity on whether the old law applied to the corruption of foreign officials.

4 Definition of a foreign public official

How does your law define a foreign public official?

Section 6(5) of the Bribery Act defines a 'foreign public official' as an individual who holds a legislative, administrative or judicial position, whether appointed or elected; or who exercises a public function for or on behalf of a foreign country; or who exercises a public function for a public agency or enterprise in a foreign country.

The definition also covers officials or agents of public international organisations, meaning organisations 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.

Under the old regime, when the corruption law was extended in 2001 to criminalise the bribery of foreign public officials (on the basis of nationality), the legislation added a 'foreign' component to existing definitions of 'agent', 'principal', 'public office', 'public body' and 'public authorities'.

The expression 'public body' means any council of a county or city or town, any council of a municipal borough, also any board of commissioners, select vestry or other body which has power to act under and for the purposes of any act relating to local government or the public health or to poor law or otherwise to administer money raised by rates in pursuance of any public general act and includes any body that exists in a country or territory outside the UK and is equivalent to any body described above. In the 1916 Act and in the 1889 Act, the expression 'public body' included, in addition to the bodies mentioned in the last-mentioned act, local and public authorities of all descriptions, including authorities existing in a country or territory outside the UK.

The expression 'public office' means any office or employment of a person as a member, officer or servant of such public body.

The expression 'agent' includes any person employed by or acting for another; and the expression 'principal' includes an employer. Further, a person serving under the Crown or under any corporation or any borough, county or district council or any board of guardians is an agent within the meaning of the 1906 Act.

5 Travel and entertainment restrictions

To what extent do your anti-bribery laws restrict providing foreign officials with gifts, travel expenses, meals or entertainment?

We have no specific legislation or rules regarding the giving of gifts, travel expenses, meals or entertainment to foreign officials. Most UK companies would have a zero-tolerance policy or a policy restricted to no gifts, modest and necessary travel expenses for the official only (ie, no family or entourage), modest shared meals and no entertainment.

The Bribery Act 2010 does not prohibit bona fide hospitality and promotional expenditure that is proportionate, reasonable and undertaken in good faith, but there may be instances where such expenditure could form the basis of offences under sections 1, 6 and 7.

The government and the Serious Fraud Office (SFO) have openly recognised that corporate hospitality is an accepted part of modern business practice and made plain that they are not seeking to penalise expenditure on corporate hospitality for legitimate commercial purposes. However, as lavish corporate hospitality can also be used as a bribe to secure advantages, the offences in the Act must be capable of penalising those who use it for such purposes.

Guidance relating to business expenditure was issued by the SFO in October 2012.

Whether the SFO will prosecute in respect of a bribe presented as hospitality or some other apparently promotional business expenditure will be governed by the Full Code Test in the Code for Crown Prosecutors and the Joint Prosecution Guidance of the Director of the SFO and the Director of Public Prosecutions (DPP) on the Bribery Act 2010 (the Joint Prosecution Guidance). Where relevant, the Joint Guidance on Corporate Prosecutions will also be applied.

If on the evidence there is a realistic prospect of conviction, the SFO will prosecute if it is in the public interest to do so. In appropriate cases the SFO may use its powers under proceeds of crime legislation as an alternative (or in addition) to prosecution; see the attorney general's guidance to prosecuting bodies on their asset recovery powers under the Proceeds of Crime Act 2002 (POCA).

The director of the SFO, David Green QC, has previously said in an interview with a national newspaper in November 2012:

> *I am sceptical of guidance notes. I suspect the motives of those that want absolutely precise guidance, because I suspect they want to wait round the corner and hit you over the head with it, and say, you are acting contrary to your guidance. The criminal law covers an endless multitude of possibilities and possible sets of facts. It is very hard to be specific. On corporate hospitality, it rather depends on the motive and the context and the timing and the value. You can't just say, Wimbledon tickets are OK. They'll say that you said, 'Wimbledon tickets are all right'.*

The Ministry of Justice Guidance states about hospitality:

> *in cases where hospitality, promotional expenditure or facilitation payments do, on their face, trigger the provisions of the Act prosecutors will consider very carefully what is in the public interest before deciding whether to prosecute.*

The Joint Prosecution Guidance, also issued in March 2011, states that:

> *The more lavish the hospitality or expenditure (beyond what may be reasonable standards in the particular circumstances) the greater the inference that it is intended to encourage or reward improper performance or influence an official. Lavishness is just one factor that may be taken into account in determining whether an offence has been committed. The full circumstances of each case would need to be considered. Other factors might include that the hospitality or expenditure was not clearly connected with legitimate business activity or was concealed.*

The Joint Prosecution Guidance provides that the following public interest factors tending in favour of and against prosecution are likely to be relevant.

Factors tending in favour of prosecution are:

- a conviction for bribery is likely to attract a significant sentence;
- offences will often be premeditated and may include an element of corruption of the person bribed;
- offences may be committed in order to facilitate more serious offending; and
- those involved in bribery may be in positions of authority or trust and take advantage of that position.

Factors tending against prosecution are:

- the court is likely to impose only a nominal penalty;
- the harm can be described as minor and was the result of a single incident; and
- there has been a genuinely proactive approach involving self-reporting and remedial action.

See www.justice.gov.uk/downloads/guidance/making-reviewing-law/bribery-act-2010-guidance.pdf and www.sfo.gov.uk/media/167348/bribery%20act%20joint%20prosecution%20guidance.pdf.

6 Facilitating payments

Do the laws and regulations permit facilitating or 'grease' payments?

A 'facilitation payment' refers to the practice of paying a small sum of money to a public official (or other person) as a way of ensuring that they perform their duty, either more promptly or at all.

The current position

Facilitation payments have always been unlawful in the UK: no regime, be it statutory or founded in the common law, has distinguished them from any other form of bribery.

The UK government has publicly stated that it is difficult to envisage circumstances in which the making of a small facilitation payment, extorted by a foreign official in countries where this is normal practice, would of itself give rise to a prosecution in the UK. The Law Commission (the Commission) reiterated in its consultation paper that the government has made clear that, although committed to facilitation payments remaining criminal, it is unlikely that the making of such payments would result in prosecution. However, the SFO guidance issued in October 2012 was far more vague about the prosecution of facilitation payments.

Whether the SFO prosecutes in relation to facilitation payments will always depend on whether it is a serious or complex case which falls within the SFO's remit and, if so, whether the SFO concludes, applying the Full Code Test in the Code for Crown Prosecutors, that there is an offender that should be prosecuted.

If the requirements of the Full Code Test are not established, the SFO may consider civil recovery as an alternative to a prosecution.

The Law Commission's recommendations

In its final report, the Commission reiterated that it is generally agreed that, on broad social grounds, a culture in which facilitation payments are regular and accepted is undesirable and that such payments should be discouraged. The Commission went on to recognise 'degrees of desirability', identifying situations in which, for example, a payment is made as a matter of local courtesy, as situations unlikely to engage the new provisions. Examples of situations that would be covered, although not necessarily prosecuted, include:

- where the official, if not paid, either will not fulfil the duty at all or will do so only after a seriously damaging delay;
- where the official generally fulfils the relevant duties correctly, but accepts payment for dealing with a particular matter with exceptional despatch or effort; and
- where the official fulfils the relevant duties correctly, but a payment made is part of his or her reason for so doing.

The Joint Committee's observations

The Parliamentary Joint Committee (the Committee) agreed with the government that facilitation payments should continue to be criminalised. A specific defence, they said, risks legitimising corruption at the thin end of the wedge. At the same time the Committee recognised that business needs clarity about the circumstances in which facilitation payments will be prosecuted, particularly given the difficult situations that can arise. Therefore, the basic principles of prosecution policy, which the Committee expected to adhere firmly to the concept of proportionality, must be made clear. In so concluding, the Committee noted that:

> *[T]here are undoubtedly difficult and unanswered dilemmas facing business, as Lord Robertson illustrated: 'stevedores on the docks of a country say they will not unload your ship unless a payment is made to their union or to their corporate organisation, what do you do? You say, "No. We will just let our ships lie there"[?]*

The parliamentary passage of the Bribery Act saw considerable debate on the issue of facilitation payments. A full exploration is outside of the scope of this publication. The Ministry of Justice Guidance notes that facilitation payments could trigger either the section 6 offence or, where there is an intention to induce improper conduct, including where the acceptance of such payments is itself improper, the section 1 offence, and therefore potential liability under section 7.

The Joint Prosecution Guidance lists the following public interest factors tending in favour of and against prosecution.

Factors tending in favour of prosecution are:

- large or repeated payments are more likely to attract a significant sentence;
- facilitation payments that are planned for or accepted as part of a standard way of conducting business may indicate the offence was premeditated;
- payments may indicate an element of active corruption of the official in the way the offence was committed; 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.

Factors tending against prosecution are:

- a single small payment likely to result in only a nominal penalty;
- the payment or payments came to light as a result of a genuinely proactive approach involving self-reporting and remedial action;
- 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 been correctly followed; and
- the payer was in a vulnerable position arising from the circumstances in which the payment was demanded.

7 Payments through intermediaries or third parties

In what circumstances do the laws prohibit payments through intermediaries or third parties to foreign public officials?

Sections 1(5) and 6(3) of the Bribery Act unambiguously state that it does not matter whether an advantage is offered, promised or given by P directly or through a third party for the purposes of the sections 1 and 6 offences. Section 7 creates a responsibility for companies to ensure that third parties and intermediaries, such as joint venture partners, approved local agents or suppliers, are fully aware of their anti-bribery and corruption policies. Otherwise the adequate procedures defence will not be available to them where a third party or intermediary offered bribes on their behalf.

The report of the OECD Working Group on Bribery on the UK's Implementation of the OECD Anti-Bribery Convention raised a concern that bribes paid through an intermediary were not covered by the old law. The 1906 Act and the body of case law creating the common law offence, and therefore the law that governs any action before 1 July 2011, do not expressly refer to an offer, etc, being made through an intermediary.

Under the 1906 Act, a person who gives or offers, etc, a bribe to a foreign public official with the assistance of an intermediary would be guilty of an offence as well as the intermediary because the offence is aimed at any person who corruptly 'gives or agrees to give or offers any gift or consideration to any agent'.

The use of an agent (innocent or otherwise) by an offender will not allow the offender to escape criminal liability. The wide ambit of section 1 of the 1906 Act is demonstrated by the passive provisions, which explicitly state 'for himself or for any other person'.

In its final report the Law Commission noted the SFO's comments that cases of bribery where payments are made through intermediaries are frequent and difficult to investigate and prosecute. The SFO also emphasised that it should make no difference that the beneficiary of the corrupt transaction is a third party, which could be commonplace where multiple companies are involved. It could be suggested that there has been an attempt to address these in the width of drafting of the section 7 offence of the Bribery Act where commercial organisations can be guilty of failure to prevent bribery where action has been taken that fulfils the requirements of the section 1 or 6 offences (bribing and specifically bribery of a foreign public official) by an associated person who need have no close connection to the UK nor be a British citizen or company or any type.

8 Individual and corporate liability

Can both individuals and companies be held liable for bribery of a foreign official?

Subject to certain exemptions below, both companies and individuals may be liable for bribery of a foreign official under the old law and the Bribery Act.

The Queen, foreign sovereigns or heads of state, their families and their private servants are all immune from criminal jurisdiction by virtue of the State Immunity Act 1978. Furthermore, the Diplomatic Privileges Act 1964 gives immunity to diplomatic agents, members of the staff of a diplomatic mission and their families.

In 2004, a private application for an extradition warrant against President Robert Mugabe was refused by the Bow Street Magistrates' Court. That court stated that 'while international law evolves over a period of time, international customary law, which is embodied in our common law, currently provides absolute immunity to any head of state'.

For a discussion of the application of the immunity provisions for former heads of state, see the House of Lords' decision in *Ex parte Pinochet Ugarte* (No. 3) [1999] 2 All ER 97.

Corporate liability – general principles

The question of corporate liability for offences under sections 1, 2 and 6 would be determined by the application of the 'identification principle'. The principle allows 'the acts and state of mind' of those who represent the 'directing mind and will' to be imputed to the company. *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153 restricts the application of the 'identification principle' to the actions of 'the board of directors, the managing director and perhaps other superior officers who carry out functions of management and speak and act as the company'.

A more detailed assessment of the principles underpinning corporate criminal liability in the UK is beyond the scope of this work. The Joint Guidance on Corporate Prosecutions (issued in December 2009 by the DPP and the director of the SFO, and agreed by the Attorney General) provides the necessary particulars. It is sufficient to note that the 'identification principle' places an exceptionally arduous burden on the prosecution to establish corporate criminal liability where a corruption offence is committed by an employee of a large, decentralised, corporation. The Law Commission was recently tasked with reconsidering the whole law of corporate criminal liability. Its consultation paper, published in August 2010, acknowledged the 'considerable uncertainty' surrounding the identification principle and recommended that Parliament develop specific corporate criminal offences, similar to the section 7 offence, instead of relying on a single basis for corporate prosecutions.

In the event that a company is convicted following application of the identification principle, section 14 of the Bribery Act provides that a senior officer or person (as well as the body corporate or partnership) is guilty of the offence, and liable to be proceeded against and punished accordingly, if an offence contrary to sections 1, 2 or 6 is proved to have been committed by a body corporate or a Scottish partnership with the consent or connivance of: that senior officer of the body corporate or Scottish partnership, or a person purporting to act in such a capacity.

For a 'senior officer' or similar person to be guilty, he or she must have a close connection to the UK, for the meaning of which see section 12(4). It should be noted that the body corporate and the senior manager are both guilty of the main bribery offence; this section does not create a separate offence of 'consent or connivance'. Nor does the section apply to the corporate offence under section 7, and the government has confirmed that there is no possibility of individual liability arising under section 14 where the section 7 offence has been committed.

Corporate liability – failure to prevent bribery

Section 7 of the Bribery Act creates a novel offence of failing to prevent bribery which can only be committed by a 'relevant commercial organisation', an umbrella term that encompasses bodies incorporated in the UK, together with partnerships formed under UK law, irrespective of where business is carried out, and bodies and partnerships, wherever formed or incorporated, who conduct business in the UK. The offence is committed where a person (A) who is associated with the commercial organisation (C) bribes another person with the intention of obtaining or retaining business or an advantage in the conduct of business for C.

'Bribery' in the context of this offence relates only to the offering, promising or giving of a bribe contrary to sections 1 and 6 (C is not criminally liable for failing to prevent its employees from taking bribes). Applying ordinary principles of criminal law, the reference to offences under sections 1 and 6 include being liable for such offences by way of aiding, abetting, counselling or procuring (secondary liability). Subsection (3) also makes clear that there is no need for the prosecution to show that the person who committed the bribery offence has already been successfully prosecuted. The prosecution must, however, show that the person would be guilty of the offence were that person to be prosecuted or capable of being prosecuted under this act. Subsection (3)(b) makes clear that there is no need for A to have a close connection to the UK as defined in section 12; rather, so long as C falls within the definition of 'relevant commercial organisation', that should be enough to provide courts in the UK with jurisdiction.

Section 12(5) clarifies that for the purposes of the offence in section 7 it is immaterial where the conduct element of the offence occurs.

Section 7(2) provides that it is a defence for the commercial organisation to show it had adequate procedures in place to prevent persons associated with C from committing bribery offences. According to the Ministry of Justice Guidance, the standard of proof which the commercial organisation would need to achieve to discharge the burden of establishing a defence, in the event it was prosecuted, is the 'balance of probabilities'.

The Ministry of Justice Guidance provides six flexible and outcome-focused principles, 'allowing for the huge variety of circumstances that commercial organisations find themselves in'. The six principles are:

- proportionate procedures;
- top-level commitment;
- risk assessment;
- due diligence;
- communication (including training); and
- monitoring and review.

In May 2016, the UK government announced plans to widen the corporate 'failure to prevent' offence beyond bribery to cover other economic crimes. The proposal has enjoyed the long-term support of David Green and the SFO. The current version of the Criminal Finances Bill, introduced on 13 October 2016, is limited to a new offence of failure to prevent the facilitation of tax evasion, a measure on which the government had already consulted before publication of the bill. At the time of writing, the government has not yet published its consultation on the wider offence of failure to prevent economic crime.

9 Successor liability

Can a successor entity be held liable for bribery of foreign officials by the target entity that occurred prior to the merger or acquisition?

The Bribery Act does not contain any explicit provisions on successor liability, nor is there any specific Ministry of Justice guidance available on the circumstances under which a successor entity may be held criminally liable for acts of bribery allegedly committed by the acquired entity.

It is likely that the extent of successor liability will depend on the exact nature and structure of the corporate transaction and that each case will be judged on its own facts and circumstances.

Where ownership of all of a target's shareholding is transferred, the question of holding the successor entity criminally liable will largely be a matter of public policy. Assuming the offence can be proved, the successor acquires liability for the target entity's past conduct through the merger.

However, depending on the circumstances of the case, it may not be in the public interest to hold a successor entity criminally accountable for the target's conduct by prosecuting it. In such instances, a DPA may be preferred by the SFO over launching a prosecution. Paragraph 2.8.2.(v) of the DPA Code lists the following amongst the factors in favour of entering into a DPA:

> *The offending is not recent and P in its current form is effectively a different entity from that which committed the offences*

– for example it has been taken over by another organisation, it no longer operates in the relevant industry or market, P's management team has completely changed, disciplinary action has been taken against all of the culpable individuals, including dismissal where appropriate, or corporate structures or processes have been changed to minimise the risk of a repetition of offending.

The recent DPA between the SFO and ICBC Standard Bank Plc (see question 13) concerned the conduct of Standard Bank Plc's (as it was then known) sister company, Stanbic Bank Tanzania. Standard Bank Plc reported the alleged wrongdoing to the SFO in early 2014 and entered into DPA negotiations thereafter. Subsequently, at the same time as the talks with the SFO were ongoing, Industrial and Commercial Bank of China (ICBC) acquired a 60 per cent controlling stake in Standard Bank Plc's shares. The newly named ICBC Standard Bank Plc was deemed liable for the offending but eligible for a DPA over Standard Bank Plc's and Stanbic Bank's conduct.

10 Civil and criminal enforcement

Is there civil and criminal enforcement of your country's foreign bribery laws?

For criminal enforcement, see questions 3 and 17.

Victims of bribery, for example, businesses whose employees have been bribed, may have a cause of action to recover damages from both the briber and the bribee. It is uncertain as to whether unsuccessful competitor businesses will try to seek financial redress for loss caused by uncompetitive and corrupt business practices following conviction under the Bribery Act.

