

**ANTI-BRIBERY LAWS**

**Materials relating to France, Germany, Italy, Spain,  
the Russian Federation and the United Kingdom**

**Prepared by Clifford Chance LLP  
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### **Introduction**

This booklet provides a short overview of the relevant anti-bribery laws in France, Germany, Italy, Spain, the Russian Federation and the United Kingdom, with a particular focus on the bribery of public officials, and considers a number of related key concepts. In particular, it sets out information under the following headings:

1. Relevant laws and statement of the offence;
2. Extraterritorial effect;
3. Definition of "public official" and any major differences in the treatment of corruption in the public and private sectors;
4. Facilitation payments;
5. Tax and accounting offences;
6. Corruption and the public procurement process;
7. Due diligence and subsidiaries/agents;
8. Penalties/sanctions; and
9. Other relevant national legislation.

**France**

**1. Relevant laws and statement of the offence**

Act No. 2000-595 of 30 June 2000, Chapter V of Title III (amending the French Criminal Code)

Articles 435-3 and 435-4 of the Criminal Code

Criminal Code provisions on jurisdiction

Criminal Code provisions on sanctions

Criminal Procedure Code articles 689-8, 693, 704 and 706-1

Article 39-2 bis of the General Tax Code on the prohibition of tax deductibility and article 1741 on sanctions

*"The direct or indirect request or acceptance without right of offers, promises, donations, gifts or advantages, when done by a person holding public authority or discharging a public service mission, or by a person holding a public electoral mandate, is punished by ten years' imprisonment and a fine of €150,000 where it is committed:*

*1° to carry out or abstain from carrying out an act relating to his office, duty, or mandate, or facilitated by his office, duty or mandate;*

*2° or to abuse his real or alleged influence with a view to obtaining from any public body or administration any distinction, employment, contract or any other favourable decision." (Article 432 - 11 Criminal Code)*

*"...the act of proposing, without right, offers, promises, gifts, presents or advantages of any kind whatsoever at any time, either directly or indirectly, to a person entrusted with a public authority, charged with a public service mission or holding an elected office in a foreign State or within a public international organisation in order that the official perform or refrain from performing an act in accordance with his function, mission or office or in a manner facilitated by his function, mission or office to obtain or retain business or other improper advantage in the conduct of international business is punished by imprisonment for ten years and a fine of € 150,000."*

*"The act of consenting to a solicitation without right, at any time, either directly or indirectly, from an aforementioned person of offers, promises, gifts, presents or advantages of any kind whatsoever in order to perform or refrain from performing an act cited above is punished by the same penalties." (Article 435-3 paragraphs 1 and 2, Criminal Code)*

*"...the act of proposing, without right, offers, promises, gifts, presents or advantages of any kind whatsoever at any time, either directly or indirectly, to a judge, juror or*

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*any other person holding a judicial office, an arbitrator or an expert appointed either by a jurisdiction or by the parties, or any person assigned by a judicial authority to perform a mission of conciliation or mediation in a foreign State or within a public international organisation in order that the official perform or refrain from performing an act in accordance with his function, mission or office or in a manner facilitated by his function, mission or office to obtain or retain business or other improper advantage in the conduct of international business is punished by imprisonment for ten years and a fine of € 150,000."*

*"The act of consenting to a solicitation without right, at any time, either directly or indirectly, from an aforementioned person of offers, promises, gifts, presents or advantages of any kind whatsoever in order to perform or refrain from performing an act cited above is punished by the same penalties." (Article 435-4 paragraphs 1 and 2, Criminal Code)*

The maximum sanctions for bribery of French public agents are higher than those relating to bribery of foreign public agents.

## 2. **Extraterritorial effect**

2.1 Article 113-6 of the Criminal Code provides that "*French criminal law is applicable to offences committed by French nationals outside the territory of the Republic if the offence involved is punishable under the law of the country where it was committed.*" Proceedings may only be initiated at the request of the public prosecutor's office and must be preceded by a complaint lodged by the victim or legal successor or by an accusation formally made by the authorities of the country in which the acts took place.

2.2 France also establishes jurisdiction over offences, punishable by imprisonment, committed by a French national or a foreigner outside French territory against a French victim (the "victim" being a French national at the time of the offence) pursuant to Article 113-7 of the Criminal Code). (Such "passive" nationality jurisdiction is not required by the Convention.)

## 3. **Definition of "public official" and any major differences in the treatment of corruption in the public and private sectors**

3.1 The definition in the implementing legislation uses the same wording as already existing in the Criminal Code, and which is explained further in the Circular of 14 May 1993, "Commentary on the legislative part of the new Criminal Code and the provisions of the Act of 16 December 1992 concerning its coming into force", No. 290. This states that "*Persons entrusted with public authority*" should be construed as persons exercising a function of authority, whether that authority be administrative, judicial or military: whether the person's status is private or public does not matter. "*Persons charged with a public service mission*" should be construed as persons, whether private or public, who, although not entrusted with public authority, perform a public service of some sort, on either a temporary or permanent basis, either

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voluntarily or because they are requisitioned to do so by the authorities. Persons in charge of public or state-controlled companies are covered by this category, though control is not the only criterion.