There have been attempts following conviction under the old law. In 2014 a Jordanian firm was unsuccessful in its follow-on damages case against Innospec (*Jalal Bezee Mejel Al-Gaood & Partner v Innospec Ltd* [2014] EWHC 3147), which had admitted to paying bribes in criminal proceedings in the UK and US. The claimant was unable to prove on the facts of that particular case that the bribes caused the Iraqi government to favour Innospec's product over the competitor's.

However, the civil courts may well be receptive to claims for damages as a result of an unlawful means conspiracy.

11 Agency enforcement

What government agencies enforce the foreign bribery laws and regulations?

The SFO has been designated the lead agency in the handling of foreign bribery allegations and investigations. It was established in 1988 with the responsibility for the detection, investigation and prosecution of serious fraud. The director of the SFO has the discretion to prosecute Bribery Act offences as per section 10 of the Bribery Act. The DPP as the head of the Crown Prosecution Service (CPS) has this power. Section 10(4) makes clear that the issue of consent must be exercised by the relevant director personally, subject to a narrow exception where the director concerned is unavailable. In such circumstances the function may be discharged by another person nominated for this purpose by the relevant director in writing.

The SFO has the responsibility for assessing each allegation of bribery and, if an investigation is merited, allocating cases to the investigative agency best suited to deal with it. The Financial Conduct Authority (FCA) (formerly the Financial Services Authority) may refer its intelligence from an investigation to one of the agencies that have the power to prosecute if they deem it necessary.

The City of London Overseas Anti-Corruption Unit (the OACU) was created in 2006 as a dedicated team for investigating international corruption, including money laundering in the UK by corrupt politicians from developing countries, and bribery by UK business overseas. The OACU played a role in the 2014 prosecution and subsequent criminal conviction of Smith & Ouzman Ltd, see question 14. On 29 May 2015, the OACU was subsumed into the International Corruption Unit (ICU) of the National Crime Agency (NCA), the UK's new national law enforcement agency that replaced the Serious Organised Crime Agency.

12 Leniency

Is there a mechanism for companies to disclose violations in exchange for lesser penalties?

The SFO's 2012 guidance on self-reporting superseded previous SFO policy and restated the SFO's primary purpose as an investigator and prosecutor. The revised policies make it clear that there will be no presumption in favour of civil settlements in any circumstances:

If on the evidence there is a realistic prospect of conviction, the SFO will prosecute if it is in the public interest to do so. The fact that a corporate body has reported itself will be a relevant consideration to the extent set out in the Guidance on Corporate Prosecutions. That Guidance explains that, for a self-report to be taken into consideration as a public interest factor tending against prosecution, it must form part of a 'genuinely proactive approach adopted by the corporate management team when the offending is brought to their notice'. Self-reporting is no guarantee that a prosecution will not follow. Each case will turn on its own facts.

The accompanying notes state 'the SFO encourages corporate self-reporting, and will always listen to what a corporate body has to say about its past conduct; but the SFO offers no guarantee that a prosecution will not follow any such report … it is not the role of the SFO to provide corporate bodies with advice on their future conduct'.

In Scotland, a self-reporting initiative was introduced on 1 July 2011 to coincide with the entry into force of the Bribery Act 2010. Guidance issued by the Crown Office and Procurator Fiscal Office (COPFS) in June 2016 confirms that the initiative will continue to run until 30 June 2017. Companies wishing to self-report must do so through a solicitor, who submits a report to the Serious and Organised Crime Unit (SOCU). In order to benefit, companies must have conducted thorough internal investigations and be prepared to disclose the full extent of any criminal conduct discovered, as well as committing to 'meaningful dialogue' with SOCU. A decision is then taken as to whether the case is suitable for referral to the Civil Recovery Unit for civil settlement. The DPA regime (discussed below) does not operate in Scotland, where Civil Recovery Orders are the only tool available to prosecutors aside from full prosecution. See question 32 for discussion of two recent settlements under the Scottish self-reporting initiative in relation to domestic bribery.

Under sections 71–73 of the Serious Organised Crime and Police Act 2005 (SOCPA) certain 'specified prosecutors' have powers to grant immunity from prosecution to cooperating offenders; to provide undertakings regarding use of evidence against cooperating offenders; and to enter into an agreement for a defendant to provide assistance to the prosecutor in relation to an offence, with powers given to the courts to take that into account when determining what sentence to pass on the defendant. The 'specified prosecutors' for the purposes of the act are:

- the DPP;
- the director of the SFO;
- the DPP for Northern Ireland;
- the FCA; and
- the Secretary of State for Business, Innovation & Skills, acting personally.

13 Dispute resolution

Can enforcement matters be resolved through plea agreements, settlement agreements, prosecutorial discretion or similar means without a trial?

Some recent SFO investigations of overseas corruption have concluded without a trial by means of plea agreements or civil recovery orders. Prosecutors may opt not to pursue certain investigations in the exercise of prosecutorial discretion in accordance with the Code for Crown Prosecutors (www.cps.gov.uk/publications/code_for_crown_prosecutors).

Deferred prosecution agreements

The desire within both government and the SFO for a power to 'allow prosecutors to hold offending organisations to account for their wrongdoing in a focused way without the uncertainty, expense, complexity or length of a criminal trial' led to the introduction of deferred prosecution agreements (DPAs) in the Crime and Courts Act 2013, effective as of 24

February 2014. Section 45 and Schedule 17 of the Act contain the legislative framework for DPAs. On 14 February 2014, the director of the SFO and the DPP published a Joint Code Of Practice on the use of Deferred Prosecution Agreements (DPA Code) required under Schedule 17, Part 1, paragraph 6 of the Act. DPAs are to be used to deal with economic crime, particularly incidences of bribery (specifically offences under the Bribery Act), fraud, money-laundering and the proceeds of crime, some offences under the Theft Act and other offences relating to economic activity as set out in Part 2 of Schedule 17. Individuals are not eligible for the DPA process. There is uncertainty as to how, if at all, DPAs and individual leniency or immunity under SOCPA (see question 12) can work alongside one another,

The government has defined a DPA as 'a voluntary agreement between a prosecutor and a commercial organisation whereby, in return for complying with a range of tough and stringent conditions including, for example, the payment of a substantial penalty, requirements to make reparation to victims and participate in monitoring for a set period, the prosecutor will defer a criminal prosecution'.

Paragraph 2 of the DPA Code sets out a list of circumstances in which a prosecutor may consider entering into a DPA, the principles applying to such decisions, and facts that would suggest a DPA to be unsuitable.

The DPA Code sets out the test to be used when determining whether entering into a DPA is appropriate: it is a two-stage test: first an evidential stage where either the Full Code Test for Crown Prosecutors is satisfied or, if this is not met, that there is at least a reasonable suspicion based upon some admissible evidence that a company has committed an offence, and there are reasonable grounds for believing that a continued investigation would provide further admissible evidence within a reasonable period of time, so that all the evidence together would be capable of establishing a realistic prospect of conviction in accordance with the Full Code Test. The second stage is a public interest test: would the public interest be properly served by the prosecutor not prosecuting but instead entering into a DPA with the company.

An invitation to negotiate a DPA is entirely at the prosecutor's discretion. If one is considered appropriate, having fulfilled the two-stage test, the prosecutor will (where the court approves the DPA) prefer an indictment that will immediately be suspended pending the satisfactory performance, or otherwise, of the DPA.

The DPA Code further addresses: the factors that may be taken into account by prosecutors when deciding whether to enter into a DPA, including additional public interest factors; the process for invitation to enter in DPA negotiations; subsequent use of information obtained by a prosecutor during the DPA negotiation period; disclosure and unused material; the statement of facts and the terms that will be included in the application to the court; monitors; financial penalties; preliminary and final hearings; variation, discontinuance and breach of a DPA; and privacy and publications of decisions.

The Criminal Procedure (Amendment No. 2) Rules 2013 inserted a new Part 12 into the Criminal Procedure Rules governing DPAs, effective as of 24 February 2014. The new rules lay out the powers of the court and how they can be exercised, as well as its duties. Furthermore, it sets out the requirements of the prosecutor, and the defence, for: any application that is to be made for the approval of a proposed entrance into a DPA; an application to approve the terms of an agreement; an application on breach of an agreement; an application to approve a variation of the terms of an agreement; an application to lift suspension of prosecution; and an application to postpone the publication of information by the prosecutor.

Whether a particular case is appropriate for the use of a DPA will be subject to judicial approval at the preliminary hearing as per paragraph 7 of Schedule 17. The test to be applied is a two-part test: first whether allowing the organisation to enter into a DPA would be in the 'interests of justice' and, second, whether the proposed terms are 'fair, reasonable and proportionate'.

The preliminary hearing seeking this approval is conducted in private to allow the prosecutor and the organisation to lay out the proposed terms before the court without any fear of jeopardising future prosecutions. A finding by the court that a DPA is appropriate in principle does not bind the judge to approve the agreement at the final hearing.

The final agreement, once approved, must be declared in open court with full reasoning provided. Once the declaration has been made in open court the prosecutor will, unless prevented from doing so by an enactment or by an order from the court, publish on its website the DPA, the court's declarations and reasoning pursuant to both paragraph 7 and 8 of Schedule 17 to the act, or if appropriate, publish the initial refusal of a declaration and accompanying reasons.

The non-exhaustive contents of a DPA are outlined in paragraph 5 of Schedule 17 to the Crime and Courts Act 2013 and the DPA Code. A DPA must contain:

- a start and end date;
- a statement of facts negotiated by the prosecutor and the commercial organisation which may include admissions; and
- the terms and conditions of the agreement. These would be specific to each instance; however, they would include some or all of the following:
- a financial penalty (this must broadly reflect the fine that a court would have imposed on conviction following a guilty plea);
- disgorgement of profits or benefit;
- compensation to victims;
- charitable or third party donations;
- cooperation with investigations;
- disclosure obligations;
- providing access to documents and witnesses;
- requirements regarding anti-corruption and anti-fraud policies, procedures and training; and
- payment of reasonable costs.

Any money received by a prosecutor under a DPA will be paid into the Consolidated Fund (ie, to the Treasury). Fines will be subject to a reduction of up to one-third based on cooperation and early reporting.

Concerns have been raised about the protection of individuals under DPAs, especially as there is no provision for individual immunity within the DPA process. This, coupled with the breadth of the proposed access provisions, has led to unease about possible prejudice to future proceedings. The SFO has taken a different approach in each of its first two DPAs. In the ICBC Standard Bank case, the DPA named those individuals said to have paid bribes but without giving them an opportunity to comment or challenge those findings. In the XYZ case, the decision approving the DPA was published, but the name of the company was kept confidential while criminal investigation into individuals continued.

If, at the end of the deferral period, the prosecutor is satisfied that the organisation has fulfilled its obligations, there would be no prosecution on the charges laid. If, on the other hand, it was felt that the requirements had not been met, the option of prosecution would still be available.

The DPA Code is further supported by the Sentencing Council's Definitive Guideline on Fraud, Bribery and Money Laundering (see question 16).

Entering into a DPA will not remove the protection of legal professional privilege, and existing law and practice on this matter will continue to apply. The government does not intend to make it a condition of the DPA that the commercial organisation should waive privilege though it has made clear that any frivolous claims to invoke privilege or impede investigation into others will be taken as clear signs of non-cooperation putting the success of a DPA in doubt in such circumstances. The principle that an accused's right to refuse to disclose information subject to legal professional privilege will nonetheless continue to apply in its current form.

Deferred prosecution agreements in practice

At the time of writing, the SFO has entered into two DPAs.

Standard Bank Plc

On 30 November 2015, the SFO announced that it had entered into the first ever UK DPA with ICBC Standard Bank Plc, in relation to the conduct of Stanbic Bank Tanzania, a sister company of Standard Bank Plc (as the company was then called). Both companies were ultimately owned by Standard Bank Group Ltd, a company registered in South Africa. Stanbic Bank operated in Tanzania and had no licence to deal with non-local foreign investors in the debt capital markets, with such work to be undertaken by Standard Bank Plc.

Stanbic Bank and Standard Bank Plc jointly put forward a proposal to raise funds for the government of Tanzania. The companies agreed a commission of 2.4 per cent of all funds raised, with the capital

target amounting to US$600 million. However, only 1.4 per cent (ie, US$8 million) was kept by the two companies. 1 per cent (ie, $6 million) was transferred on to a 'local partner' called Enterprise Growth Market Advisors Limited (EGMA). Two of EGMA's directors had close connections to the government of Tanzania; the chairman was Commissioner of the Tanzania Revenue Authority and therefore a serving member of the government of Tanzania, and the managing director had been CEO of the Tanzanian Capital Markets and Securities Authority between 1995 and 2011.

No evidence was found that EGMA had provided any services in relation to the capital raising exercise. Therefore, the inference was drawn that the 1 per cent fee was paid over in order to induce the showing of favour to Stanbic Bank's and Standard Bank Plc's proposal.

While Standard Bank acted jointly with Stanbic Bank on the US$6 million transaction, Standard Bank's procedures did not require it to carry out any due diligence or know your customer (KYC) procedures. The team made no enquiries of EGMA's role, despite numerous bribery red flags having been found to have been present. Stanbic Bank conducted little to no due diligence of its own.

When Stanbic Bank staff subsequently raised their concerns about the transaction in March 2013, the matter was promptly escalated to Standard Bank Group Ltd. Standard Bank Group Ltd launched an internal investigation shortly thereafter. Standard Bank Plc in London instructed an external law firm immediately. The day after being instructed, the law firm made a report to the Serious Organised Crime Agency, followed by a report to the SFO a few days later.

Standard Bank Plc cooperated with the SFO throughout the SFO's investigation, with a parallel internal investigation being conducted by the independent law firm. The findings of the latter investigation were passed onto the SFO.

In his preliminary judgment, approving the terms of the proposed DPA, Lord Justice Leveson identified the factors to be taken into account in determining whether a DPA was in the interests of justice, with reference to the DPA's Code of Practice. First, the seriousness of the offence, with prosecution more likely to be in the public interest in the case of more serious offences. Second, considerable weight will be attached to: prompt self-reporting, particularly where the conduct might otherwise remain unknown to the prosecutor; and proactive cooperation, including identifying witnesses, disclosing their accounts and the documents shown to them, and making witnesses available for interview. Third, any history of similar conduct involving criminal, civil and regulatory enforcement actions against the organisation must be taken into account. Finally, a relevant consideration in this case, but which will not always be necessary for a DPA, was that the organisation at the time of the DPA was effectively a different entity from that that committed the offence, following a majority share acquisition and appointment of a new board.

The DPA was entered into 19 months after the SFO had first been made aware of the transaction. Under the DPA, Standard Bank Plc paid around US$33 million, including compensation of US$6 million plus US$1.15 million interest, and disgorgement of profits of US$8.4 million. A financial penalty of US$16.8 million was agreed, amounting to 300 per cent of the profits from the illicit conduct, after a reduction of one-third. These figures were reached following detailed consideration of the Sentencing Council Guideline on Corporate Offenders (see question 16) providing the first indication of how the courts would approach the Guideline.

Lord Justice Leveson noted that the US Department of Justice had confirmed that the penalty was comparable to that that would have been imposed in the United States and that it had suggested it would close its investigation following resolution in the UK on these terms.

Standard Bank Plc also agreed under the terms of the DPA to future compliance and cooperation with the authorities, including a review of Standard Bank Plc's existing controls in place and improvement of its internal policies and procedures.

XYZ Ltd

On 8 July 2016, Lord Justice Leveson approved the SFO's second DPA, with a UK SME involved in exports to Asia. The SME has not been named because of ongoing legal proceedings involving former employees, and was referred to in the judgment as XYZ Ltd. The SME was the subject of an indictment alleging conspiracy to corrupt and conspiracy to bribe contrary to section 1 of the Criminal Law Act 1977, and failure to prevent bribery, contrary to section 7 of the Bribery Act 2010. The charges related to the systematic offer and payment of bribes to secure contracts in foreign jurisdictions in the period from June 2004 to June 2012. It was alleged that the offences were committed through the use of intermediary agents within each jurisdiction, who offered and placed bribes with those thought to exert influence over the awarding of contracts. Payments made to these agents to fund the bribes were described in internal documentation as 'special commission' or 'additional commission'.

The SME's US-registered parent company (referred to in the judgment as 'ABC') had implemented a compliance programme in late 2011, and by August 2012 concerns had come to light over how certain contracts had been secured. The SME instructed a law firm to conduct an internal investigation, resulting in a report to the SFO delivered on 31 January 2013.

Lord Justice Leveson described XYZ as having pursued a 'genuinely proactive approach to the wrongdoing it uncovered' a factor that weighed heavily in favour of finding the DPA was in the interest of justice. Under the DPA, the company must pay financial orders of £6,553,085. This figure includes £6,201,085 disgorgement of gross profits, of which £1,953,085 will be paid by ABC, as the repayment of dividends that it had (innocently) received from XYZ. In determining the financial penalty, serious aggravating factors taken into account included the fact this was sustained conduct authorised by senior executives, and the failure to put in place effective systems before 2012. Nonetheless, a generous discount of 50 per cent reflected the fact that the admissions were 'far in advance of the first reasonable opportunity' and was justified in order to 'encourage others how to conduct themselves when confronting criminality as XYZ has'. Taking into account all the circumstances, and in particular the risk of insolvency and the fact that XYZ had spent around £3.8 million in fees arising from the reasonable steps it had taken to investigate, self-report and cooperate, the financial penalty was fixed at £352,000.

As well as the financial orders, the company agreed to continue to cooperate fully with the SFO, and to provide a report on all third-party intermediary transactions and the adequacy of its existing anti-bribery and corruption controls within 12 months, and every 12 months thereafter for the duration of the DPA.

In the case of ICBC Standard Bank Plc, the deferral period will end on 30 November 2018. The DPA with XYZ has not been published but the final judgment indicates that the proposed period will be between three and five years.

14 Patterns in enforcement

Describe any recent shifts in the patterns of enforcement of the foreign bribery rules.

As discussed in question 13, in the 18 months to the end of 2016 the SFO concluded its first two DPAs arising from bribery offences. The SFO has been keen to point out that these should be seen alongside the prosecution and conviction of Sweett Group, a company that was not considered to have cooperated fully with the SFO's investigation and was therefore not able to benefit from the new means of resolution. All three investigations involved offences under section 7 of the Bribery Act 2010 (failure to prevent), which the SFO is starting to enforce successfully against companies.