- 3.2 Commercial bribery (more precisely, as referred to in article L.152-6 of the Code du travail, the corruption of managers and employees) is the corruption of employees (the provision refers also to managers but only managers who are employees, excluding the company's directors).
- 3.3 It is also an offence where the employee seeks or agrees to be corrupted without his employer's prior approval and where his employer is not aware of this corruption. This offence is punishable by imprisonment for two years and a fine of Euro 30,000. The Court may also impose a sanction depriving the defendant of his rights (civil, criminal and family rights).
- 3.4 The main difference in the treatment of public sector and private sector corruption is that the employee is liable to imprisonment for two years and a fine of Euro 30,000, whereas the maximum sanction in case of corruption of a public official varies between 10 and 15 years.

#### 4. **Facilitation payments**

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

#### 5. **Tax and accounting offences**

- 5.1 Existing French law provisions on accounting and record keeping prohibit the making of falsified or fraudulent accounts, statements and records for the purpose of bribing foreign public officials or of concealing such bribery.
- 5.2 Article 39-2 bis of the General Tax Code states that:

*"...from the coming into force of the Convention on combating bribery of foreign public officials in international business transactions, sums paid or advantages granted directly or through intermediaries, for the benefit of a public official within the meaning of Article 1(4) of the said Convention, or of a third party in order that the official acts or refrains from acting in the performance of official duties, with a view to obtaining or retaining business or another improper advantage in the conduct of international business, shall not be deductible from taxable profits".*

This provision came into force on 29 September 2000. It does not apply to all of France's overseas territories.

- 5.3 See also the Implementation of the OECD action Statement on Bribery and Official Supported Export Credit: an exporter that makes an application for credit insurance

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must declare that the contract covered by the guarantee was not secured by actions outlawed by the Criminal Code.

### **6. Corruption and the public procurement process**

There are no specific provisions in French public procurement legislation (which implements EU procurement directives) on corruption. The provisions on corruption as outlined above will apply where appropriate. There is a specific criminal offence when a public official unfairly favours a company within the public procurement regime, but this is not directly related to the anti-corruption provisions.

### **7. Due diligence and subsidiaries/agents**

7.1 The offence may be committed directly or indirectly. Therefore, a principal may be found guilty of the offence where an intermediary has either made the proposal or accepted the solicitation.

7.2 French law provides for the criminal responsibility of legal persons under Article 121-1 of the Criminal Code, providing the following requirements are met:

7.2.1 The offence must first have been committed by one or more natural persons constituting either a body or a representative of the legal person; and

7.2.2 The offence must have been committed on behalf of the legal person.

### **8. Penalties/sanctions**

#### *Natural persons*

8.1 Imprisonment for up to 10 years and a fine of up to € 150,000 for natural persons.

8.2 Other criminal penalties applicable to natural persons include:

8.2.1 deprivation of rights (civic, criminal and family rights) for five years or more;

8.2.2 possible banishment (in the case of foreign perpetrators);

8.2.3 professional restrictions (a ban for up to five years on performing a public function or professional or social activity in connection with which the offence was committed);

8.2.4 confiscation; and

8.2.5 the posting or publication of decisions.

#### *Legal persons*

8.3 Fines of up to 5 times the maximum amount of the fines on individuals can be imposed on legal persons. According to the French authorities, this is a particularly high on the

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French scale of penalties. The financial resources of the perpetrator are taken into account when a court orders a fine.

8.4 Pursuant to Article 433-25 of the Criminal Code, other criminal penalties applicable to legal persons (each of which may be imposed for a period of up to five years) include:

8.4.1 a ban on directly or indirectly performing the professional or social activity in connection with which the offence was committed;

8.4.2 placement under judicial supervision;

8.4.3 closure of one or more of the establishments of the enterprise used to commit the acts;

8.4.4 exclusion from public procurements;

8.4.5 ban on public appeals for funds;

8.4.6 ban on issuing cheques other than certified cheques and those drawn to withdraw the maker's funds on deposit;

8.4.7 ban on the use of payment cards;

8.4.8 confiscation; and

8.4.9 posting or publication of the court's ruling.

8.5 Seizure can be imposed for "*articles and documents that can help to reveal the truth*".

8.6 In respect of both natural and legal persons, confiscation of the "*instrument that was used or intended to be used to commit the offence, or of the proceeds of the offence*" may be imposed (Section 3 of Act No. 2000-595 of 30 June 2000). French case law supports a broad interpretation of the proceeds of an offence which can, for example, cover the price of the contract secured as a result of bribery.

## 9. **Other relevant national legislation**

Article 324-1 of the Criminal Code - money laundering including transposition of the second anti-money laundering of December 2001

Articles 8-17 of the Commercial Code - accounting requirements

See also law n° 2003-706 of 2 August 2003 on supervision of auditors in Feb. 2004

The chart of accounts resulting from the amended - accounting requirements ministerial decree of 23 March 1967

Article 39-2 bis of the General Tax Code - tax deductibility

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**The Federal Republic of Germany**

**1. Relevant laws and statement of the offence**

The Criminal Code (*Strafgesetzbuch*, "StGB")

The European Bribery Act (*EU-Bestechungsgesetz*, "EUBestG")

The International Bribery Act (*Gesetz zur Bekämpfung internationaler Bestechung*, "IntBestG")

**1.1 The general criminal offences (*Straftaten*) concerning public officials (*Amtsträger*) are defined in ss. 331 *et seq.* of the StGB:**

"Section 331 Accepting a benefit (*Vorteilsannahme*)"

*(1) A public official or a person with special public service obligations who demands, allows himself to be promised or accepts a benefit for himself or for a third person for the discharge of a duty (...).*

*(2) A judge or arbitrator who demands, allows himself to be promised or accepts a benefit for himself or a third person in return for the fact that he performed, or would in the future perform a judicial act (...). An attempt shall be punishable.*

*(3) The act shall not be punishable under subsection (1), if the perpetrator allows himself to be promised or accepts a benefit which he did not demand and the competent public authority, within the scope of its powers, either previously authorizes the acceptance, or the perpetrator promptly makes a report to it and it authorizes the acceptance.*

Section 332 Accepting a bribe (*Bestechlichkeit*)

*(1) A public official or person with special public service obligations who demands, allows himself to be promised or accepts a benefit for himself or for a third person in return for the fact that he performed or would in the future perform an official act, and thereby violated or would violate his official duties (...). An attempt shall be punishable.*

*(2) A judge or an arbitrator, who demands, allows himself to be promised or accepts a benefit for himself or for a third person in return for the fact that he performed or would in the future perform a judicial act, and thereby violates or would violate his judicial duties (...).*

*(3) If the perpetrator demands, allows himself to be promised or accepts a benefit in return for a future act, the subsection (1) and (2) shall already be applicable if he has indicated to the other his willingness to:*

- 1. violate his duties by the act; or*
- 2. to the extent the act is within his discretion, to allow himself to be influenced by the benefit in the exercise of his discretion.*

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## Section 333 Granting a benefit (Vorteilsgewährung)

(1) *Whoever offers, promises or grants a benefit to a public official, a person with specific public service obligations or a soldier in the Federal Armed Forces, for that person or a third person, for the discharge of a duty (...).*

(2) *Whoever offers, promises or grants a benefit to a judge or an arbitrator, for that judicial act (...).*

(3) *The act shall not be punishable under subsection (1), if the competent public authority, within the scope of its powers, either previously authorized the acceptance of the benefit by the recipient or authorizes it upon prompt report by the recipient.*

## Section 334 Granting a bribe (Bestechung)

(1) *Whoever offers, promises or grants a benefit to a public official, a person with special public service obligations, or a soldier of the Federal Armed Forces, for that person or a third person, in return for the fact that he performed or would in the future perform an official act and thereby violates or would violate his official duties (...).*

(2) *Whoever offers, promises or grants a benefit to a judge or an arbitrator, for that person or a third person, in return for the fact that he:*

1. *performed a judicial act and thereby violated his judicial duties; or*
2. *would in the future perform a judicial act and would thereby violate his judicial duties,*

*(...). An attempt shall be punishable.*

(3) *If the perpetrator offers, promises or grants the benefit in return for a future act, then subsection (1) and (2) shall already be applicable if he attempts to induce the other to:*

1. *violate his duties by the act; or*
2. *to the extent the act is within his discretion, to allow himself to be influenced by the benefit in the exercise of his discretion."*

1.2 The EUBestG stipulates that the provisions of the StGB on active and passive bribery of public officials apply also to officials and judges of EU organisations and courts and of EU members states. The IntBestG stipulates that the provisions of the StGB on active bribery apply also to officials and judges of international organisations and courts and of other foreign countries.

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

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## "Section 299 Accepting and granting a bribe in business transactions (Bestechlichkeit und Bestechung im geschäftlichen Verkehr)

(1) *Whoever, as an employee or an agent of a business, demands, allows himself to be promised, or accepts a benefit for himself or another in a business transaction as consideration for giving a preference in an unfair manner to another in the competitive purchase of goods or commercial services (...).*

(2) *Whoever, for competitive purposes, offers, promises or grants an employee or an agent of a business a benefit or for himself or for a third person in a business transaction as consideration, for his giving him or another a preference in an unfair manner in the purchase of goods or commercial services (...).*"

- 1.4 Please note that the concept of a "benefit" under the afore-mentioned German anti-corruption provisions is construed very broadly. German prosecution authorities and courts may assume such benefit even in case of modest gifts or hospitality, charitable donations or standard business contracts with scientists or other employees in the public or private sector (e.g., regarding research, consulting, lectures, etc.).
- 1.5 There are also more specific criminal offences or administrative offences (*Ordnungswidrigkeiten*) defined in other provisions of the StGB (e.g., ss. 108b and 108e on bribery of members and electors of the European Parliament or German parliamentary representations) or in other statutes (e.g., s. 2 of the IntBestG on bribery of members of parliamentary representations of international organisations or foreign states and s. 405 para. 3 no. 2 of the German Stock Exchange Act [*Aktiengesetz*] on bribery in connection with voting rights).