Speaking on 1 December 2016, the SFO's director, David Green, noted that in certain circumstances the courts are prepared to approve discounts in excess of one-third (as in the XYZ case) for companies that self-report promptly and cooperate, demonstrating that openness 'will be rewarded'. He repeated his advice that aggressive tactics, used by lawyers who approach DPA negotiations in the same way as litigation, will lead to discussions being terminated. Further DPAs are to be announced in 2017.

David Green has also emphasised that the agency will continue to work closely with its foreign counterparts. Speaking on 5 September 2016, his message for corporates was that the SFO had invested significantly in building cooperative relations with foreign agencies: 'This means, I suggest, three things for suspects: We are more likely than ever to obtain intelligence of corporate misconduct, to obtain admissible evidence from abroad, and to engage with foreign jurisdictions so that a

cooperative company can obtain organised outcomes to investigations.' (www.sfo.gov.uk/2016/09/05/cambridge-symposium-2016/)

With respect to the SFO's current investigatory caseload, a number of the high-profile investigations announced during 2016 relate to the use of cross-border intermediaries (see question 17 and SFO investigations into Airbus and Unaoil).

15 Prosecution of foreign companies

In what circumstances can foreign companies be prosecuted for foreign bribery?

The Bribery Act 2010 may have significantly widened the jurisdictional reach of the UK in the prosecution of bribery offences.

Section 7 of the Bribery Act, the corporate offence of failing to prevent bribery, has a broad extraterritorial reach. The offence applies to a 'relevant commercial organisation', defined to include entities formed or incorporated outside the UK but that carry on a business, or part of a business, in any part of the UK. The Act does not specify what 'carrying on a business in the UK' entails. As the Ministry of Justice Guidance acknowledges, the courts will be the final arbiter as to whether an organisation carries on a business in the UK, taking into account the particular facts in each case.

In the guidance, the government anticipates that the courts will adopt 'a common-sense approach' meaning that organisations that do not have 'a demonstrable business presence' in the UK would not be caught. In particular, the government does not expect companies solely admitted to the UK Listing Authority's Official List, without more, to qualify as carrying on a business or part of a business in the UK; nor does it expect parent companies that merely have a UK subsidiary, without significant business activity, to fall within the definition.

Caution should be exercised if relying on this part of the Ministry of Justice Guidance. The prosecution guidance states clearly that prosecutors must only take into account the ministry's guidance when considering the adequacy of procedures. The prosecution guidance states that where the government's guidance provides explanations of the particular concepts relevant to the application of sections 1, 6 and 7 (ie, policy statements) prosecutors 'may find this helpful' when reviewing cases involving commercial bribery. However, there is no obligation to take the policy explanations into account.

In March 2011, the then-director of the SFO noted the ambiguity of the term 'carries on business in the UK' as follows:

> *The test is expressed in very simple terms. Are you carrying on your business or part of your business in the UK? What does that mean? What about subsidiaries? What about raising finance? What about providing services over the Internet, or indeed in other ways? We shall have to see. Ultimately our courts will apply that test to particular circumstances. Do not be surprised though, if the Serious Fraud Office takes a wide view of this phrase so that we can ensure that the policy objective of ensuring competitiveness is complied with.*

Therefore, hypothetically, if the UK subsidiary of a foreign company was engaged in business relationships outside the UK where there was evidence of bribery, the UK subsidiary could be prosecuted and the parent company might also find itself subject to investigation and proceedings.

16 Sanctions

What are the sanctions for individuals and companies violating the foreign bribery rules?

Criminal penalties

Individuals

Section 11 of the Bribery Act 2010 provides for a potentially unlimited fine or up to 10 years' imprisonment for individuals convicted on indictment of offences under section 6. For convictions under the previous regime, the penalties for foreign and domestic bribery are the same. Under the 1889 Act and the 1906 Act they are as follows: on summary conviction, a maximum of six months' imprisonment or a fine to the statutory maximum, currently £5,000; on indictment, seven years' imprisonment, an unlimited fine or both. The common law bribery offences have no prescribed or maximum penalties, although generally sanctions for comparable statutory offences can guide the courts. Penalties for attempt and conspiracy are the same as for the related offence. There is no mandatory minimum sentence for any bribery offence.

Corporates

The Sentencing Council's Definitive Guideline on Fraud, Bribery and Money Laundering (the Sentencing Guideline on Corporate Offenders), published on 23 May 2014 and effective from 1 October 2014, applies to companies sentenced on or after 1 October 2014, regardless of the date of the offence. The Sentencing Guideline contains a 10-step process for the determination of fines in bribery cases:

- compensation;
- confiscation;
- determining the offence category with reference to culpability and harm: culpability will be demonstrated by the offending corporation's role and motivation for their conduct, with harm being represented by a financial sum calculated as the amount obtained or intended to be obtained, or loss avoided or intended to be avoided. There are three categories of culpability: high (A), medium (B) and lesser (C);
- the amount that is determined as 'harm' is then multiplied by a percentage dependent on the culpability level: high culpability has a multiplier of 300 per cent, medium of 200 per cent, and lesser remains at 100 per cent. Each category (A, B and C) has a range, within which the court can consider adjusting the fine, having considered factors that increase or reduce the seriousness of the offence;
- having arrived at a fine level, the court then has to 'step back' and consider the overall effect of all orders: compensation, confiscation and the fine. Cumulatively they should achieve the removal of all gain, appropriate additional punishment and deterrence;
- the court must then consider any factors that would indicate a reduction, such as any assistance provided to the prosecution;
- potential reductions for guilty pleas in accordance with section 144 of the Criminal Justice Act 2003 and the Guilty Plea guideline;
- ancillary orders are then considered by the court;
- the court then looks at whether the sentence is just and proportionate to the offending behaviour under the totality principle; and
- finally, the court must provide reasons for, and explain the effect of, the sentence as per section 174 of the Criminal Justice Act 2003.

The sentencing of companies in two recently concluded criminal proceedings is discussed at question 17. Further guidance on how the courts are applying the Sentencing Guideline can be found in the judgments in the two recent DPAs discussed in question 13 (noting the DPA legislation requires any financial penalty to demonstrate broad comparability with a fine following conviction).

Other sanctions

Generally, the UK courts may not impose any administrative or civil sanctions on persons convicted of bribery; however, the Company Directors Disqualification Act 1986 allows the application of a civil or administrative sanction in the form of disqualification of directors for general misconduct in connection with companies.

Under POCA, an individual may have the proceeds of his or her criminal offending removed under a Civil Recovery Order. Part 5 of POCA enables the major UK prosecuting agencies to issue proceedings in the High Court against any person who holds property alleged to have been obtained through unlawful conduct, such as the proceeds of bribery. In March 2016, Elena Kotova, a former executive director of the European Bank for Reconstruction and Development, agreed to settle civil recovery proceedings brought by the NCA by handing over a Mayfair property and monies in two bank accounts. The NCA alleged that the assets represented the proceeds of corrupt payments from her clients in return for assistance in securing funding for their projects, which had been laundered through an offshore company. Concern about the proceeds of overseas corruption being laundered through the UK, and the difficulty faced by law enforcement agencies in establishing that property was purchased with the proceeds of crime, have given rise to the new powers in the Criminal Finances Bill, currently being debated in parliament. The Bill creates Unexplained Wealth Orders (UWOs), which would require politically exposed persons and persons suspected of involvement in criminality to explain the origin of

particular assets. The agencies that can apply for an order are the NCA, HMRC, the FCA, the SFO, and the DPP. An application is made to the High Court, specifying the property in question, the value of which must exceed £100,000. The court must be satisfied that the respondent is a politically exposed person or there are reasonable grounds for suspecting that they are or have been involved in serious crime. Once the order is granted by the court, the respondent must explain in a statement his or her interest in the property in question and how it was obtained. Failure to provide a response would give rise to a presumption that the property was recoverable under Part V POCA.

Debarment

In different jurisdictions different offences attract different sanctions. Debarment is one of the more severe sanctions posing high risk of loss of business. Needless to say, the possibility of debarment will feature prominently in considerations on how to structure a settlement in multi-jurisdictional investigations. Of particular concern is the recently introduced Public Procurement Directive (2014/24/EU) (the Directive). The Directive was incorporated into UK law under the Public Contracts Regulations 2015 (the Regulations). The Regulations came into force on 26 February 2015 and apply to all new tenders starting on or after that date.

The Regulation softened the rules on preventing companies from bidding for public contracts where they or their directors have been convicted of certain economic crimes. Under the previous Public Procurement Directive, tenderers who had been the subject of a conviction by final judgement for offences such as corruption, fraud or money laundering were excluded from participating in public contracts. The exclusion was mandatory and permanent.

Under the new Regulation, the scope of offences falling under either mandatory or discretionary debarment has been widened; however, the debarment period has been decreased.

Specifically with respect to the Bribery Act 2010, a conviction for the section 1, section 2 and section 6 offences gives rise to a mandatory exclusion from participation in public tenders. However, the corporate offence under section 7 of the Act will not trigger mandatory exclusion, but may give rise to grounds in support of a discretionary exclusion. This is owing to the concern, raised with the Secretary of State for Justice in 2011, about the possibility of a section 7 conviction permanently debarring companies from all totally and partially EU-funded projects.

The debarment period has been defined as up to five years for mandatory exclusion cases and as up to three years for discretionary exclusion cases, in place of the previous indefinite debarment.

17 Recent decisions and investigations

Identify and summarise recent landmark decisions or investigations involving foreign bribery.

Investigations

The SFO publishes a list of its current investigations, which can be found on its website. A number of high-profile criminal investigations relating to bribery and corruption have been announced in 2016.

Unaoil

On 19 July 2016, the SFO announced an investigation into Unaoil, the Monaco-based company implicated in an international corruption scandal uncovered by Australian journalists, and alleged to have corruptly secured contracts for various multinationals. Part of the investigation will involve its relationship with Rolls-Royce plc, which has also been under investigation by the SFO since December 2013. The SFO has reportedly been granted special funding for its Unaoil investigation, which is likely to be one of its largest. Very recently, Unaoil launched a judicial review challenging the SFO's conduct of the investigation, and specifically a request to the Monaco police to carry out a search of its offices. Unaoil seeks a ruling that the letter of request was unlawful and that seized materials now in the possession of the SFO should be returned.

Airbus

On 8 August 2016, the SFO announced a criminal investigation into corruption in the civil aviation business of Airbus Group. In April 2016, Airbus announced that it had informed UK authorities of its own findings 'concerning certain inaccuracies relating to applications for export credit financing for Airbus customers'. Shortly thereafter, export finance agencies in the UK, France and Germany suspended its funding vecaus of lack of transparency in relation to third-party payments. The recently announced SFO investigation involves allegations of irregularities in relation to deals concluded by third-party consultants. The SFO is already investigating allegations of bribes paid by GPT Special Project Management Ltd, Airbus' UK subsidiary, to a Cayman Islands-based subcontractor on a government-to-government contract with Saudi Arabia.

Soma Oil & Gas

The SFO's ongoing caseload in 2016 included a criminal investigation into British companies Soma Oil & Gas Holdings Ltd, Soma Oil & Gas Exploration Limited, Soma Management Limited and others (Soma Oil) announced in August 2015. The announcement followed the leak of a report by the United Nations' Somalia and Eritrea Monitoring Group, containing allegations that improper payments were made to officials in Somalia's Ministry of Petroleum in order to secure permission to explore the country for oil reserves. The SFO alleged that Soma Oil's involvement in making 'capacity building' payments to Somali public officials gives rise to reasonable grounds to suspect Soma Oil of having committed offences under sections 6 and 7 of the Bribery Act.

On 10 August 2016, Soma Oil, frustrated by the length of the investigation and facing insolvency because of inability to bid for certain key contracts, applied for judicial review of the SFO's decision not to conclude parts of the investigation and not to disclose details of other lines of inquiry that it had informed the company it was pursuing. As a result of filing these proceedings, Soma Oil was able to obtain an 'exceptional' letter in which the SFO informed the company that there was insufficient evidence of criminality in relation to the 'capacity building' payments. Soma Oil was refused permission to proceed with the judicial review, on the grounds that it would be extremely rare for a court to interfere with the wide discretion enjoyed by the SFO with respect to its investigatory function. Nonetheless, the judge expressed sympathy with the company's situation and exhorted the SFO to proceed as expeditiously as possible.

On 14 December 2016, the SFO closed its investigation, on the basis that the available evidence, taken at its highest, was insufficient to provide a realistic prospect of conviction.

Criminal proceedings

2016 has seen the conclusion of a number of bribery investigations with sentences imposed on individuals and corporates.

Smith & Ouzman Ltd

At a sentencing hearing on 8 January 2016, the UK printing company Smith & Ouzman Ltd was ordered to pay £2.2 million, following the first conviction of a corporate for overseas bribery offences following a contested trial. The conviction under section 1 of the Prevention of Corruption Act 1906 related to payments made to public officials in Kenya and Mauritania in order to secure contracts for printing ballot papers, examination papers and certificates.

This was the first time the Sentencing Guideline on Corporate Offenders (see question 16) was applied following criminal conviction. The sum of £2.2 million comprised a fine of £1,316,799 and a confiscation order of £881,158, plus £25,000 towards the SFO's costs. In order to calculate the fine, a multiplier of 300 per cent was applied, reflecting the high level of culpability of a company with a dominant position in the market engaging in corrupt conduct over a sustained period. No compensation order was made; although the judge recognised that the people of Kenya and Mauritania had been the victims of crime, there had been no formal request from these countries, and he was not convinced that compensation would be delivered into the 'right hands'. Confiscation and costs orders were imposed on Christopher Smith, its chairman, and Nicholas Smith, sales and marketing manager, who had been sentenced in February 2015.

Sweett Group PLC

In February 2016, Sweett Group PLC (Sweett Group) became the first company to be convicted and sentenced for the offence under section 7 of the Bribery Act. The SFO had opened its criminal investigation in July 2014. Sweett Group subsequently pleaded guilty in December 2015 to a charge under section 7 of the Bribery Act 2010 of failing to prevent

an act of bribery by an associated person, its subsidiary Cyril Sweett International Limited. The Cypriot subsidiary had made a corrupt payment to a senior official of the Al Ain Ahlia Insurance in order to secure a consultancy contract in relation to the construction of a hotel in Dubai. Sweett Group was ordered to pay £2.25 million, comprising a £1.4 million fine and £851,152.23 confiscation order, as well as the SFO's costs of £95,000. Applying the Sentencing Guideline on Corporate Offenders, the offending was sustained and the company had not taken steps to improve since the coming into force of the Bribery Act 2010, therefore the company's culpability was high and the starting point was a multiplier of 300 per cent to be applied to the gross profit figure in the confiscation order. It was also significant that there had been a deliberate attempt to mislead the SFO through obtaining a letter from the UAE company supporting the Sweett Group's initial claim that the payments were legitimate. Mitigating factors reduced the multiplier to 250 per cent: the company had admitted the wrongdoing, had no previous convictions and had eventually cooperated with the SFO and taken steps to improve its procedures.

Peter Chapman – Securency

On 12 May 2016, Peter Chapman was sentenced to 30 months for each of four counts of making corrupt payments to a foreign official contrary to the Prevention of Corruption Act 1906, to be served concurrently. The former manager of the Australian banknote company Securency International PTY Ltd was convicted following a five-week trial at Southwark Crown Court. The trial followed a joint investigation by the SFO and the Australian Federal Police into the activities of Securency's employees and agents and their alleged role in securing international polymer banknote contracts.

Simon Davies and Robert Gillam

On 28 September 2016, Simon Davies and Robert Gillam, Directors of British arms manufacturer Mondial Defence Systems Ltd, were sentenced at the Old Bailey following an investigation by the City of London Police. Both pleaded guilty to charges of bribing an employee at an American firm in order to secure a £5 million contract for the supply of military equipment. Robert Gillam was sentenced to two years' imprisonment and disqualified for being a director for five years. Simon Davis was sentenced to 11 months and disqualified for two years. Both were ordered to pay prosecution costs.

Royal properties cases

On 28 September 2016, Ronald Harper, former deputy property manager within the Royal Household, was sentenced to five years' imprisonment having been found guilty of taking payments or gifts worth around £105,000 in return for awarding large contracts. Steven Thompson of Melton Power Services and Christopher Murphy of BPI Nordale, directors of the companies that made the corrupt payments, were each sentenced to 18 months' imprisonment.

Alstom

On 29 March 2016, the SFO announced that it had charged another British national as part of its ongoing investigation into the Alstom Network UK Ltd (Alstom Network), a UK subsidiary of the rail power and electricity transmission manufacturer Alstom, which has been subject to criminal inquiries into alleged corruption by authorities in UK, France, Switzerland, Brazil and the US since 2009. Terence Watson, the Alstom country president for the UK and managing director of Alstom Transport UK & Ireland, has now been charged with an offence of corruption contrary to section 1 of the Prevention of Corruption Act 1906 and conspiracy to corrupt contrary to section 1 of the Criminal Law Act 1977, relating to the supply of trains to the Budapest Metro in Hungary between 1 January 2003 and 31 December 2008. The trial is expected to start at Southwark Crown Court in May 2017.

Alstom Network has already been charged with three offences of corruption contrary to section 1 of the Prevention of Corruption Act 1906 and three offences of conspiracy to corrupt contrary to section 1 of the Criminal Law Act 1977. Company executives Robert John Hallett and Graham Denis Hill were charged with the same offences. These offences are said to have taken place between 1 June 2000 and 30 November 2006 and concern large transport projects in India, Poland and Tunisia. The company is alleged to have paid approximately £5.27 million in bribes over the six-year period to win train and tram infrastructure deals, disguising the corrupt payments under consultancy agreements. This trial is expected to start in January 2018.

Charges have also been brought against Alstom Power Ltd and its former employees Nicholas Paul Reynolds and John Venskus in relation to contracts with Lithuanian companies and a project Alstom was involved in at the Elektrenai Power Plant in Lithuania, with a trial expected in September 2017.