## 2. **Do these laws have extraterritorial effect?**

Yes. The EUBestG and the IntBestG stipulate that certain provisions of the StGB on bribery of public officials apply also to activities outside Germany if they are committed (i) by a German perpetrator or (ii) involving a public official or judge who is employed by Germany or the EU or who is a German national. S. 299 para. 3 of the StGB clarifies that the criminal provisions for bribery of employees and agents apply also to activities in foreign competition. Moreover, according to general rules, provisions on German criminal or administrative offences may apply to activities outside Germany, in particular, if they are committed (i) by a German perpetrator, (ii) jointly with co-perpetrators who act in Germany, or (iii) to the detriment of a German natural or legal person (e.g., corruption offences to the detriment of the German employer of a bribed employee or of a German competitor of the person bribing him).

## 3. **Definition of public official and any major differences in the treatment of corruption in the public and private sectors**

- 3.1 The term "public official" ("*Amtsträger*") within the meaning of ss.331 *et seq.* of the StGB (see item 1. above) is defined by s.11 para. 1 no. 2 of the StGB as follows:

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

(a) is a civil servant or judge;

(b) otherwise has an official relationship with public law functions or;

(c) has been appointed to a public authority or other agency or has been commissioned to perform duties of public administration without prejudice to the organizational form chosen to fulfil such duties."

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

3.2 As mentioned above (under item 1.), the EUBestG and the IntBestG stipulate that certain provisions of the StGB on bribery of public officials apply also to officials and judges of European and international organisations and courts and of EU member states and other foreign countries. Furthermore, the StGB and the IntBestG contain separate criminal provisions regarding bribery of members and electors of parliamentary representations of Germany, foreign countries, the EU and international organisations.

3.3 There are two main differences between treatment of corruption in the public and private sectors:

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

3.3.2 In the public sector, corruption offences are so-called official offences (*Offizialdelikte*) which may be prosecuted without a demand for prosecution (*Strafantrag*). In the private sector, corruption offences can only be prosecuted if, and as long as, there is such demand for prosecution (e.g. by the employer of a bribed employee or a competitor of the person bribing him).

## 4. **Facilitation payments**

There is no specific exemption in German law for facilitation payments. Each payment must be judged according to whether it fulfils the criteria for corruption offences (see item 1. above).

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### **5. Tax and accounting offences**

5.1 Under German tax law, expenses are not tax-deductible if they were made in connection with (international or domestic) criminal or administrative offences, in particular, corruption offences. If such offences are made tax-deductible, this may, under certain circumstances, lead to criminal or administrative liability for tax offences. The German criminal prosecution and tax authorities are obliged to inform each other about any suspicion that expenses were made in connection with criminal or administrative offences, in particular, corruption offences.

5.2 False or fraudulent accounting, particularly in connection with corruption offences, may, under certain circumstances, lead to criminal or administrative liability.

### **6. Corruption and the public procurement process**

Although there are not yet federal legal provisions on an exclusion from public procurement in case of corruption, there are such legal provisions issued by certain lands (*Bundesländer*) or other public law bodies. Furthermore, there are general provisions on the requirement of reliability of a contract partner, which may lead to exclusion from procurement in case of corruption. Moreover, many German companies have introduced internal guidelines providing for an exclusion from procurement in case of corruption.

### **7. Due diligence and subsidiaries / agents**

7.1 Pursuant to s.130 of the German Administrative Offences Act (*Ordnungswidrigkeitengesetz*), it may constitute the administrative offence of violation of supervisory duties if superiors do not appropriately and efficiently supervise subordinate employees in enterprises and if this leads to criminal or administrative offences, in particular, corruption offences. Such administrative offence of violation of supervisory duties may be sanctioned by an administrative fine (*Geldbuße*) which may amount to up to EUR1 million or even exceed this amount if this is necessary to siphon off higher profits. German prosecution authorities and courts may assume such violation of supervisory duties if superiors do not duly instruct employees regarding anti-corruption provisions (e.g., by compliance guidelines) and do not establish an effective monitoring (e.g., by appointing a compliance officer and establishing a compliance process).

7.2 There are no general anti-corruption provisions regarding the use of agents. However, in some procurement processes it is specifically prohibited to use agents. If such prohibitions are violated and the use of agents is not disclosed, German prosecution authorities and courts may take the position that this constitutes fraud. Generally, it is advisable to include into agency agreements clauses expressly obliging the agent to comply with all applicable legal provisions, in particular, with all anti-corruption provisions. Furthermore, agency agreements should not provide for inappropriately high commissions or other remuneration structures which German prosecution authorities or courts could interpret as incentive for corruption offences.