The Alstom group has been subject to investigations in multiple jurisdictions and pleaded guilty on 22 December 2014 as part of a settlement with the DOJ to having paid US$75 million in bribes to government officials around the world that resulted in US$4 billion worth of power projects across the globe, rendering US$300 million in profits. Deputy Attorney-General James Cole described the corruption as 'astounding in its breadth, its brazenness and its worldwide consequences'. Alstom agreed to pay a fine of US$772.3 million as a result, the largest ever fine for breaches of the Foreign Corrupt Practices Act (FCPA) issued by the DOJ. Alstom also pleaded guilty to offences of falsifying records and failing to implement adequate controls over bribes paid to officials in Indonesia, Saudi Arabia, Egypt, Taiwan and the Bahamas. The ultimate fine levied reached such heights because of Alstom's continued refusal to cooperate with the investigation for several years and its failure to voluntarily disclose any of the relevant misconduct and similar misconduct known to it to be present in other subsidiaries. In addition, as part of the overall settlement Alstom Network Schweiz AG, a Swiss subsidiary, pleaded guilty to conspiracy to violate the anti-bribery provisions of the Foreign Corrupt Practices Act, and two US subsidiaries, Alstom Power and Alstom Grid, entered into deferred prosecution agreements relating to the bribery charges.

On 2 November 2015, Alstom sold most of its energy division, including Alstom Power, to General Electric Co, which had previously agreed to take on any subsequent liabilities relating to the bribery and corruption charges. However, the DOJ insisted that the French group pay the entire US$772.3 million fine with no part eligible for transfer to General Electric. Considering the SFO does not offer any guidance on successor liability akin to that found in the DOJ's Resource Guide to the FCPA, it remains to be seen how UK authorities will apportion any fines ultimately imposed in the event of a UK conviction. Notwithstanding that the new directors will not be liable for the company's historical actions, enforcement action undertaken against previous owners may cause severe reputational issues for the company. Moreover, the proceeds of historical bribery and corruption subsumed within the current business – revenue, improperly obtained licences, etc – will nevertheless be targeted by regulators.

Civil actions

As global enforcement of bribery and anti-corruption laws becomes more prevalent, competitors in markets where there have been high-profile investigations are increasingly finding the opportunity to claim they have been denied business and/or suffered significant losses as a result of their competitor's malfeasance. This 'piggy-backing' onto prosecutions for corruption is likely to become an increasingly common theme given the recent relaxation of the rules on bringing an unlawful means conspiracy claim.

JBMA

On 8 August 2014 Mr Justice Flaux rejected Jalal Bezee Mejel Algaood & Partners' (JBMA) US$42 million claim for 'follow on' damages, alleging that but for the bribery activities of Innospec Ltd in Iraq they would have secured the lucrative contract to supply fuel additives to Iraqi authorities. While the court found, 'there was clearly criminal wrongdoing', causation was not sufficiently proven, illustrating the key difficulty in such claims; the court must be persuaded as to what would have occurred but for the alleged, or proven, corruption. In the context of competitive commercial markets to cross this threshold will require detailed analysis and strong supporting factual evidence.

UBS

On 4 November 2014, Mr Justice Males rejected the Swiss bank UBS's claim for sums said to be due from a German municipal water company, Kommunale Wasserwerke Leipzig Gmbh (KWL), and two banks, DEPFA Bank Plc and Landesbank Baden Wurttemberg, under certain single tranche collateralised debt obligations (STCDOs). One of KWL's grounds for defence was that the STCDOs were voidable and had been

avoided because of a bribe paid by Value Partners, an agent of both KWL and UBS, to one of KWL's managing directors. In reality, UBS had not been aware of the unlawful payment. The court held that it was possible for UBS to be liable in law for the bribe paid by its agent as the payment fell within the scope of its agency relationship, even though UBS had no knowledge of the bribe. Therefore, the court found that KWL had the right to rescind the STCDOs and that UBS had no right to enforce payment under them. An appeal is expected to be heard in 2017.

Ecclestone

On 5 November 2014 the much-reported *Bernie Ecclestone* litigation involving German media group Constantin Medien AG concluded when the Court of Appeal upheld the High Court's decision to dismiss its claim for damages under the tort of unlawful means conspiracy. Constantin alleged that Ecclestone and his family trust made corrupt payments to Dr Gerhard Gribkowsky, a member of the management board of Bayerische Landesbank, in order to facilitate the sale of Formula One shares to his preferred buyer in 2006. Notwithstanding the judge's clear findings that the payments amounted to a bribe, the causation hurdle again proved the downfall in that Constantin could not surpass the evidential burden of establishing that the bribes caused its loss.

Though both claims were unsuccessful the courts have made clear such claims are viable, the major obstacle being proof of causation. While it may seem sufficient to prove substantial corrupt payments had an impact, the cases highlight the importance of claimants ensuring every link of the chain of causation is proven (ie, a clear demonstration that in the absence of the bribe the claimants would not have suffered loss). There have been no known civil claims attempting to claw back damages as a result of alleged corrupt conduct brought in front of the UK courts in 2015/2016.

Financial record keeping

18 Laws and regulations

What legal rules require accurate corporate books and records, effective internal company controls, periodic financial statements or external auditing?

In the UK, companies are not required to monitor and report on the effectiveness of their internal control mechanisms, although in the financial services sector there are statutory requirements as to compliance mechanisms and internal controls. Specifically, financial service providers must comply with statutory requirements for internal controls, and listed companies have a 'comply or explain' duty in respect of the effectiveness of internal mechanisms under the UK Corporate Governance Code (https://frc.org.uk/Our-Work/Publications/Corporate-Governance/UK-Corporate-Governance-Code-September-2012.pdf). In addition, UK companies that file returns with the US Securities and Exchange Commission are responsible for complying with control requirements around their financial reporting systems under the Sarbanes-Oxley Act 2002.

The 2007 Money Laundering Regulations require each regulated business or profession to maintain, inter alia: identification procedures; record keeping procedures; and internal reporting procedures.

The Companies Act 2006 was a major overhaul of company law. Some provisions came into force on 1 October 2007, and others on 6 April 2008; however, these are too numerous to quote here. The company law provisions of the 2006 act restate almost all of the provisions of the Companies Act 1985, together with the company law provisions of the Companies Act 1989 and the Companies (Audit, Investigations and Community Enterprise) Act 2004. Of particular interest to practitioners will be Part 15, relating to accounts and records, and the offences contained therein for those who fail to comply with the duty to keep accounting records. Annex A to the DPP and SFO's Guidance on Corporate Prosecutions contains a list of possible offences under the Companies Act 2006 for the prosecutors' consideration when reviewing a case against a company.

Businesses regulated by the FCA are subject to disciplinary procedures where they have failed to meet the FCA's regulatory requirements, which could include a failure to have effective anti-corruption procedures in place.

The UK is also the first member state to adopt the EU Directive on Extractive Industries through The Reports on Payments to Governments Regulations 2014 (SI 2014/3209). The regulations require detailed disclosure of a range of payments, including fees, taxes, royalties and dividends made to governments on a country and project basis, as of 1 January 2015.

19 Disclosure of violations or irregularities

To what extent must companies disclose violations of anti-bribery laws or associated accounting irregularities?

The Bribery Act contains no obligation to report any instances of bribery and corruption. This is consistent with existing company law and accounting standards, neither of which set out specific requirements in respect of the recognition, measurement, presentation or disclosure of matters relating to bribery offences. If a transaction involving a bribery offence were material to the reporting entity, it would probably fall within the definition of an 'extraordinary item' as defined in the Financial Reporting Council's updated Financial Reporting Standard FRS102, which is required to be disclosed separately, along with an adequate description to enable its nature to be understood.

As regards internal company controls and the role of company directors, companies are not obliged to maintain or report on the effectiveness of internal controls. Directors are under no obligation to declare that the company complies with UK legal and regulatory requirements or that there are no errors or irregularities contained in the financial information. However, the broad spread of liability in the section 7 corporate offence may result in greater self-reporting of irregularities.

The anti-money-laundering provisions contained within sections 327 to 329 and sections 330 to 332 of POCA provide for possible disclosure of such violations.

20 Prosecution under financial record keeping legislation

Are such laws used to prosecute domestic or foreign bribery?

Yes, they have been. The controversial settlement with BAE Systems announced by the SFO and the US DoJ incorporated an agreement between the SFO and BAE that the company would plead guilty to an offence under section 221 of the Companies Act 1985 of failing to keep accurate accounting records in relation to its activities in Tanzania. The company agreed to make a £30 million ex gratia payment for the benefit of the people of Tanzania, less any financial orders imposed by the court. In the US, however, BAE pleaded guilty to a criminal charge of misleading the US government and was fined US$400 million.

On 21 December 2010, Mr Justice Bean sentenced BAE to a £500,000 fine and ordered it to pay £225,000 towards the prosecution's costs. However, the judge came close to halting the process for lack of evidence before him:

> *I could not, without hearing evidence, accept any interpretation of the basis of plea which suggested that what BAE were concealing by the section 221 offence was merely a series of payments to an expensive lobbyist. Such evidence might, for example, have involved witnesses who could testify, if it really is the case, that legitimate lobbyists could be paid 30 per cent of the value of a $40 million contract simply as recompense for their time and trouble. Neither side sought to call evidence, although I indicated that I was prepared to grant an adjournment for them to do so.*
>
> *I asked Mr Temple what should have been in the accounting records instead of the phrase 'provision of technical services'. He replied that something along the lines of 'public relations and marketing services' would have been a more accurate description. If that had been a true and accurate description of the services which Mr Vithlani was going to provide then I question whether it would have been appropriate to prosecute at all. Certainly the section 221 offence would have been suitable for being sentenced in the magistrates' court. I would myself have imposed a fine of at most £5,000.*

His lordship also expressed surprise to find the prosecution granting blanket immunity for all offences committed prior to February 2010 whether disclosed or otherwise; and that no individuals were being charged despite the opening of the case by the SFO submitting that the BAE offence 'was the result of a deliberate decision by one or more officers'. The judge conceded, however, that he had no power to vary or set aside the settlement agreement.

Section 221 has been replaced by an identical section – section 386 of the Companies Act 2006.

21 Sanctions for accounting violations

What are the sanctions for violations of the accounting rules associated with the payment of bribes?

The offence of fraudulent accounting under section 993 of the Companies Act 2006 applies to all those who are knowingly a party to the carrying on of the business with the intent to defraud creditors, regardless of whether the company is, or has been, wound up. Penalties for this offence on summary conviction carry a maximum term of 12 months' imprisonment or a £5,000 fine or both, and on conviction on indictment, a maximum term of 10 years' imprisonment or a fine not exceeding the statutory maximum or both.

In the *BAE* criminal proceedings Mr Justice Bean, having observed that under section 221 of the Companies Act 1985 he normally would have imposed a fine of £5,000, sentenced the company to £500,000 fine on the basis that:

> *by describing the payments in their accounting records as being for the provision of 'technical services' the Defendants were concealing from the auditors and ultimately the public the fact that they were making payments to Mr Vithlani, 97 per cent of them via two offshore companies, with the intention that he should have free rein to make such payments to such people as he thought fit in order to secure the Radar Contract for the defendants, but that the defendants did not want to know the details.*

22 Tax-deductibility of domestic or foreign bribes

Do your country's tax laws prohibit the deductibility of domestic or foreign bribes?

Although no specific provision exists prohibiting the deductibility of bribe payments to foreign public officials, section 1304 of the Corporation Taxes Act 2009 and section 55 of the Income (Trading and Other) Act of 2005 provides that tax deductibility is denied for any payment the making of which constitutes the commission of a criminal offence in the UK. Additionally, the Finance Act 2002 has ensured that the prohibition also applies to payments that take place wholly outside the jurisdiction of the UK. Although deductibility of bribe payments is clearly prohibited within the UK, some of the Crown dependencies and overseas territories are not in compliance with provisions of the OECD Council Recommendation on the Tax Deductibility of Bribes to Foreign Public Officials.

Domestic bribery

23 Legal framework

Describe the individual elements of the law prohibiting bribery of a domestic public official.

Current position

Sections 1 and 2 of the Bribery Act set out two active and four passive bribery scenarios (cases) that describe conduct of the payer or the recipient that will constitute a bribery offence.

Section 1

Section 1 defines the offence of bribery as it applies to the person who offers, promises or gives a financial or other advantage to another. That person is referred to in the section as P – he or she is the payer. Section 1 provides that P is guilty of an offence if one of two scenarios applies to him or her:

Case 1

Case 1 is where –

(a) P offers, promises or gives a financial or other advantage ['Financial or other advantage' is left to be determined as a matter of common sense by the tribunal of fact] to another person, and

(b) P intends the advantage –

(i) to induce a person to perform improperly a relevant function or activity, or

(ii) to reward a person for the improper performance of such a function or activity.

It does not matter whether the person to whom the advantage is offered, promised or given is the same person as the person who is to perform, or has performed, the function or activity concerned.

Case 2

Case 2 is where –

(a) P offers, promises or gives a financial or other advantage to another person, and

(b) P knows or believes that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity.

In neither case does it matter whether the advantage is offered, promised or given by P directly or through a third party.

Section 2

Section 2 defines the offence of bribery as it applies to the recipient or potential recipient of the bribe, who is called R. It distinguishes four cases, for which it does not matter whether R does or will request, agree to receive or accept the advantage directly or through a third party or whether the advantage is (or is to be) for the benefit of R or another person.

Case 3

Case 3 is where R requests, agrees to receive or accepts a financial or other advantage intending that, in consequence, a relevant function or activity should be performed improperly (whether by R or another person).

Case 4

Case 4 is where –

(a) R requests, agrees to receive or accepts a financial or other advantage, and

(b) the request, agreement or acceptance itself constitutes the improper performance by R of a relevant function or activity.

In this scenario, it does not matter whether R knows or believes that the performance of the function or activity is improper.

Case 5

Case 5 is where R requests, agrees to receive or accepts a financial or other advantage as a reward for the improper performance (whether by R or another person) of a relevant function or activity.

Again, in this scenario as with case 4 above, it does not matter whether R knows or believes that the performance of the function or activity is improper.

Case 6

Case 6 is where, in anticipation of or in consequence of R requesting, agreeing to receive or accepting a financial or other advantage, a relevant function or activity is performed improperly either by R, or by another person at R's request or with R's assent or acquiescence. Not only does it not matter whether R knows or believes that the performance of the function or activity is improper, but in this scenario, where a person other than R is performing the function or activity, it also does not matter whether that person knows or believes that the performance of the function or activity is improper.

Previous regime

Conduct occurring prior to 1 July 2011 falls under the previous regime with the possible offences being:

- the common law offence of bribery;
- the two offences in section 1 of the Public Bodies Corrupt Practices Act 1889; and
- the first two offences in section 1(1) of the Prevention of Corruption Act 1906.

All these offences address the gift or receipt of bribes (or corrupt advantages), but they differ in their application depending upon who is the recipient. The common law applies where the person who receives the

Update and trends

SFO enforcement under the Bribery Act 2010 is gathering momentum. The past 18 months have seen the conclusions of the first successful enforcement actions for the failure to prevent offence in section 7, including the first successful prosecution and two deferred prosecution agreements. In these proceedings, the courts were able for the first time to apply the 2014 Sentencing Council Guideline on Corporate Offenders in order to determine the sanctions to be imposed. The SFO's ongoing caseload also includes cases in which the old law will be applied, with the trials of the two companies and seven individuals implicated in the Alstom Group investigation expected in 2017 and 2018.

bribe holds any public office; the 1889 Act applies where he or she is a 'member, officer or servant' of any local or public authority and the 1906 Act applies where he or she is an 'agent' – which includes persons working in the private sector as well as persons serving under the Crown and other public authorities.

These offences were amended by the Prevention of Corruption Act 1916, which introduced the presumption of corruption. Section 2 of the 1916 Act provides that where money or any 'consideration' is received by a public official from a person seeking to obtain a public contract, it shall be presumed to have been corruptly received unless the contrary can be proved.

24 Prohibitions

Does the law prohibit both the paying and receiving of a bribe?

The Bribery Act, in sections 1 and 2, very clearly prohibits the paying and the receiving of a bribe, respectively.

The giving, promising or offering of a financial or other advantage whatsoever to any person, whether for the benefit of that person, or of another person, as an inducement to or reward for doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed in which the public body is concerned are offences under the Bribery Act, punishable with a maximum of 10 years' imprisonment.

25 Public officials

How does your law define a public official and does that definition include employees of state-owned or state-controlled companies?

The Bribery Act makes no distinction in domestic law between the bribery of public officials and private individuals. Under sections 1 and 2 the bribe must be connected to an improper performance (or non-performance) of a 'relevant function or activity'. Thus, 'relevant function or activity' is defined in section 3 as being:

- any function of a public nature;
- any activity connected with a business;
- any activity performed in the course of a person's employment; and
- any activity performed by or on behalf of a body of persons, whether corporate or not.

These functions or activities must meet one of the following three conditions in order to qualify as 'relevant' function or activity:

- a person performing the function or activity is expected to perform it in good faith;
- a person performing the function or activity is expected to perform it impartially; and
- a person performing the function or activity is in a position of trust by virtue of performing it.

Previous regime

The Court of Appeal decision in *Whitaker* [1914] 3 KB 1283 provides the most widely cited definition concerning who is to be regarded as a public officer for the purposes of common law bribery. Under the definition a public officer is 'an officer who discharges any duty in the discharge of which the public are interested, more clearly so if he is paid out of a fund provided by the public'.

As originally enacted, the 1889 Act was concerned only with local public bodies (such as bodies that have power to act under and for the purposes of any act relating to local government, or the public health, or otherwise to administer money raised by rates in pursuance of any public general act). Section 4(2) of the 1916 Act extended this definition to encompass 'local and public authorities of all descriptions'. This, however, does not include the Crown or a government department. Schedule 11, paragraph 3 of the Local Government and Housing Act 1989 makes provision for including companies 'under the control of one or more local authorities', but this provision is not in force.

The 1906 Act, in extending the law of corruption into the private sector, defined 'agent' as meaning 'any person employed by or acting for another'. Section 1(3) of the act further clarified that 'a person serving under the Crown or under any corporation or any ... , borough, county, or district council, or any board of guardians, is an agent within the meaning of this Act.' As mentioned in response to question 3, the Court of Appeal has recently clarified the law, confirming that the scope of the Act has never been limited to the agents of UK bodies.

26 Public official participation in commercial activities

Can a public official participate in commercial activities while serving as a public official?

The development of effective codes of conduct regulating those who are involved in public life has been accepted as being essential in reducing the prevalence of corruption in society. The codes that have been developed contain detailed rules of conduct tailored to the requirements of the office-holders concerned and the risks they are likely to encounter. The rules include requirements to declare and register interests and to avoid conflicts of interest and situations that may create a perception of conflict of interest.