**8. Penalties**

The maximum penalty under the StGB for a corruption offence is imprisonment for a term not exceeding 10 years (in particularly serious cases of bribery of public officials). Furthermore, the perpetrator may be imposed with a forfeiture order (*Verfallsanordnung*) siphoning off the gross proceeds from a corruption offence (without deduction of expenses made). Moreover, if a natural person commits a corruption offence when acting for a company, also the company may be imposed with such forfeiture order or with an administrative fine which may amount to up to EUR1 million or even exceed this amount if this is necessary to siphon off higher profits.

**9. Other relevant national legislation**

The German Income Tax Act (*Einkommensteuergesetz*)

The German Tax Act (*Abgabenordnung*).

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**Italy**

**1. Relevant law and statement of the offence**

Law No. 300 of 29 September 2000 (amending the Italian Criminal Code)  
Legislative Decree No. 231 dated 8 June 2001  
Articles 317 to 323bis of the Criminal Code  
Criminal Code provisions on jurisdiction  
Criminal Code provisions on additional sanctions

*"Whoever, being a public officer or in charge of a public service, takes advantage of his/her functions or power to oblige or induce another to unduly give or promise money or any other advantage to himself or a third party, shall be liable to imprisonment for between four and twelve years."* (Art. 317, Concussion, Criminal Code)

*"Whoever, being a public office, receives money or any other advantage or the promise thereof, for himself or a third party, as undue payment for performing acts related to his office, shall be liable to imprisonment for between six months and three years."* (Article 318, Bribery for official acts, Criminal Code)

*"Whoever, being a public officer, receives money or any other advantage or the promise thereof, for himself or a third party, for omitting or delaying or for having omitted or delayed acts relating to his office, or for performing or having performed acts in breach of his official duties, shall be liable to imprisonment for between two and five years."* (Article 319, Bribery for acts against official duties, Criminal Code)

- 1.1 Article 321 applies the same punishments in respect of Articles 318 and 319 to "any person giving or promising money or any other advantage to a public officer or a person in charge of a public service".
- 1.2 Article 322-bis (inserted by Law No. 300) extends the application of Articles 321 (active bribery) and 322 (Incitement to bribery) where the money or advantage is given, offered or promised to (inter alia) *"persons carrying out functions or activities equivalent to those performed by public officials and persons in charge of a public service within other foreign States or public international organisations, when the offence was committed in order to procure an undue benefit for himself or others in international business transactions"*.

**2. Extraterritorial effect**

- 2.1 Italy has jurisdiction over a citizen or an alien for an offence committed by a public officer in the service of the State by abusing the powers or violating the duties of his/her office. This provision applies regardless of whether the offender is found within Italian territory.

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2.2 Italy has jurisdiction over an Italian national for offences committed abroad in other cases (with some exceptions) provided that the following requirements are met:

2.2.1 The offender must be within Italian territory;

2.2.2 The offence must be punishable under Italian law by life imprisonment or at least 3 years' imprisonment; and

2.2.3 Where the offence was committed to the detriment of European Community or foreign countries, or aliens, jurisdiction shall only be established at the request of the Minister of Justice and only where extradition has not been granted or requested by the country in which the offence was committed.

2.3 Italy also has jurisdiction over aliens (including non-Italians permanently resident in Italy) for offences committed abroad (with some exceptions) provided that the following requirements are met:

2.3.1 The offender must be within Italian territory;

2.3.2 The crime must be committed to the detriment of the Italian state or an Italian citizen and be punishable under Italian law by life at or least one year's imprisonment, or committed to the detriment of a European Community or foreign country or an alien and be punishable under Italian law by life imprisonment or at least 3 years' imprisonment; and

2.3.3 In the case of detriment to the Italian state or an Italian citizen, jurisdiction shall only be established at the request of the Minister of Justice or upon the complaint of the victim, or in the case of detriment to a European Community country, foreign state or alien, jurisdiction shall only be established at the request of the Minister of Justice and only where extradition has not been granted or requested by the country in which the offence was committed or by the state to which he/she belongs.

### 3. **Definition of "public official" and any major differences in the treatment of corruption in the public and private sectors**

3.1 Paragraph 2, sub-section 2 of Article 322-*bis* applies to the bribery of "persons carrying out functions or activities equivalent to those performed by public officials and persons in charge of a public service within other foreign States or public international organisations".

3.2 The definition of "public officer" derives from an existing provision of the Criminal Code (Article 357):

*"whoever performs public functions in the legislative, judicial or administrative sector shall be considered a public officer."*

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*In this same regard, any administrative functions shall be considered to be public if they are governed by public law and administrative act and characterised by the expression and manifestation or the exercise of the will of the public administration through authoritative powers or certification. "*

- 3.3 The definition of a "person in charge of a public service" also derives from an existing provision of the Criminal Code (Article 358):

*"Whoever performs a public service for whatever purpose shall be considered to be in charge of a public service.*

*Public service shall mean an activity that is governed in accordance with the same modalities as a public function, although in the absence of the power vested in the latter, and excluding the performance of simple ordinary tasks and exclusively manual work."*

- 3.4 Article 2635 of the Italian Civil Code, as recently amended by Legislative Decree no. 61 of 11 April 2002, provides that: "administrators, general directors, auditors, liquidators and people in charge of audit who, owing to the proposal or the grant of a benefit, carry or leave out acts, in violation of their obligations, causing a damage to the company, are punished with imprisonment up to three years. The same penalty is imposed to the person who gives or promises the benefit".