The Committee on Standards in Public Life (the CSPL) is an advisory non-departmental public body of the UK government. Its first general recommendation, in May 1995, was that the principles underpinning standards in public life should be restated. These principles as formulated by the CSPL have come to be known as the Seven Principles of Public Life and have come to be regarded as the 'touchstone for ethical standards across the public sector generally' (CSPL Sixth Report). Their second recommendation was that all public bodies should draw up codes of conduct incorporating these seven principles.

The Principle of Selflessness states that: 'Holders of public office should take decisions solely in terms of the public interest. They should not do so in order to gain financial or other material benefits for themselves, their family, or their friends.'

The Principle of Integrity states that: 'Holders of public office should not place themselves under any financial or other obligation to outside individuals or organisations that might influence them in the performance of their official duties.'

By way of example, the Ministerial Code states that ministers must ensure that no conflict arises, or appears to arise, between their public duties and their private interests, financial or otherwise.

Ministers customarily place their family assets in blind trusts during the currency of their ministry.

27 Travel and entertainment

Describe any restrictions on providing domestic officials with gifts, travel expenses, meals or entertainment. Do the restrictions apply to both the providing and receiving of such benefits?

The new offence of corporate bribery in section 7 of the Bribery Act applies to both domestic and foreign officials: the offence is the failure to prevent bribery. Therefore, besides the codes of conduct that public officials and many private employees are subject to, in response to the section 7 offence many companies have re-evaluated their guidelines and restrictions for corporate hospitality and business expenditure, which would encompass business relations with domestic officials. The principles upon which the section 7 guidance is based highlight the importance of ongoing training and monitoring that it must be assumed will encompass this area.

The Ministry of Justice Guidance, as mentioned in question 2, also applies to domestic business expenditure.

It is a well-established and recognised rule that no minister or public servant should accept gifts, hospitality or services from anyone who would, or might appear to, place him or her under an obligation. The

same principle applies if gifts, etc, are offered to a member of their family. See clauses 7.20 to 7.24 of the Ministerial Code.

In February 1997 Michael Allcock, a senior tax inspector in the Special Compliance Office, was convicted on six counts of corruptly accepting money and other benefits from taxpayers, between 1987 and 1992, in return for favourable treatment of their tax affairs. He was sentenced to five years' imprisonment.

28 Gifts and gratuities

Are certain types of gifts and gratuities permissible under your domestic bribery laws and, if so, what types?

There are no specific guidelines or permitted items contained in legislation; however, there has been a large amount of guidance. Cases of this nature will turn on their facts in the context of all the guidance that exists. Basically, businesses should wherever possible avoid gifts and gratuities to anyone who can influence the obtaining/sustaining of business advantage, or that would induce improper performance.

The convictions in the Sainsbury's potato-buyer corruption case, which concluded in May 2012, provide assistance in judging the line between acceptable corporate hospitality and outright bribery, as well as the concept of inducement and improper conduct or performance. The buyer received hospitality and gifts from Greenvale, which supplies potatoes to the supermarket, including:

- a stay at Claridge's costing a total of £200,000;
- a luxury 12-day excursion to the Monaco Grand Prix in 2007, at a cost to Greenvale of around £350,000; and
- lump-sum payments, via an account in Luxembourg, in the amount of £1.5 million (supposedly for the storage of potatoes in Spain and other bogus activities).

In the recent settlement between Brand-Rex Ltd and the Scottish COPFS (see question 32), a loyalty programme entitling distributors to foreign holidays, as an incentive in exchange for exceeding their sales targets, was deemed to be permissible under domestic law. However, the passing on of the travel tickets from a distributor to an employee of an end-user customer, who could influence purchasing decisions, was deemed to fall outside the intended scope of the scheme and fall within the remit of the Bribery Act.

29 Private commercial bribery

Does your country also prohibit private commercial bribery?

The Bribery Act makes no distinction between public official and private commercial bribery. It is therefore prohibited under sections 1 and 2 of the Bribery Act (see question 22). Under sections 1 and 2, the bribe must be connected to the improper performance of a 'relevant function or activity'. This has been defined very widely (see question 25) and can be (among others) an activity connected with a business, in the course of employment or performed by or on behalf of a group of persons. This easily encompasses private commercial relationships and thus prohibits private commercial bribery.

International law on bribery within the private sector is somewhat undeveloped. In essence, two conventions (Council of Europe and UN) and a Framework Decision of the EU contain requirements for the criminalisation of the giving or receiving of undue advantages in the course of business activities for actions that represent a breach of duty. The provisions in the conventions are in effect optional: reservations may be made on articles 7 and 8 in the Council of Europe convention, and article 21 of the UN convention only requires parties to 'consider' such an offence.

Previous regime

The UK, in 1906, was the first country to legislate on private-to-private bribery. UK courts will also hear cases in which elements of the offence of private-to-private bribery involving UK nationals or companies have occurred abroad. This applies both to the public and private sectors. See question 2.

The common law offence of bribery is limited to public sector corruption.

30 Penalties and enforcement

What are the sanctions for individuals and companies violating the domestic bribery rules?

The penalties for foreign and domestic bribery are the same.

31 Facilitating payments

Have the domestic bribery laws been enforced with respect to facilitating or 'grease' payments?

A facilitation payment is given to an official as encouragement to do something that in any case would fall within the official's functions. Facilitation payments are not exempt under UK law: common law and UK legislation have never distinguished 'facilitation payments' from other bribes. The Bribery Act has made no change to the law and there have been no reported cases.

See also question 6.

32 Recent decisions and investigations

Identify and summarise recent landmark decisions and investigations involving domestic bribery laws, including any investigations or decisions involving foreign companies.

In April 2016, the COPFS, the Scottish Prosecutor, announced a civil settlement with freight and logistics company Braid Group (Holdings) Ltd. The COPFS provided limited details of the investigation because of the possibility of future criminal proceedings against individuals. The parent company had become aware of potentially corrupt practices in 2012 and had instigated an internal investigation that uncovered two incidents. The first related to an agreement entered into by a Braid Group employee under which an account was used as a means for unauthorised expenses to be incurred by the employee of a customer, who provided fake invoices. The investigation also uncovered separate bribery

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offences in relation to a profit-sharing arrangement with a director of a customer company, through which the profit on services provided to the company were split in return for continued business. Braid Group made a self-report to the COPFS and accepted liability for breaches of sections 1 and 7 of the Bribery Act 2010. The case was deemed suitable for a civil recovery settlement with Braid Group agreeing to pay £2.2 million, based on the gross profits made in relation to the relevant contracts.

This is the second enforcement action by the COPFS for the corporate offence of failure to prevent bribery under section 7 of the Bribery Act. In September 2015, the prosecuting authority announced a civil settlement with Brand-Rex Ltd, a medium-sized Scottish company, which ran an incentive scheme for UK cabling distributors and installers between 2008 and 2012, the details of which are set out at question 28. Brand-Rex Ltd became aware of the issue through an internal review. The company acknowledged that it had failed to prevent bribery and that it had benefitted from unlawful conduct by an associated third party, but was able to avoid criminal prosecution because of its extensive investigation and self-reporting, instead paying the £212,800 representing the gross profit from the misuse of the incentive scheme under a civil settlement.

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United States

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1 International anti-corruption conventions

To which international anti-corruption conventions is your country a signatory?

The United States is a signatory to and has ratified the OECD Anti-Bribery Convention, the OAS Convention and the United Nations Convention against Corruption, all with reservations or declarations. The most significant reservations involve declining to specifically provide the private right of action envisioned by the United Nations Convention against Corruption and not applying the illicit enrichment provisions of the OAS Convention. The United States is also a signatory to the Council of Europe Criminal Law Convention (Criminal Convention) but has not ratified it.

2 Foreign and domestic bribery laws

Identify and describe your national laws and regulations prohibiting bribery of foreign public officials (foreign bribery laws) and domestic public officials (domestic bribery laws).

The principal US law prohibiting bribery of foreign public officials is the Foreign Corrupt Practices Act (FCPA), 15 USC sections 78m, 78dd-1, 78dd-2, 78dd-3, 78ff, enacted in 1977. The principal domestic public bribery law is 18 USC section 201, enacted in 1962. There are no implementing regulations for either statute, other than the regulations governing the Department of Justice's (DOJ) FCPA opinion procedure, under which the DOJ issues non-precedential opinions regarding its intent to take enforcement action in response to specific inquiries. See 28 CFR part 80. In November 2012, however, the DOJ and the Securities and Exchange Commission (SEC) jointly issued *A Resource Guide to the U.S. Foreign Corrupt Practices Act*. While this written guidance explicitly states that it 'is non-binding, informal, and summary in nature, and the information contained herein does not constitute rules or regulations', it nonetheless serves to clarify the FCPA and how it is applied by the enforcement agencies, expressly confirming pre-existing enforcement practices and policies, and consolidating current agency thinking in a single, comprehensive reference source.

Foreign bribery

3 Legal framework

Describe the elements of the law prohibiting bribery of a foreign public official.

The FCPA prohibits the following:

- a covered person or entity;
- corruptly;
- committing any act in furtherance of;
- an offer, payment, promise to pay or authorisation of an offer, payment or promise;
- of money or anything of value to:
  - any foreign official;
  - any foreign political party or party official;
  - any candidate for foreign political office; or
  - any other person;
- while 'knowing' that the payment or promise to pay will be passed on to one of the above;
- for the purpose of:
  - influencing an official act or decision of that person;
  - inducing that person to do or omit to do any act in violation of his or her lawful duty;
  - inducing that person to use his or her influence with a foreign government to affect or influence any government act or decision; or
  - securing any improper advantage;
- in order to obtain or retain business, or direct business to any person.

See 15 USC sections 78dd-1(a), 78dd-2(a), 78dd-3(a).

Jurisdiction
Jurisdiction exists over US persons and companies acting anywhere in the world, companies listed on US stock exchanges (issuers) and their employees, and non-US persons and companies, or anyone acting on their behalf, whose actions take place in whole or in part while in the territory of the United States (see question 15).

Prohibited acts
Prohibited acts include promises to pay, even if no payment is ultimately made. The prohibitions also apply to improper payments made indirectly by third parties or intermediaries, even without explicit direction by the principal.

Corrupt intent
Corrupt intent, described in the legislative history as connoting an evil motive or purpose, is readily inferred from the circumstances, from the existence of a quid pro quo, from conduct that violates local law, and even from surreptitious behaviour.

Improper advantage
Added to the statute following the OECD Anti-Bribery Convention, an 'improper advantage' does not require an actual action or decision by a foreign official.

Business purpose
A US court has confirmed that the 'business purpose' element (to obtain or retain business) is to be construed broadly to include any benefit to a company that will improve its business opportunities or profitability.

4 Definition of a foreign public official

How does your law define a foreign public official?

The FCPA defines a 'foreign official' as 'any officer or employee of' or 'any person acting in an official capacity for or on behalf of' 'a foreign government or any department, agency, or instrumentality thereof, or of a public international organization' such as the World Bank. This can include part-time workers, unpaid workers, officers and employees of companies with government ownership or control, as well as anyone acting under a delegation of authority from the government to carry out government responsibilities. US courts have held that determining whether an entity is a government 'instrumentality' for the purposes of the FCPA requires a 'fact-specific analysis'. The US Court of Appeals for the Eleventh Circuit, the only federal appellate court to

have considered the issue, set forth a two-part test for making such a determination: An entity is an 'instrumentality' if it is controlled by the government of a foreign country and performs a function that the controlling government treats as its own. The court then outlined a list of non-exhaustive factors that 'may be relevant to deciding the issue'.

First, to determine if the government of a foreign country controls an entity, courts and juries should look to:

- the government's formal designation of the entity;
- whether the government has a majority interest;
- the government's ability to hire and fire the entity's principals;
- the extent to which the government profits or subsidises the entity; and
- the length of time these indicia have existed.

Second, to determine whether an entity performs a function that the government treats as its own, courts and juries should consider:

- whether the entity has a monopoly over the function;
- whether the government subsidises costs associated with the entity providing services;
- whether the entity provides services to the public; and
- whether the public and the government perceive the entity to be performing a governmental function.

The FCPA also applies to 'any foreign political party or official thereof or any candidate for foreign political office'.

5 Travel and entertainment restrictions

To what extent do your anti-bribery laws restrict providing foreign officials with gifts, travel expenses, meals or entertainment?

The FCPA criminalises providing 'anything of value', including gifts, travel expenses, meals and entertainment, to foreign officials, where all the other requisite elements of a violation are met.

In addition, less obvious items provided to 'foreign officials' can violate the FCPA. For example, in-kind contributions, investment opportunities, subcontracts, stock options, positions in joint ventures, favourable contracts, business opportunities and similar items provided to 'foreign officials' are all things of value that can violate the FCPA.

The FCPA includes an affirmative defence, however, for reasonable and bona fide expenses that are directly related to product demonstrations, tours of company facilities or 'the execution or performance of a contract' with a foreign government or agency. The defendant bears the burden of proving the elements of the asserted defence.

Guidance recently issued by the DOJ and SEC underscores that anti-bribery violations require a corrupt intent and states that 'it is difficult to envision any scenario in which the provision of cups of coffee, taxi fare, or company promotional items of nominal value would ever evidence corrupt intent'. The guidance also notes that, under appropriate circumstances, the provision of benefits such as business-class airfare for international travel, modestly priced dinners, tickets to a baseball game or a play would not create an FCPA violation.

6 Facilitating payments

Do the laws and regulations permit facilitating or 'grease' payments?

The FCPA permits 'facilitating' or 'grease' payments. This narrow exception applies to payments to expedite or secure the performance of 'routine governmental action[s]', which are specifically defined to exclude actions involving the exercise of discretion. As such, the exception generally applies only to small payments used to expedite the processing of permits, licences, or other routine documentation; the provision of utility, police or mail services; or the performance of other non-discretionary functions.

7 Payments through intermediaries or third parties

In what circumstances do the laws prohibit payments through intermediaries or third parties to foreign public officials?

The FCPA prohibits making payments through intermediaries or third parties while 'knowing' that all or a portion of the funds will be offered or provided to a foreign official. 'Knowledge' in this context is statutorily defined to be broader than actual knowledge: a person is deemed to 'know' that a third party will use money provided by that person to make an improper payment or offer if he or she is aware of, but consciously disregards, a 'high probability' that such a payment or offer will be made. The DOJ and SEC have identified a number of 'red flags' – circumstances that, in their view, suggest such a 'high probability' of a payment – and in recent years, there has been a significant uptick in the number of FCPA-related enforcement actions involving third-party intermediaries.

8 Individual and corporate liability

Can both individuals and companies be held liable for bribery of a foreign official?

Both individuals and companies can be held liable for bribery of a foreign official. A corporation may be held liable (even criminally) for the acts of its employees in certain circumstances, generally where the employee acts within the scope of his or her duties and for the corporation's benefit. A corporation may be found liable even when an employee is not and vice versa. In recent years, the DOJ has increasingly made the prosecution of individuals a cornerstone of its FCPA enforcement strategy.

9 Successor liability

Can a successor entity be held liable for bribery of foreign officials by the target entity that occurred prior to the merger or acquisition?

It is a well-established principle of US law that acquiring companies generally assume the civil and criminal liabilities of the companies they acquire, including liabilities under statutes such as the FCPA. US enforcement authorities view successor liability as an integral component of corporate law that, among other things, prevents companies from avoiding liabilities through reorganisation.

Successor liability does not, however, create liability where none existed before. Where a company acquires a foreign entity that was not previously subject to the FCPA, the acquirer cannot be held retroactively liable under the FCPA for improper payments that the acquired entity may have made prior to the acquisition – though it could face liability for such conduct under applicable foreign laws. The protection offered by this principle is limited in scope though. For instance, if the improper conduct continues following the acquisition of a company not previously subject to the FCPA, it could create FCPA or related criminal liability for the new combined company in the United States.

While there are no fail-safe means of avoiding successor liability, US enforcement authorities have indicated that companies that conscientiously seek to identify, address and remedy bribery issues at the target company – either before or soon after closing – will be given considerable credit for doing so, and that the result may be a decision to take no enforcement action. Such enforcement decisions, however, will depend on the facts and circumstances, considered on a case-by-case basis.

10 Civil and criminal enforcement

Is there civil and criminal enforcement of your country's foreign bribery laws?

There is civil and criminal enforcement of the United States' foreign bribery laws. See question 16.

11 Agency enforcement

What government agencies enforce the foreign bribery laws and regulations?

Both the DOJ and SEC have jurisdiction to enforce the anti-bribery provisions of the FCPA. The DOJ has the authority to enforce the FCPA criminally and, in certain circumstances, civilly; the SEC's enforcement authority is limited to civil penalties and remedies for violations by issuers of certain types of securities regulated by the SEC.

12 Leniency

Is there a mechanism for companies to disclose violations in exchange for lesser penalties?

The FCPA does not require self-reporting of FCPA violations. However, under US securities laws, including the Sarbanes-Oxley Act (SOX), corporations are sometimes required to disclose improper payments or internal investigations into possible improper payments, thereby effectively notifying or reporting to the government (see question 19). Following the enactment of SOX, the number of voluntary disclosures of actual or suspected FCPA violations has sharply increased.

Enforcement authorities encourage voluntary disclosure of actual or suspected violations and publicly assert that voluntary disclosure, and subsequent cooperation with enforcement authorities, may influence the decision of whether to bring an enforcement action, the scope of any government investigation, and the choice of penalties sought to be imposed. In short, voluntary disclosure can result in more lenient treatment than if the government were to learn of the violations from other sources. The benefits of voluntary disclosure, however, are not statutorily guaranteed or quantified in advance by enforcement officials.

On 5 April 2016, the DOJ launched a one-year FCPA enforcement 'pilot program', which provides incentives for companies to self-report potential FCPA-related misconduct. For a company to be eligible to participate, the DOJ requires: the voluntary self-disclosure of the underlying FCPA violations; full cooperation with the Department's subsequent investigation (including the disclosure of 'all facts related to involvement in the criminal activity by the corporation's officers, employees, or agents'); the taking of appropriate remediation measures; and the disgorgement of all profits resulting from the FCPA violations. If a company takes all these steps, the Fraud Section 'may accord up to a 50 percent reduction off the bottom end of the Sentencing Guidelines fine range' and 'generally should not require appointment of a monitor'. In addition, where a company fulfils these same conditions, 'the Fraud Section's FCPA Unit will consider a declination of prosecution'.

13 Dispute resolution

Can enforcement matters be resolved through plea agreements, settlement agreements, prosecutorial discretion or similar means without a trial?

FCPA enforcement matters are most often resolved without a trial through plea agreements, civil administrative actions, and settlement agreements such as deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs). As a matter of prosecutorial discretion, some investigations or disclosures are not pursued. Although still a fairly rare occurrence, an increase in the number of individuals prosecuted has resulted in more defendants holding out for jury verdicts in recent years.

14 Patterns in enforcement

Describe any recent shifts in the patterns of enforcement of the foreign bribery rules.

The pace of FCPA enforcement has accelerated greatly over the past decade, with the DOJ and SEC averaging more than 35 enforcement actions a year during this time period compared with approximately four a year over the first 28 years following the statute's enactment. Along with this increase in overall enforcement, the sanctions imposed have also increased in severity, particularly in recent years, with monetary penalties (including fines, disgorgement of profits, and payment of pre-judgment interest) significantly eclipsing those imposed by earlier FCPA settlements. For example, from 2005 to 2007, the SEC and DOJ imposed approximately US$272 million in FCPA-related corporate penalties, with the average combined penalty coming to nearly US$11 million. In the ensuing nine years, these figures have skyrocketed, with the agencies imposing approximately US$4.35 billion in FCPA-related corporate penalties from 2014 to 2016, bringing the average combined penalty to more thanUS$89 million. In addition to monetary penalties, companies are now frequently required either to retain independent compliance monitors, usually for a period of two to three years, or to agree to self-monitor and file periodic progress reports with US enforcement agencies for an equivalent length of time. In recent years, the agencies have also introduced a hybrid approach that imposes an abbreviated monitorship, generally ranging from a year to 18 months, followed by a similarly abbreviated period of self-monitoring and self-reporting. Companies entering into DPAs or NPAs typically submit to probationary periods under these agreements.

Individuals have increasingly been targets of prosecution and have been sentenced to prison terms, fined heavily, or both. Since 2011, over 90 individuals have been charged with or convicted of criminal or civil violations of the FCPA, and this emphasis by US enforcement authorities on the prosecution of individuals shows no signs of letting up. On 9 September 2015, Deputy Attorney General Sally Yates issued a memorandum entitled 'Individual Accountability for Corporate Wrongdoing' to federal prosecutors nationwide detailing new DOJ policies that require a corporation that wants to receive credit for cooperating with the government to provide 'all relevant facts' about employees at the company who were involved in the underlying corporate wrongdoing. The DOJ's new FCPA enforcement 'pilot program', discussed in question 12, furthers these aims, explicitly requiring that a company comply with the Yates Memo directives to receive full cooperation credit.

Many recent prosecutions have been based on expansive interpretations of substantive and jurisdictional provisions of the FCPA, and foreign entities have been directly subjected to US enforcement actions. US authorities have also targeted specific industries for enforcement, including the oil and gas, the medical device and the pharmaceutical industries and, most recently, the financial industry.

SOX has encouraged voluntary disclosures, and a number of recent cases have arisen in the context of proposed corporate transactions. US enforcement agencies have also benefited from the cooperation of their counterparts overseas; including coordination that has contributed to some of the most high-profile DOJ enforcement activities to date. Enforcement agencies' expectations for compliance standards continue to rise, as reflected in the compliance obligations imposed on companies in recent settlements.

15 Prosecution of foreign companies

In what circumstances can foreign companies be prosecuted for foreign bribery?

A foreign company that is listed on a US stock exchange or raises capital through US capital markets, and is thus an 'issuer', may be prosecuted for violations of the anti-bribery provisions if it uses any instrumentality of US commerce in taking any action in furtherance of a payment or other act prohibited by the FCPA.

Any foreign person or foreign company, whether or not an 'issuer', may be prosecuted under the FCPA if it commits (either directly or indirectly) any act in furtherance of an improper payment 'while in the territory of the United States'.

Recent guidance from the DOJ and SEC also asserts that a foreign company may be held liable for aiding and abetting an FCPA violation (18 USC, section 2, or 15 USC sections 78t(e) and u-3(a)) or for conspiring to violate the FCPA (18 USC, section 371), even if the foreign company did not take any act in furtherance of the corrupt payment while in the territory of the United States. In conspiracy cases, the United States generally has asserted jurisdiction over all the conspirators where at least one conspirator is an issuer, domestic concern or commits a reasonably foreseeable overt act within the United States.

16 Sanctions

What are the sanctions for individuals and companies violating the foreign bribery rules?

Criminal and civil penalties may be imposed on both individuals and corporations for violations of the FCPA's anti-bribery provisions.

Criminal penalties for wilful violations

Corporations can be fined up to US$2 million per anti-bribery violation. Actual fines can exceed this maximum under alternative fine provisions of the Sentencing Reform Act (18 USC section 3571(d)), which allow a corporation to be fined up to an amount that is the greater of twice the gross pecuniary gain or loss from the transaction enabled by the bribe. Individuals can face fines of up to US$100,000 per anti-bribery violation or up to five years' imprisonment, or both. Likewise,

under the alternative fine provisions of the Sentencing Reform Act, individuals may also face increased fines of up to US$250,000 per anti-bribery violation or the greater of twice the gross pecuniary gain or loss the transaction enabled by the bribe.

Civil penalties

Corporations and individuals can be civilly fined up to US$10,000 per anti-bribery violation. In addition, the SEC or the DOJ may seek injunctive relief to enjoin any act that violates or may violate the FCPA. The SEC may also order disgorgement of ill-gotten gains and assess pre-judgment interest. In fact, in recent years, disgorgement has become a common component of most FCPA dispositions, with the amount disgorged frequently exceeding the total value of the civil and criminal fines imposed.

Since 2008, US enforcement authorities have imposed over US$5 billion in criminal and civil fines, disgorgement, and pre-judgment interest in connection with FCPA enforcement actions, including 11 cases in which the combined penalties exceeded US$100 million.

Collateral sanctions

In addition to the statutory penalties, firms may, upon indictment, face suspension and debarment from US government contracting, loss of export privileges and loss of benefits under government programmes, such as financing and insurance. The SEC and the DOJ also generally require companies to implement detailed compliance programmes and appoint independent compliance monitors (who report to the US government) and/or self-monitor for a specified period in connection with the settlement of FCPA matters.

17 Recent decisions and investigations

Identify and summarise recent landmark decisions or investigations involving foreign bribery.

The SEC and DOJ resolved 57 FCPA-related enforcement actions in 2016, which represents the second-highest annual total on record and comes just a year after enforcement had fallen to a 10-year low in 2015. This increase was largely driven by the SEC, which entered into substantially more corporate FCPA dispositions in 2016 than the DOJ, which has shifted its focus toward larger cases involving more serious misconduct.

Among other notable developments this past year, several companies entered into substantial 'global' settlements to resolve FCPA-related charges in multiple jurisdictions simultaneously, reflecting levels of coordination and international cooperation heretofore not seen between the US and a variety of other countries.

In February 2016, the Netherlands-based global telecommunications provider VimpelCom Ltd agreed to a joint settlement with the SEC, DOJ and Dutch authorities to resolve FCPA-related allegations that VimpelCom entities made more than US$114 million in improper payments to a foreign official in Uzbekistan in exchange for that official's understood influence over the telecommunications regulator in Uzbekistan. As part of its resolution, VimpelCom agreed to pay a total of US$795 million in fines and disgorgement to US and Dutch authorities and retain an independent compliance monitor for three years. For its part, the SEC agreed to offset more than US$207 million of Vimpelcom's US$350 million disgorgement in recognition of the company's US$167.5 million disgorgement payment to Dutch authorities and US$40 million forfeiture to the DOJ. VimpelCom's resolution may signal not only increasing international coordination with respect to resolutions, but also with respect to fact-gathering and case-building. In its press release, the SEC thanked agencies of 14 other countries for assisting in its investigation. The DOJ noted that it was 'one of the most significant coordinated international and multi-agency resolutions in the history of the FCPA'.

In September 2016, New York-based hedge fund Och-Ziff Capital Management Group LLC (Och-Ziff) entered into a parallel settlement with the SEC and DOJ to resolve a five-year investigation into allegations that Och-Ziff paid agents and business partners while knowing that some or all of the underlying funds would be used to bribe high-level government officials in the Democratic Republic of Congo and Libya to secure hundreds of millions of dollars in investment opportunities. In settling, Och-Ziff agreed to pay US$412 million in fines and disgorgement and retain a compliance monitor for three years. Although this matter does not constitute another joint multijurisdictional settlement, the DOJ still acknowledged extensive international cooperation in its investigation, including assistance from authorities in a number of jurisdictions with prominent offshore banking industries, such as Switzerland, the British Virgin Islands, Malta, Cyprus, Gibraltar, Jersey, Guernsey and the United Kingdom. The involvement and cooperation of so many countries signals a growing willingness by anti-corruption authorities worldwide to help the US track down evidence related to corrupt transactions.

In October 2016, the Brazilian aircraft manufacturer Embraer SA likewise entered into a joint settlement with the SEC, DOJ and Brazilian authorities to resolve a six-year investigation into FCPA-related allegations that the company paid millions in bribes to government officials in the Dominican Republic, Mozambique, India, and Saudi Arabia to secure hundreds of millions of dollars in aircraft contracts between 2008 and 2010. Embraer frequently sought to conceal the illicit payments by channelling them through third parties, including consultants with no relevant expertise or experience, whose services were unnecessary, and who were retained without meaningful scrutiny. As part of its resolution, Embraer agreed to pay a total of US$205 million in fines, disgorgement, and prejudgment interest to US and Brazilian authorities and retain an independent compliance monitor for three years. For its part, the SEC agreed to offset more than US$20 million of Embraer's US$98 million disgorgement in recognition of the company's US$20 million disgorgement payment to Brazilian authorities. According to the DOJ, Brazilian authorities have also charged 11 individuals to date for their alleged roles in the Dominican Republic misconduct, while Saudi Arabian authorities have reportedly charged two local officials based on their alleged involvement in the Saudi scheme.

In November 2016, the global financial services firm JPMorgan Chase and Co and its Chinese subsidiary entered into a parallel settlement with the SEC and DOJ to resolve allegations that the Chinese subsidiary created a client-referral programme in 2006 called the 'Sons and Daughters Program' as a means of providing the relatives of local officials with internships and paid positions in exchange for favourable business deals that reportedly generated at least US$35 million profit for the company. From the outset, the alleged purpose of the programme was to generate business for the Chinese subsidiary, as the candidates hired to the client-referral programme were typically less qualified in terms of grades, language skills and quantitative ability than the regular pool of candidates, who had to go through a competitive interview process. Additionally, the departments that hired these candidates generally expected less from them in terms of competency, workload and number of hours worked, and provided them with 'special consideration' in terms of work assignments, promotions, and protection from heavy workloads. As part of its resolution, JPMorgan Chase and its Chinese subsidiary agreed to pay more than US$264 million in fines, disgorgement and prejudgment interest to US authorities.

Financial record keeping

18 Laws and regulations

What legal rules require accurate corporate books and records, effective internal company controls, periodic financial statements or external auditing?

The FCPA, in addition to prohibiting foreign bribery, requires issuers to keep accurate books and records and to establish and maintain a system of internal controls adequate to ensure accountability for assets. Specifically, the accounting provisions require issuers to make and keep books, records and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the issuers' assets. Issuers must also devise and maintain a system of internal accounting controls that assures that transactions are executed and assets are accessed only in accordance with management's authorisation; that accounts of assets and existing assets are periodically reconciled; and that transactions are recorded so as to allow for the preparation of financial statements in conformity with GAAP standards. Issuers are strictly liable for the failure of any of their owned or controlled foreign affiliates to meet the books and records and internal controls standards for the FCPA.

SOX imposes reporting obligations with respect to internal controls. Issuer CEOs and CFOs (signatories to the financial reports) are directly responsible for and must certify the adequacy of both internal

controls and disclosure controls and procedures. Management must disclose all 'material weaknesses' in internal controls to the external auditors. SOX also requires that each annual report contain an internal control report and an attestation by the external auditors of management's internal control assessment. SOX sets related certification requirements (that a report fairly presents, in all material respects, the financial condition and operational results) and provides criminal penalties for knowing and wilful violations.

The securities laws also impose various auditing obligations, require that the issuer's financial statements be subject to external audit and specify the scope and reporting obligations with respect to such audits. SOX also established the Public Company Accounting Oversight Board (the PCAOB) and authorised it to set auditing standards.

19 Disclosure of violations or irregularities

To what extent must companies disclose violations of anti-bribery laws or associated accounting irregularities?

The accounting provisions of the FCPA do not themselves require disclosure of a violation (see question 12). US securities laws do, however, prohibit 'material' misstatements and otherwise may require disclosure of a violation of anti-bribery laws. The mandatory certification requirements of SOX can also result in the disclosure of violations.

20 Prosecution under financial record keeping legislation

Are such laws used to prosecute domestic or foreign bribery?

Although part of the FCPA, the accounting provisions are not limited to violations that occur in connection with the bribery of foreign officials. Rather, they apply generally to issuers and can be a separate and independent basis of liability. Accordingly, there have been many cases involving violations of the record keeping or internal controls provisions of the FCPA that are wholly unrelated to foreign bribery.

At the same time, charges of violations of the accounting provisions are commonly found in cases involving the bribery of foreign officials. In situations in which there is FCPA jurisdiction under the accounting provisions but not the anti-bribery provisions, cases have been settled with the SEC under the accounting provisions with no corresponding resolution under the anti-bribery provisions.

21 Sanctions for accounting violations

What are the sanctions for violations of the accounting rules associated with the payment of bribes?

For accounting violations of the FCPA, the SEC may impose civil penalties, seek injunctive relief, enter a cease-and-desist order and require disgorgement of tainted gains. Civil fines can range from either US$5,000 to US$100,000 per violation for individuals and US$50,000 to US$500,000 per violation for corporations or the gross amount of pecuniary gain per violation. Neither materiality nor 'knowledge' is required to establish civil liability: the mere fact that books and records are inaccurate, or that internal accounting controls are inadequate, is sufficient. Through its injunctive powers, the SEC can impose preventive internal control and reporting obligations.

The DOJ has authority over criminal accounting violations. Persons may be criminally liable under the accounting rules if they 'knowingly circumvent or knowingly fail to implement a system of internal accounting controls or knowingly falsify any book, record, or account' required to be maintained under the FCPA.

Penalties for criminal violations of the FCPA's accounting provisions are the same penalties applicable to other criminal violations of the securities laws. 'Knowing and wilful' violations can result in fines up to US$25 million for corporations and US$5 million for individuals, along with up to 20 years' imprisonment. Like the anti-bribery provisions, however, the accounting provisions are also subject to the alternative fine provisions (see question 16).

22 Tax-deductibility of domestic or foreign bribes

Do your country's tax laws prohibit the deductibility of domestic or foreign bribes?

US tax laws prohibit the deductibility of domestic and foreign bribes. See 26 USC section 162(c)(1).

Domestic bribery

23 Legal framework

Describe the individual elements of the law prohibiting bribery of a domestic public official.

The domestic criminal bribery statute prohibits:

- directly or indirectly;
- corruptly giving, offering or promising;
- something of value;
- to a public official;
- with the intent to influence an official act.

See 18 USC section 201(b)(1).

'Directly or indirectly'

The fact that an individual does not pay a bribe directly to a public official, but rather does so through an intermediary or third party, does not allow that individual to evade liability.

'Something of value'

'Anything of value' can constitute a bribe. Accordingly, a prosecutor does not have to establish a minimum value of the bribe in order to secure a conviction. Rather, it is enough that the item or service offered or solicited has some subjective value to the public official.

'Public official'

The recipient may be either a 'public official' or a person selected to be a public official (see question 25).

'Official act'

The prosecutor must prove that the bribe was given or offered in exchange for the performance of a specific official act – in other words, a quid pro quo. An 'official act' includes duties of an office or position, whether or not statutorily prescribed. For members of Congress, for example, an 'official act' is not strictly confined to legislative actions (such as casting a vote), but can encompass a congressman's attempt to influence a local official on a constituent's behalf.

24 Prohibitions

Does the law prohibit both the paying and receiving of a bribe?

In addition to punishing the payment of a bribe, the federal bribery statute prohibits public officials and those who are selected to be public officials from either soliciting or accepting anything of value with the intent to be influenced in the performance of an official act (see 18 USC section 201(b)(2)).

25 Public officials

How does your law define a public official and does that definition include employees of state-owned or state-controlled companies?

The bribery statute broadly defines 'public official' to include members of Congress, any person 'selected to be a public official' (ie, any person nominated or appointed, such as a federal judge), officers and employees of all branches of the federal government, as well as federal jurors. An individual need not be a direct employee of the government to qualify as a public official, as the statute includes in its definition 'a person acting for or on behalf of the United States'. The Supreme Court has explained this to mean someone who 'occupies a position of public trust with official federal responsibilities'. In the spirit of this expansive definition, courts have deemed a warehouseman employed at a US Air Force base, a grain inspector licensed by the Department of Agriculture, and an immigration detention centre guard employed by a private contractor as falling within the ambit of 'public official'.

Because the bribery statute applies only to the bribery of federal public officials, officials of the various state governments are exempt from the statute's reach. However, there are other federal statutory provisions which can be used to prosecute bribery of state public officials, as well as those attempting to bribe them. Specifically, the federal mail and wire fraud statutes prohibit the use of the mail system, phone or internet to carry out a 'scheme to defraud', which includes a scheme

Update and trends

The past several years have seen not only the continued use of independent compliance monitors or consultants as a condition of settlement in certain cases, but also the growth of such alternative dispositions as deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs), with the agencies giving increasing attention and publicity most recently to 'declinations'. Disgorgement with prejudgment interest has become a common, and sometimes significant, sanction by the SEC. The DOJ and SEC resolved several prominent enforcement actions this past year in parallel with foreign enforcement authorities, highlighting a dramatic rise in cooperation and coordination in global anti-corruption efforts. And, as noted in question 32, the prosecution of individuals has been recently reaffirmed as an enforcement priority.

to deprive another of 'honest services'. Under these provisions, state public officials who solicit bribes, and private individuals who offer them, can be prosecuted for defrauding the state's citizens of the public official's 'honest services' (bribery of federal public officials can also be prosecuted under the same theory). In addition, the bribing of state public officials is also prohibited by the laws of each state.

26 Public official participation in commercial activities

Can a public official participate in commercial activities while serving as a public official?