- 3.5 The violation of Article 2635 by one of the above-mentioned natural persons does not lead to the criminal liability of the company. Only the natural person is liable to punishment, since Article 25-ter of Legislative Decree No. 231 dated 8 June 2001 ("**Law No. 231**"), which regulates the administrative liability of legal entities (such as companies), does not expressly refer to Article 2635. For additional information on Law No. 231, please see paragraph 8 below.

#### **4. Facilitation payments**

- 4.1 The Italian Criminal Code does not provide a specific definition of facilitation payments, but it distinguishes between two hypotheses:

4.1.1 Concussion, which is regulated by Article 317 of the Criminal Code (*i.e.*, whenever a public officer obliges or induces another person to unduly give or promise money or any advantage to him / her); and

4.1.2 Bribery for official acts, which is regulated by Article 318 of the Criminal Code (*i.e.*, whenever a public officer is offered and or given money for performing acts related to his/her office)

- 4.2 When the facilitation payment consists of a small sum of money - which may not be considered sufficient enough to influence the Public Officer -, either (i) the crime may be judged as being not subject to prosecution or, in the opposite case, (ii) the punishment may be reduced according to Article 323 *bis* of the Criminal Code.

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### **5. Tax and accounting offences**

- 5.1 Existing Italian law provisions on accounting and record keeping prohibits the making of falsified or fraudulent accounts, statements and records for the purpose of bribing foreign public officials or of concealing such bribery.
- 5.2 There is no explicit provision in Italian tax legislation, stating that bribes cannot be deducted for tax purposes. However, Italian case law holds that such payments are not legitimate business expenses and hence are not tax deductible.

### **6. Corruption and the public procurement process**

- 6.1 Under Italian criminal law, hindering or affecting the outcome of a tender procedure by, for example, making donations or promises to, or fraudulent agreements with, public authorities is deemed to be a crime, subject to imprisonment or fines.
- 6.2 Italian courts have further held that any action that has the effect of hindering or altering procurement procedures by affecting their outcome may constitute a crime, and not just those actions specifically listed in the legislation (i.e. donations, promises and fraudulent agreements).
- 6.3 Criminal law provisions relating to crimes such as corruption of a civil servant or fraud against the State may be relevant in the context of contracts entered into with public bodies.

### **7. Due diligence and subsidiaries/agents**

- 7.1 A significant development for companies has been the aforesaid Law 231 on the administrative liability of legal entities, corporations, and non-legal entities. According to Law 231, an entity may be held liable for administrative wrongdoings deriving from a crime, when the crime was committed in the interest, or to the benefit, of the same entity, by legal representatives, managers or people under the management or supervision of representatives and managers.
- 7.2 The entity's liability is autonomous from the natural person's liability; the entity is not liable when the person acted in his own interest.
- 7.3 Liability of the entity may be excluded, *inter alia*, if its board of directors implemented, before the crime was committed, organisation and management plans suitable for preventing crimes like those for which the entity is being sued.
- 7.4 In particular, the entity is not liable when:
  - 7.4.1 Legal representatives, managers or people under the management or supervision of representatives and managers acted in their own interest or in the interest of third parties;

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- 7.4.2 The crime was committed by these people and the entity proves that (i) its board of directors adopted and effectively implemented, before the crime was committed, organization and management plans suitable for preventing crimes like the one for which the entity is being sued; (ii) a body of the entity with autonomous decision-making and control powers was entrusted with the task of supervising the operation and the compliance with the organization and management plans, as well as updating the same plans; (iii) the persons who committed the crime did it by fraudulently avoiding to comply with the organization and management plans; (iv) the supervision of the body with autonomous decision-making and control powers - entrusted with the task of supervising the operation and the compliance with the organization and management plans - did not lack and was not inadequate.
- 7.5 The entity will be liable where the crime was committed by these people and the entity failed to carry out their supervision and control tasks. In this case, however, it is up to the Public Prosecutor to prove that the organization and management plans were not adopted and effectively implemented.
8. **Penalties/sanctions**
- 8.1 Where a bribe is offered, promised or given to obtain the *performance* of acts related to the public official's office, the base penalty is 6 months to 3 years' imprisonment.
- 8.2 Where a bribe is offered, promised or given to obtain an *omission/delay* of an act relating to a public official's office or the performance of an act in breach of official duties (the aggravated bribery offence), the base penalty is 2 to 5 years' imprisonment.
- 8.3 There are no pecuniary sanctions, other than confiscatory measures, applicable to a natural person for the foreign bribery offence.
- 8.4 Legal persons, companies, associations and bodies without legal personality can also be held administratively responsible for acts of bribery if the following criteria are satisfied:
- 8.4.1 The offence must be committed for the benefit or interest of the body;
- 8.4.2 The offence must be committed by a person acting as a representative, director or manager (*de facto*), a person exercising powers of management and control, or a person subject to the direction or control of such a person; and
- 8.4.3 The offence must be committed through non-compliance with the duties connected to the functions of the responsible person.
- 8.5 The principal administrative penalty is a fine, which can range from approximately Euro 25,823 to Euro 1,549,371 depending on the proceeds of the offence and the economic condition of the entity concerned.
- 8.6 Other sanctions can be imposed in particularly serious cases, including:

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- 8.6.1 The closing (temporary or permanent) of a place of business;
- 8.6.2 The suspension or revocation of authorisations, licences or permits instrumental to the offence;
- 8.6.3 Disqualification (temporary or permanent) from carrying out the activity of the body, and possible appointment of another body to carry out the activity;
- 8.6.4 Prohibition (temporary or permanent) on dealing with the public administration;
- 8.6.5 Temporary exclusion from obtaining any allowances, funding, contribution or aid, and possible revocation of those already granted;
- 8.6.6 Prohibition (temporary or permanent) from advertising goods and services; and
- 8.6.7 Publication of the sentence.
- 8.7 Article 322-ter of the Criminal Code provides for the confiscation of the "proceeds or the price of the offence" or the "equivalent value".
- 8.8 Italian law also provides for preventative seizure (for the purpose of preventing the continuation or perpetration of further offences) and probatory seizure (to provide evidence of the offence).
9. **Other relevant national legislation**
- |   |   |
|---|---|
| Articles 317-322 of the Criminal Code         | - domestic bribery offences                             |
| Articles 648 and 648-bis of the Criminal Code | - money laundering                                      |
| Presidential decree 600/73                    | - accounting requirements                               |
| Article 2423 of the Civil Code                | - accounting requirements                               |
| Italian Code of Criminal Procedure            | - provisions on mutual legal assistance and extradition |

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**Spain**

**1. Relevant law and statement of the offence**

Organic Act 3/2000 of 11 January modifies the Spanish Penal Code by the insertion of Article 445 bis

Organic Act on the Judicial Power provisions on jurisdiction

Penal Code provisions on sanctions

*"Whoever that, through presents, gifts, offers or promises, corrupts or tries to corrupt, whether directly or through intermediaries, authorities or public officials whether foreign or from international organisations in the exercise of their post to the advantage of them or of a third party, or complies with their demands in respect to this, in order that they act or refrain from acting in relation to the performance of official duties, in order to obtain or retain a business or other improper advantage in the conduct of international business, will be punished with the penalties set forth in Article 423 in each respective case." (445 bis Spanish Penal Code).*

*"1. The person who corrupts or endeavours to corrupt authorities or public officials with donations, presents, offers or promises, will be punished with the same penalties of imprisonment and fine as the authorities or public officials in questions.*

*2. Those who accept the requests of authorities or public officials will be punished with a penalty inferior in degree to the one established in the preceding paragraph" (Article 423, Spanish Penal Code).*

**2. Extraterritorial effect**

2.1 Pursuant to article 23 of the Organic Act on the Judicial Power, the Spanish Criminal Courts have jurisdiction to adjudicate crimes committed within the Spanish territory by Spanish nationals and foreigners;

2.2 In accordance with article 23.2 of the Organic Act on the Judicial Power, Spain has jurisdiction over crimes under Spanish penal laws committed outside Spanish territory by Spanish nationals or foreigners who acquired Spanish nationality following the perpetration of the crime when the following requirements are satisfied:

2.2.1 the act is punishable in the place where it was carried out, except when this requirement is not necessary by virtue of an international treaty or rule of an international organisation to which Spain is a party;

2.2.2 either the "aggrieved party or the Public Prosecutor makes a complaint before the Spanish courts"; and

2.2.3 the alleged offender has not been acquitted, pardoned or served the sentence abroad for the offence.

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2.3 The Spanish authorities are of the view that the first requirement is interpreted broadly so that it is not necessary that the country where the offence is committed has established the offence of bribing a foreign public official, as long as the act of bribery is established as an offence.

### 3. **Definition of "public official" and any major differences in the treatment of corruption in the public and private sectors**

3.1 Article 445 bis applies to bribes given, etc. to "authorities or public officials whether foreign or from international organisations". While Article 24 of the Penal Code includes a definition of national public officials applicable to the offence of bribing a domestic official under Article 423 of the Penal Code, there is no corresponding definition in respect of foreign public officials.

3.2 There is some discussion as to whether the Spanish courts will apply the definition set out in Article 24, or the definition of "foreign public official" set out in article 1.4.a of the OECD Convention. The OECD Working Group responsible for evaluating Spain's implementation of the Convention has expressed concern that the Spanish courts may choose to apply a different definition, possibly under another international convention, employing a lower standard than that provided for under the OECD Convention.