The extent to which public officials may earn income from outside commercial activities while serving as a public official varies by branch of government (see 5 USC App 4 sections 501–502). At present, members of Congress are prohibited by statute from earning more than US$27,495 in outside income. Members of Congress are also prohibited by statute from receiving any compensation from an activity that involves a fiduciary relationship (eg, attorney–client) or from serving on a corporation's board of directors. With respect to the executive branch, presidential appointees subject to Senate confirmation (senior non-career personnel) – such as cabinet secretaries and their deputies – are prohibited by executive order from earning any outside income whatsoever. Senior-level, non-career presidential appointees who are not subject to Senate confirmation may earn up to US$27,495 in outside income per year and may not receive compensation from any activity involving a fiduciary relationship. Career civil servants in the executive branch who are not presidential appointees are not subject to any outside earned income cap. However, no executive branch employee – whether a presidential appointee or not – may engage in outside employment that would conflict with his or her official duties. For example, a civil servant working for an agency that regulates the energy industry may not earn any outside income from work related to the energy industry.

27 Travel and entertainment

Describe any restrictions on providing domestic officials with gifts, travel expenses, meals or entertainment. Do the restrictions apply to both the providing and receiving of such benefits?

The giving of gifts, or 'gratuities', to public officials is regulated by a federal criminal statute applicable to all government officials and by regulations promulgated by each branch of government that establish specific gift and travel rules for its employees. The criminal gratuities statute applies to those who either provide or receive improper gifts, while the regulations apply only to the receiving of gifts. However, ethics reform legislation enacted in 2007 now makes it a crime for registered lobbyists and organisations that employ them to knowingly provide a gift to a member of Congress that violates legislative branch ethics rules.

The statutory provision that prohibits the payment and solicitation of gratuities (18 USC section 201(c)) is contained within the same section that prohibits bribery (18 USC section 201(b)). The basic elements of an illegal gratuities violation overlap substantially with the elements of bribery, except that a gratuity need not be paid with the intent to influence the public official. Rather, a person can be convicted of paying an illegal gratuity if he or she gives or offers anything of value to the public official 'for or because of any official act' performed or to be performed by the official. For example, a gift given to a senator as an expression of gratitude for passing favourable legislation could trigger the gratuities statute, even if the gift was not intended to influence the senator's actions (since it was given after the legislation was already passed). There is no requirement that the gift actually produce the intended result. The mere act of giving can be enough to trigger the statute.

In addition to the federal criminal gratuities statute, each branch of government regulates the extent to which its employees may accept gifts from outside sources. In effect, these regulations prohibit government officials from accepting certain gifts that would otherwise not be prohibited by the criminal gratuities statute. With respect to the executive branch regulations, employees of any executive branch department or agency are prohibited from soliciting or accepting anything of monetary value, including gifts, travel, lodging or meals from a 'prohibited source', that is, anyone who does or seeks to do business with the employee's agency, performs activities regulated by the employee's agency, seeks official action by the employee's agency, or has interests that may be substantially affected by the performance or non-performance of the employee's official duties. Unlike the criminal gratuities statute, which requires some connection with a specific official act, the executive branch gift regulations can be implicated even where the solicitation of a gift from a prohibited source is unconnected to any such act. In addition, federal employees may not accept gifts having an aggregate market value of US$20 or more per occasion, and may not accept gifts having an aggregate market value of more than US$50 from a single source in a given year. Limited exceptions exist for certain de minimis gifts, such as gifts motivated by a family relationship. However, the gift rules are even stricter for presidential appointees: under an executive order signed by President Obama, executive branch officials appointed by the president cannot accept any gifts from registered lobbyists, even those having a market value of less than US$20.

Under the Rules of the Senate and House of Representatives, members of Congress may not accept a gift (which includes travel or lodging) worth US$50 or more, or multiple gifts from a single source that total US$100 or more, for a given calendar year. These limits also apply to gifts to relatives of a member, donations by lobbyists to entities controlled by a member, donations made to charities at a member's request and donations to a member's legal defence fund. Importantly, the US$50 gift exceptions are not available to registered lobbyists, entities that retain or employ lobbyists, or agents of a foreign government (but the foreign government itself may still provide such gifts). A member of Congress is wholly prohibited from receiving a gift of any kind from a registered lobbyist and their affiliates. In addition, members are prohibited from receiving reimbursement or payment in kind for travel when accompanied by a registered lobbyist, or for trips that have been organised by a lobbyist. The House of Representatives specifically bars members from accepting refreshments from lobbyists in a one-on-one setting. Registered lobbyists can face up to a five-year prison term for knowingly providing gifts to members of Congress in violation of either the House or Senate ethics rules.

A recent bill introduced by Senators Michael Bennet and Al Franken would ban members of Congress from working as a lobbyist at any time after they leave office. Current law prohibits senators from lobbying for two years after leaving Congress and House members have a one-year ban. Under the proposed Close the Revolving Door Act of 2015, both House and Senate members would be permanently banned from lobbying after leaving office. In addition, the proposed law would increase the one-year restrictions on congressional staff to six years and increase the disclosure requirements for lobbying activities.

28 Gifts and gratuities

Are certain types of gifts and gratuities permissible under your domestic bribery laws and, if so, what types?

As noted in question 27, members of Congress may accept gifts that are worth less than US$50 (except from lobbyists or agents of a foreign government, from whom they are prohibited from accepting any gifts), but the aggregate value of such gifts from a single source in a given calendar year must be less than US$100. In addition to gifts under the US$50 limit, the House and Senate Rules exempt from the restrictions on gifts contributions to a member's campaign fund, food

and refreshments of nominal value other than a meal, and informational materials like books and videotapes, among other low-value items. Finally, the House and Senate ethics rules also contain a 'widely attended event' exception that allows members (and their staffers) to attend sponsored events, free of charge, where at least 25 non-congressional employees will be in attendance and the event relates to their official duties.

The executive branch regulations similarly allow for nominal gifts, such as those having a market value of US$20 or less (although presidential appointees may not accept any gift from a registered lobbyist), gifts based on a personal relationship and honorary degrees. De minimis items such as refreshments and greeting cards are also excluded from the definition of 'gift.' Like the House and Senate Rules, the executive branch regulations also contain a 'widely attended gathering' exception, although a key difference is that the employing agency's ethics official must provide the employee with a written finding that the importance of the employee's attendance to his or her official duties outweighs any threat of improper influence. The executive branch regulations also permit officials travelling abroad on official business to accept food and entertainment, as long as it does not exceed the official's per diem and is not provided by a foreign government. Under an executive order signed by President Obama, however, neither the widely attended gathering exception nor the exception for food and entertainment in the course of foreign travel are available to presidential appointees.

29 Private commercial bribery

Does your country also prohibit private commercial bribery?

Private commercial bribery is prohibited primarily by various state laws, among which there is considerable variation. New York, for example, has a broad statute that makes it an offence to confer any benefit on an employee, without the consent of his employer, with the intent to influence the employee's professional conduct.

While there is no federal statute that specifically prohibits commercial bribery, there are a handful of statutes that can be used by prosecutors to prosecute commercial bribery cases. First, the mail and wire fraud statutes prohibit the use of the mail system, phone or internet to carry out a 'scheme to defraud', which includes a scheme to deprive another of 'honest services'. A bribe paid to an employee of a corporation has been classified as a scheme to deprive the corporation of the employee's 'honest services', and thus can be prosecuted under the mail and wire fraud statutes.

Second, the so-called 'federal funds bribery statute' prohibits the payment of bribes to any organisation – which can include a private company – that in any one year receives federal funds in excess of US$10,000, whether through a grant, loan, contract or otherwise.

Finally, a federal statute known as the 'Travel Act' makes it a federal criminal offence to commit an 'unlawful act' – which includes violating state commercial bribery laws – if the bribery is facilitated by travelling in interstate commerce or using the mail system. Thus, if an individual travels from New Jersey to New York in order to effectuate a bribe, that individual can be prosecuted under the federal Travel Act for violating New York's commercial bribery law. A violation of the Travel Act based on violating a state commercial bribery law can result in a prison term of five years and a fine. Finally, commercial bribery is also actionable as a tort in the civil court system.

30 Penalties and enforcement

What are the sanctions for individuals and companies violating the domestic bribery rules?

Both the provider and recipient of a bribe in violation of the federal bribery statute can face up to 15 years' imprisonment. Moreover, either in addition to or in lieu of a prison sentence, individuals who violate the bribery statute can be fined up to the greater of US$250,000 (US$500,000 for organisations) or three times the monetary equivalent of the bribe. Under the gratuities statute, the provider or recipient of an illegal gratuity is subject to up to two years' imprisonment or a fine of up to US$250,000 (US$500,000 for organisations), or both.

Senior presidential appointees and members of Congress who violate the statute regulating outside earned income can face a civil enforcement action, which can result in a fine of US$10,000 or the amount of compensation received, whichever is greater. Government employees who violate applicable gift and earned income regulations can face disciplinary action by their employing agency or body. Registered lobbyists can face up to a five-year prison term for knowingly providing gifts to members of Congress in violation of either the House or Senate ethics rules.

31 Facilitating payments

Have the domestic bribery laws been enforced with respect to facilitating or 'grease' payments?

The domestic bribery statute does not contain an exception for grease payments. The statute covers any payment made with the intent to 'influence an official act' and the statutory term 'official act' includes non-discretionary acts. Courts have held, however, that if an official demands payment to perform a routine duty, a defendant may raise an economic coercion defence to the bribery charge.

32 Recent decisions and investigations

Identify and summarise recent landmark decisions and investigations involving domestic bribery laws, including any investigations or decisions involving foreign companies.

As noted in the answer to question 25, the federal bribery statute does not apply directly to state public officials. However, other federal laws can be used to reach the actions of state officials engaged in corruption. A recent prominent action against former Virginia governor Bob McDonnell and his wife Maureen illustrates this point. In September 2014, a federal jury convicted the McDonnells of multiple counts of both conspiracy and substantive 'honest services' wire fraud for accepting monetary and other gifts from a prominent local

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businessman in exchange for official acts and the prestige of the governor's office, which defrauded the state's citizens of the governor's 'honest services'. On 6 January 2015, a federal judge sentenced Bob McDonnell to two years in prison, substantially less than the six-and-a-half-year term sought by prosecutors. His wife Maureen was sentenced on 20 February 2015 to one year and a day in prison. On 10 July 2015, Bob McDonnell's conviction was upheld by the Fourth Circuit Court of Appeals. He subsequently requested review by the US Supreme Court, which granted his petition on 15 January 2016. Arguments were heard on 27 April 2016 and on 27 June 2016, the Supreme Court, in a unanimous opinion, vacated the governor's conviction on grounds that the definition of 'official act' relied on by the prosecution was overinclusive and erroneous. The Court held that for an action to qualify as an 'official act' under the federal bribery statute, a public official must proactively take an action or make a decision on a question or issue that involves a formal exercise of governmental power. Setting up a meeting, talking to another official, or organising an event – without more – does not rise to the level of an 'official act' within the meaning of the statute. As a result of the decision, lawyers for Maureen McDonnell requested that the Fourth Circuit Court of Appeals vacate her conviction as well. On 8 September 2016, the DOJ announced that it would not seek to retry either Bob or Maureen McDonnell on federal bribery charges. On 23 September 2016, a federal district court granted motions from both parties to dismiss all charges against the former governor and his wife.

A recent action against a federal public official demonstrates that enforcement of the domestic bribery laws continues to be a high priority for the DOJ. In April 2015, Senator Robert Menendez (New Jersey) was indicted on a total of 14 counts of corruption-related offences for allegedly accepting gifts, travel, and legal donations valued at nearly US$1 million from a wealthy Florida donor in exchange for intervening on behalf of the donor's business and personal interests. Among others, the charges included one count of conspiracy, one count of violating the Travel Act, eight counts of bribery and three counts of honest services fraud. Senator Menendez has pleaded not guilty, and on 13 September 2016, the Third Circuit Court of Appeals rejected his application to have the bribery and corruption charges dismissed on grounds that his constitutional protections as a senator were violated. In light of the recent Supreme Court decision in the McDonnell case, Senator Menendez has indicated that he will request that the Court review his appeal and grant his request to dismiss the charges against him.

Similarly, on 12 December 2016, former Pennsylvania congressman, Chaka Fattah, was sentenced to 10 years in federal prison after being convicted of multiple counts of wire and mail fraud, honest services fraud, bribery and money laundering relating to a series of elaborate criminal schemes, including misappropriation of funds and accepting bribes. The sentence is one of the longest ever imposed on a member of Congress.

Venezuela

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1 International anti-corruption conventions

To which international anti-corruption conventions is your country a signatory?

The Inter-American Convention against Corruption was signed and ratified by Venezuela. The United Nations Convention against Corruption has also been signed and ratified by Venezuela. Venezuela has also signed the United Nations Convention against Transnational Organized Crime.

2 Foreign and domestic bribery laws

Identify and describe your national laws and regulations prohibiting bribery of foreign public officials (foreign bribery laws) and domestic public officials (domestic bribery laws).

The main anti-corruption and bribery law In Venezuela is the Law against Corruption (the Law), which came into force on 19 November 2014.

The Law includes provisions against bribery, attempted bribery, collusion and illegal enrichment by public servants. The Law also criminalises the receipt of extraordinary or valuable gifts by public officials even when no bribery is involved. Also, it refers to bribery of foreign public officials, as it has been regulated by article 85.

To be classified as a crime, the law provides that the gift, profit or retribution is received or promised in exchange for the performance or omission of acts contrary to the duties of the public official. Delivery of gifts, gratuities or courtesies without an intent to have the public officials take or omit a specific action within their duties does not constitute bribery under the Law.

The Law defines: public official, and provides the duty and procedure for public officials to give sworn statements on their assets or equity upon entering and leaving public service; specific corruption-related crimes including bribery, illegal enrichment, collusion, etc; certain administrative violations; and the role of the National Comptroller's Office as the overseeing entity at the administrative level and of the Public Prosecutor's Office as the entity in charge of judicial or criminal investigation, prosecution and enforcement of the law.

From a constitutional perspective, corruption-related crimes are not subject to statutes of limitations and those accused of committing corruption-related crimes are not entitled to any benefits, privileges or procedural advantages.

The following laws also govern corruption in Venezuela: the Law against Organised Crime, the Organic Law of the Republic's Comptroller General and of the National Fiscal Control System, the Public Function Statute and the Code of Ethics of the Public Servant.

There are a number of resolutions and other acts that have an impact on domestic public officials, such as the Public Procurement Laws and the Organic Law for Citizens' Power.

Foreign bribery

3 Legal framework

Describe the elements of the law prohibiting bribery of a foreign public official.

Article 85 of the Law against Corruption exposes the responsibility of those who bribe foreign public officials so that they perform or omit an action inherent to the exercise of their public attributions. The penalty determined for such crime ranges between six and 12 years of prison.

Concerning International Treaties, Venezuela is a signatory to the United Nations Convention against Corruption and the OAS Inter-American Convention against Corruption, whose regulations also cover bribery of a foreign public official.

4 Definition of a foreign public official

How does your law define a foreign public official?

The Venezuelan Law against Corruption does not provide a formal definition of foreign public official. However, article 85 refers to foreign public officials as public officials from other countries, which leads to the interpretation that the same definition of domestic public officials applies to foreign public officials with the addition that they are from a different country.

5 Travel and entertainment restrictions

To what extent do your anti-bribery laws restrict providing foreign officials with gifts, travel expenses, meals or entertainment?

Article 85 prohibits giving any type of gifts or favours to foreign officials in order for them to omit or execute an action inherent to their attributions. Because of this, the law prohibits any type of gift for foreign official as long as the objective thereof is to have them omit or execute an action inherent to their attributions.

6 Facilitating payments

Do the laws and regulations permit facilitating or 'grease' payments?

About facilitating or grease payments, article 85 expressly states the prohibition of any type of payments, either direct or non-direct payments, by Venezuelan citizens or individuals whose permanent residence is established in Venezuela and corporations domiciled in the country.

Nevertheless, since facilitation of payments has been defined by The Organisation for Economic Co-operation and Development (OECD) as those minor payments made to a public servant in order to expedite a determined procedure, this action does not entail refraining or exceeding in the exercise of public attributions or an advantage for one of the parties.

Venezuelan laws have not regulated these payments since the concept of facilitating payments does not cover the circumstance described in the article above.

7 Payments through intermediaries or third parties

In what circumstances do the laws prohibit payments through intermediaries or third parties to foreign public officials?

Details on payments to foreign public officials through intermediaries or third parties are also described in article 85 of the Law against Corruption, as it prohibits indirect payments to foreign public servants through an intermediary.

In addition, the international anti-corruption conventions establish that promising or giving a foreign public official a bribe directly or

indirectly through a citizen or persons with permanent residence in the foreign country, or through companies domiciled in such foreign country, must also be prohibited and punished by the member countries.

8 Individual and corporate liability

Can both individuals and companies be held liable for bribery of a foreign official?

Article 2 of the Law against Corruption establishes who is liable. In this regard, as it is stated in such article, either individuals or companies can be held liable for bribery of a foreign official, under the terms of article 85.

In April 2012, the Law against Organised Crime and Terrorism Financing came into force, which provides civil, administrative and criminal liability for individuals and corporations that engage in corrupt practices under local law that also qualify as actions of organised crime. This law also establishes liability if the crime is committed by just one person on behalf of a corporation. It is worth noting that this law applies to Venezuelans or foreigners who commit any of the offences established therein, even if they were committed in foreign territory, when their behaviour affects financial interests or the security of Venezuela. In addition, the statute applies if part of the crime was committed in the country, at sea, in international waters or even in international airspace.

9 Successor liability

Can a successor entity be held liable for bribery of foreign officials by the target entity that occurred prior to the merger or acquisition?

There are no specific provisions about the matter in the Law against Corruption. This leads to the conclusion that successor entities must be ruled by the provisions about companies' liability contained in the law.

However, considering that criminal liability in Venezuela falls to individuals, only the members of the board of directors can be liable for bribery of foreign officials. Thus, regardless of whether the members of the board of directors of the target entity merge with another entity or not, liability can only be attributed to them individually. Therefore, in this case, the successor entity is not liable for bribery of foreign officials by the target entity that occurred prior to the merger or acquisition.

10 Civil and criminal enforcement

Is there civil and criminal enforcement of your country's foreign bribery laws?

Yes, there is. According to article 90 of the Law against Corruption, the criminal court judge, in addition to the criminal sanction, has to determine the civil liability of the people involved in the trial.

11 Agency enforcement

What government agencies enforce the foreign bribery laws and regulations?

There is no entity specifically in charge of investigating cases of foreign bribery. Although the Law created a new Intelligence Bureau in charge of prevention, investigation and fighting corruption, the Law does not establish determined attributions for this entity.

The Public Prosecutor's Office is the one in charge of criminal investigations including corruption and has the power to designate the specialised authority to carry out the investigation.

International cooperation must follow the regular international cooperation mechanisms provided in treaties involving the respective courts, foreign ministries and public prosecutors' offices.

12 Leniency

Is there a mechanism for companies to disclose violations in exchange for lesser penalties?

Yes. A mechanism for companies to disclose violations in exchange for lesser penalties does exist under Venezuelan law. In accordance with these regulations, the penalty can be reduced for up to two-thirds if certain conditions are met.

13 Dispute resolution

Can enforcement matters be resolved through plea agreements, settlement agreements, prosecutorial discretion or similar means without a trial?

Enforcement matters cannot be resolved through plea or settlement agreements. They can only be resolved through trial since these matters are considered a 'non-disposable' judicial matter by our legislation and doctrine. That is, matters related to corruption are not subject to negotiation between the parties and must be judged and punished according to the standards of the applicable law.

14 Patterns in enforcement

Describe any recent shifts in the patterns of enforcement of the foreign bribery rules.

There have not been any recent shifts in the patterns of enforcement.

15 Prosecution of foreign companies

In what circumstances can foreign companies be prosecuted for foreign bribery?

Under Venezuelan bribery laws, according to articles 2 and 85, foreign companies can be prosecuted for foreign bribery, provided that they have permanent residence in Venezuela or companies domiciled in national territory.

According to the Law against Organised Crime and Terrorism Financing, corporations may be found criminally liable if they engage in corrupt practices that are deemed to be actions of organised crime. Companies could be responsible even if the bribery was carried out by a company representative acting on the company's behalf, thus exposing the company to special penalties. This law states that crimes of corruption are not subject to any statute of limitations.

Also, they may be prosecuted if they have engaged in other illicit conduct, which is defined as such by specific Venezuelan laws.

16 Sanctions

What are the sanctions for individuals and companies violating the foreign bribery rules?

The sanction established by article 85 is imprisonment from six to 12 years.

17 Recent decisions and investigations

Identify and summarise recent landmark decisions or investigations involving foreign bribery.

One of the latest cases was, for instance, the one where a Venezuelan ex-banking official pleaded guilty in a US bribery case on 18 November 2013. Maria de los Angeles González, who was a senior official in Venezuela's State Economic Development Bank (BANDES), pleaded guilty in the federal court in New York to charges that included money-laundering, as part of a deal to cooperate with US prosecutors in the ongoing probe of Direct Access Partners LLC. The investigation is for US$5 million paid in kickbacks, and money laundering of more than US$60 million.

More recently, in 2015, the Venezuelan Football Federation's president, Rafael Esquivel, was arrested, among other authorities of FIFA (Fédération Internationale de Football Association) in Switzerland under the charges of fraud, blackmail and money laundering, related to the organisation of Copa America hosted in Venezuela (2007) and Argentina (2011). Allegedly, Esquivel was involved with several bribery acts through which he received more than US$110 million. He is now being investigated while he is still detained.

Financial record keeping

18 Laws and regulations

What legal rules require accurate corporate books and records, effective internal company controls, periodic financial statements or external auditing?

Venezuelan anti-bribery laws do not address corporate record keeping and bookkeeping.

According to the Law against Organised Crime and Terrorism Financing, the obligors must retain, for a minimum period of five years, documents or records demonstrating the performance of operations and business relationships with the customers or users in hard copy and digital format, as well as the documents required for their identification at the time of conducting business with the obligors.

General commercial law requires accurate corporate bookkeeping, and breaches of those obligations can result in classifying bankruptcy as culpable or even fraudulent, and expose the management involved to criminal liability.

Accurate record keeping and the issue of correct financial statements is required under capital markets regulations, which apply to corporations that make public offers of securities (ie, bonds and stock).

Additional obligations are imposed on financial and capital markets institutions by our anti-money laundering legislation and regulations.

Under tax legislation, inaccurate record and bookkeeping can subject the company and its management to administrative penalties.

In general, external auditing is optional.

19 Disclosure of violations or irregularities

To what extent must companies disclose violations of anti-bribery laws or associated accounting irregularities?

Neither companies nor individuals are subject to specific obligations to disclose violations of anti-bribery laws or associated accounting irregularities.

Nonetheless, in the context of criminal law, a confession may give rise to a reduction of the penalty.

20 Prosecution under financial record keeping legislation

Are such laws used to prosecute domestic or foreign bribery?

There are no financial record keeping regulations that are used to prosecute domestic or foreign bribery; rather, financial records may be used as proof or evidence of illicit conduct taking place under anti-corruption regulations.

21 Sanctions for accounting violations

What are the sanctions for violations of the accounting rules associated with the payment of bribes?

This specific conduct is not addressed in Venezuelan anti-corruption regulations. Punishable conduct is the promise or payment of a bribe – violations of accounting rules are not subject to specific penalties under anti-bribery legislation.

22 Tax-deductibility of domestic or foreign bribes

Do your country's tax laws prohibit the deductibility of domestic or foreign bribes?

Following the United Nations Convention against Corruption and the guidelines in article 12, Venezuela prohibits the tax deduction of domestic and foreign bribes, since local and foreign bribery is considered a crime, and our national tax law only permits the deduction of legal expenses, it is nonetheless illegal under the Inter-American Convention against Corruption; also, Venezuelan income tax law provides that, in order to be deductible, expenses must be necessary for the normal progress of business, and a foreign bribe – which is illegal – cannot be justified as a necessary expense in the normal course of business.

Domestic bribery

23 Legal framework

Describe the individual elements of the law prohibiting bribery of a domestic public official.

The Law against Corruption penalises bribery of local public officials in articles 61, 62 and 63 in the following terms.

Article 61

Article 61 provides that the public official who receives a benefit or other undue profit or accepts the promise of such a benefit or profit in exchange for any action in the performance of his or her duties has committed the crime of bribery. Bribery under this article, involving actions taken by public officials, is punishable by imprisonment from one to four years and a fine of up to 50 per cent of the value of what was received or promised in the bribery scheme. Both public officials and parties who give or promise the benefit or other profits are subject to these penalties.

Article 62

Article 62 provides that a public official who receives or is promised a sum of money or any other undue profit in exchange for delaying or omitting an action of his or her duties or for performing an action contrary to his or her duties is guilty of bribery. Parties who offer the bribe are also subject to prosecution under this provision. Bribery under this article, involving delays or omissions of public officials or actions contrary to their duties, is punishable by imprisonment from three to seven years and a fine of up to 50 per cent of the value of what was received or promised in the bribery scheme. Both public officials and parties who give or promise the benefit or other profits are subject to these penalties.

Prison terms shall be from four to eight years and the penalty shall be of up to 60 per cent if the crime results in:

- the grant of public employment, subsidies, pensions or honours, or an agreement on contracts related to the public administration to which the official belongs; or
- favouring or harming any of the parties in an administrative or judicial procedure, whether civil or criminal or of any other nature. If the responsible party is a judge and the result is a court decision that condemns the guilty party to imprisonment that exceeds six months, the penalty shall be imprisonment ranging from five to 10 years.

The same penalty, in each case, shall be applied to the intermediary through which the public official received or had money or another profit promised, and to the person that gives or promises such money or profit.

Article 63

Article 63 provides that those that attempt, without achieving their purpose, to persuade or induce a public official to commit any of the crimes provided for in articles 61 and 62 of this law will be guilty of unsuccessful (frustrated) bribery and shall be punished with imprisonment ranging from six months to two years. If the purpose is to make the official commit a crime specified in article 62, the penalties provided therein will be reduced by half.

24 Prohibitions

Does the law prohibit both the paying and receiving of a bribe?

Yes, the law prohibits both the paying and the receiving of a bribe. Regarding bribe payment, Venezuelan law prohibits bribing or promising a bribe to any public official; the unsuccessful attempt to bribe a public official is also punished.

The law also prohibits and punishes a public official who accepts the promise, the fee or another benefit that was not owed or that he should not receive.

25 Public officials

How does your law define a public official and does that definition include employees of state-owned or state-controlled companies?

The law defines public officials as those who are in charge of exercising public, permanent or transitory, remunerated or non-remunerated functions originated by election, by appointment or contract granted by a public authority, at the service of the Republic, the states, the territories and federal dependencies, the districts, the metropolitan districts or the municipalities, the autonomous national institutes, the public universities, the Central Bank of Venezuela or in any of the bodies or entities that exercise public power.

The definition of public officials also includes the directors and managers of civil and mercantile corporations, foundations, civil associations and other institutions constituted with public funds, or when the totality of the budgetary contributions or contributions in any fiscal year from one or several of the public persons represents 50 per cent or more of its budget or equity.

26 Public official participation in commercial activities

Can a public official participate in commercial activities while serving as a public official?

In Venezuela, a public official can participate in any type of commercial activity while serving as a public official, provided that the public official participates in such commercial activities with his or her own funds and resources, and as long as there is no connection between those activities and his or her public duties.

Domestic law mandates public officials to give periodical sworn statements about their assets or equity.

27 Travel and entertainment

Describe any restrictions on providing domestic officials with gifts, travel expenses, meals or entertainment. Do the restrictions apply to both the providing and receiving of such benefits?

The law uses the phrase 'undue donation'. Nevertheless, the doctrine establishes that only monetary fees or benefits qualify to constitute corruption. The gifts, travel expenses, meals or entertainment may be accepted, but it will be up to the decision of the judge whether the import of the gift impacts on the particular bribery case.

The taking of gifts, acceptance of coverage of travel expenses, meals or entertainment by a public official are deemed to be violations of the code of ethics of the public official and of the mandate to act honestly, subjecting the official to disciplinary penalties that can lead to termination.

28 Gifts and gratuities

Are certain types of gifts and gratuities permissible under your domestic bribery laws and, if so, what types?

The domestic bribery law prohibits giving a public official any 'undue donation' as a bribe. Currently, the national doctrine and judicial decisions consider as 'undue donation' only monetary fees, permitting gifts and gratuities; nonetheless, it is up to the judge to decide if the gift was an undue donation or not, because there are no specifications in the law.

Again, as with travel and entertainment above, acceptance of gifts and gratuities is a breach of code of ethics and may expose the official to disciplinary penalties and eventual termination.

29 Private commercial bribery

Does your country also prohibit private commercial bribery?

Yes. Article 47 of the Law against Corruption punishes people or entities, who directly or through a third party, offer gifts, profit or promises to any representative of a private entity in exchange for an advantage or a benefit ahead of other person or entity in the sale or acquisition of goods.

In addition, article 17 of the Law against Monopoly prohibits commercial bribery and violation of industrial secrets as specific forms of disloyal competition. Breach of this prohibition is considered by law to be an administrative violation and exposes the offender to a fine of up to 10 per cent of the value of the sales of the offender, an amount that may be increased up to 20 per cent of the value of the sales. In the event of recidivism, the fine shall increase to 40 per cent. The value of sales shall be that of the fiscal year immediately preceding the imposition of the fine.

30 Penalties and enforcement

What are the sanctions for individuals and companies violating the domestic bribery rules?

The individuals and companies that violate bribery laws by giving or promising money to a public official for performing his or her functions will be punished with the same sanction given to the public official who accepted the promise or received money. The punishment is imprisonment ranging from one to four years and a fine of up to 50 per cent of the received or promised amount:

- when the bribe is for delaying or omitting some action within the functions of the public official, the sanction is imprisonment from three to seven years and a fine of up to 50 per cent of the received or promised benefit; and
- when the bribe is used to award public employment, subsidies, pensions or honours, to agree about contracts related to the public administration, or to favour or to cause some prejudice within an administrative procedure, a penal or civil judgment or a public procedure of any other nature, the sanction is imprisonment from four to eight years and a fine of up to 60 per cent of the received or promised benefit.

If the company or individual bribes a judge to issue a condemnatory judgment that restricts someone's freedom exceeding six months, the sanction of imprisonment will be from five to 10 years.

31 Facilitating payments

Have the domestic bribery laws been enforced with respect to facilitating or 'grease' payments?

There is no specific provision regarding 'grease' payments; thus, the general anti-bribery provisions described in question 23 apply.

32 Recent decisions and investigations

Identify and summarise recent landmark decisions and investigations involving domestic bribery laws, including any investigations or decisions involving foreign companies.

On 15 October 2013 the ninth crime control court of the State of Carabobo (north-west Venezuela) remanded in custody Valencia's Mayor Edgardo Parra Oquendo, a member of the ruling United Socialist Party of Venezuela, for alleged involvement in corruption during his tenure. The Venezuelan Public Prosecutor's Office charged Mr Parra with collusive bidding, corruption, embezzlement and criminal association. The

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court set the Bolivarian Intelligence Service Territorial Base in the city of Valencia, State of Carabobo (north-west Venezuela), as the detention centre. It also ordered seizure of Mr Parra's bank accounts and assets, including estates, apartments, boats and technology equipment.

More recently, in September 2015, an arrest warrant was issued by the Fifth Court Control of the State of Bolívar against Mayor José Ramón López, who later surrendered before the authorities. The charges consisted of fraudulent embezzlement, conspiracy and avoidance of tenders. López is currently detained, waiting for the actions of the prosecutors.

* *The content of this chapter is accurate as of [the previous issue's month of publication] [the previous issue's year of publication]*

Appendix
Corruption Perceptions Index

Transparency International

The Corruption Perceptions Index (CPI), published annually by Transparency International, ranks countries and territories based on how corrupt their public sector is perceived to be. A country or territory's score indicates the perceived level of public sector corruption on a scale of zero to 100, where zero means that a country is perceived as highly corrupt and 100 means it is perceived as very clean.

A country's rank indicates its position relative to the other countries and territories in the index. This year's CPI includes 176 countries and territories. Full details on the methodology are available at www.transparency.org/cpi2016.

Rank	Country/Territory	CPI 2015 Score
1	New Zealand	90
1	Denmark	90
3	Finland	89
4	Sweden	88
5	Switzerland	86
6	Norway	85
7	Singapore	84
8	Netherlands	83
9	Canada	82
10	Germany	81
10	Luxembourg	81
10	United Kingdom	81
13	Australia	79
14	Iceland	78
15	Hong Kong	77
15	Belgium	77
17	Austria	75
18	The United States of America	74
19	Ireland	73
20	Japan	72
21	Uruguay	71
22	Estonia	70
23	France	69
24	Bahamas	66
24	Chile	66
24	United Arab Emirates	66
27	Bhutan	65
28	Israel	64
29	Poland	62
29	Portugal	62
31	Barbados	61
31	Taiwan	61
31	Qatar	61
31	Slovenia	61
35	Saint Lucia	60
35	Saint Vincent and The Grenadines	60
35	Botswana	60
38	Dominica	59
38	Cape Verde	59
38	Lithuania	59
41	Costa Rica	58
41	Brunei	58
41	Spain	58
44	Georgia	57
44	Latvia	57
46	Grenada	56
47	Cyprus	55
47	Czech Republic	55
47	Malta	55
50	Mauritius	54
50	Rwanda	54
52	Korea (South)	53
53	Namibia	52
54	Slovakia	51
55	Malaysia	49
55	Croatia	49
57	Jordan	48
57	Hungary	48
57	Romania	48
60	Cuba	47
60	Italy	47
62	Saudi Arabia	46
62	Sao Tome and Principe	46
64	Suriname	45
64	Montenegro	45
64	Oman	45
64	Senegal	45
64	South Africa	45
69	Greece	44
70	Bahrain	43
70	Ghana	43
72	Solomon Islands	42
72	Serbia	42
72	Burkina Faso	42
75	Turkey	41
75	Kuwait	41
75	Tunisia	41
75	Bulgaria	41
79	Brazil	40
79	China	40
79	India	40
79	Belarus	40
83	Jamaica	39
83	Albania	39
83	Bosnia and Herzegovina	39
83	Lesotho	39
87	Panama	38
87	Mongolia	38
87	Zambia	38
90	Colombia	37
90	Indonesia	37
90	The FYR of Macedonia	37
90	Morocco	37

Rank	Country/Territory	CPI 2015 Score
90	Liberia	37
95	Argentina	36
95	El Salvador	36
95	Maldives	36
95	Sri Lanka	36
95	Kosovo	36
95	Benin	36
101	Peru	35
101	Trinidad and Tobago	35
101	Philippines	35
101	Thailand	35
101	Timor-Leste	35
101	Gabon	35
101	Niger	35
108	Guyana	34
108	Algeria	34
108	Egypt	34
108	Côte d'Ivoire	34
108	Ethiopia	34
113	Bolivia	33
113	Vietnam	33
113	Armenia	33
116	Pakistan	32
116	Mali	32
116	Tanzania	32
116	Togo	32
120	Dominican Republic	31
120	Ecuador	31

Rank	Country/Territory	CPI 2015 Score
120	Malawi	31
123	Honduras	30
123	Mexico	30
123	Paraguay	30
123	Laos	30
123	Azerbaijan	30
123	Moldova	30
123	Djibouti	30
123	Sierra Leone	30
131	Nepal	29
131	Kazakhstan	29
131	Russia	29
131	Ukraine	29
131	Iran	29
136	Guatemala	28
136	Myanmar	28
136	Papua New Guinea	28
136	Kyrgyzstan	28
136	Lebanon	28
136	Nigeria	28
142	Guinea	27
142	Mauritania	27
142	Mozambique	27
145	Nicaragua	26
145	Bangladesh	26
145	Cameroon	26
145	Gambia	26
145	Kenya	26

Rank	Country/Territory	CPI 2015 Score
145	Madagascar	26
151	Tajikistan	25
151	Uganda	25
153	Comoros	24
154	Turkmenistan	22
154	Zimbabwe	22
156	Cambodia	21
156	Uzbekistan	21
156	The Democratic Republic of Congo	21
159	Haiti	20
159	Burundi	20
159	Central African Republic	20
159	Chad	20
159	Republic of Congo	20
164	Angola	18
164	Eritrea	18
166	Venezuela	17
166	Iraq	17
168	Guinea-Bissau	16
169	Afghanistan	15
170	Libya	14
170	Yemen	14
170	Sudan	14
173	Syria	13
174	Korea (North)	12
175	South Sudan	11
176	Somalia	10

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Debt Capital Markets
Dispute Resolution
Distribution & Agency
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Dominance
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Private Equity
Product Liability
Product Recall
Project Finance
Public-Private Partnerships
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Shareholder Activism & Engagement
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