3.3 Without prejudice to that, considering (i) the wide scope of the definition of authorities and public officials provided by article 24 of the Penal Code, and; (ii) the broadening interpretation given by Case Law to both concepts, it is probable that the Spanish Courts will apply the Spanish definition, though they may, in some cases, make use of the more restrictive definition provided by the OECD Convention.

3.4 There are no specific provisions in Spanish law as regards corruption within the private sector as bribery is only punishable when the target of corruption is an authority or public official. However, the interpretations in Spanish Criminal Case Law of the concepts "authority" and "public officer" are extremely broad (and not equivalent to the same concepts in the administrative jurisdiction). For Penal purposes, "public officer" could be anyone who participates in civil service ("*función pública*") or in other words, who provides public service. Additionally, there are certain public companies subject to commercial regulation whose employees could be considered public officers (e.g. certain Spanish Railway Company employees).

### 4. **Facilitation payments**

4.1 Facilitation payments in favour of national authorities and public officials are proscribed under articles 425 and 426 of the Spanish Penal Code.

4.2 It is doubtful if the provisions contained in articles 425 and 426 of the Spanish Penal Code are applicable to the bribery regulated under article 445 bis of the Spanish Penal Code - i.e. to authorities or public officials whether foreign or from international organisations. In this sense, article 445 bis comprises two different behaviours:

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- 4.2.1 Those tending to corrupt the authorities or public officials, which by nature are illegal and therefore excluded from the concept of facilitation payments, and;
  - 4.2.2 Compliance with the demands of the authorities or public officials to obtain or retain a business or other improper advantage.
- 4.3 It is not clear if facilitation payments could be included in this sort of behaviours or not. Presumably this will be established by Case Law in the near future, especially by clarifying the meaning of the wording "improper advantages". However, the reference contained at article 445 bis to the penalties set by article 423 of the Spanish Penal Code seem to exclude application of articles 425 and 426 to foreign authorities or public officials.
- 4.4 However, it is worth noting that Case Law tends to consider that payments made to authorities or public officials are aimed at corrupting their activities, although the real objective could be different.
- 4.5 Therefore, although it is doubtful whether article 445 bis includes a prohibition on facilitation payments made to foreign officials, it would be prudent to avoid making such payments.
5. **Tax and accounting offences**
- 5.1 Existing Spanish law provisions on accounting and record keeping appear to satisfy the requirements of the Convention in prohibiting the making of falsified or fraudulent accounts, statements and records for the purpose of bribing foreign public officials or of concealing such bribery.
- 5.2 There is no express provision in the Spanish Companies Tax Law which provides that bribes given to foreign public officials cannot be deducted for tax purposes. However, a decision of the Supreme Court of Spain<sup>1</sup> has been cited by the Spanish authorities as authority for the proposition that tax deductibility of an expense incurred in the commission of a crime is unlawful.
6. **Corruption and the public procurement process**
- 6.1 Although there are no specific provisions in Spanish criminal regulation concerning public procurement, public procurement processes must be conducted in the way provide by their specific legislation.
- 6.2 Failure to comply with public procurement proceedings may entail corruption - for example, if the decision of the authorities or public officials is swayed by means of gifts, offers or promises of advantage.

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<sup>1</sup> Decision of the Supreme Court, Bench Three, Section Two, which reviews the Remedy of Appeal 3065/1992, lodged by the Central Government against the judgement given on 31 December 1991 by the Contentious-Administrative Bench of the Superior Court of Justice of the Region of Valencia, in Appeal 1734/1990.

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### 7. Due diligence and subsidiaries/agents

7.1 According to Spanish Criminal Laws, criminal liabilities are direct, personal and by virtue of the author's own behaviour.

7.2 Criminal liabilities may be incurred not only by the perpetrator but also by accomplices, conspirators and abettors.

7.3 The Spanish system does not establish criminal responsibility of legal persons, though Article 31 of the Penal Code provides for criminal liabilities of the managers, directors or representatives of a legal person who took part in the criminal activities of the legal person:

*"Any person acting as an administrator (manager) in fact or in law for a corporate body or on behalf of in legal or voluntary representation of another person shall be personally liable, even though he does not possess the conditions, qualities or relations that the relevant concept of the crime or offence requires in order to be the perpetrator of it, should such circumstances be present for the organisation or person on whose behalf or in whose representation he acts."*

7.4 So, for example, a manager may be liable under article 31 if he/she authorised the bribe, or had knowledge that the bribe took place and did nothing to prevent it. The term "manager" comprises those individuals who in fact - although without documented support - have the power to decide within the legal person ("de facto managers"). It therefore includes not only members of the Board of Directors, but also executives or persons with the authority to represent the company.

7.5 Where an administrator or representative is convicted of committing a criminal offence on its behalf, the legal person may be subject to secondary civil responsibility - if the convicted party fails to cover its civil liabilities - for damages associated with crimes committed on their behalf, and/or to administrative responsibility: under Article 20.a of the Act Concerning Contracts with the Public Administration, a legal person is subject to a prohibition to contract with the Spanish public authorities for a maximum period of 8 years in such a case.

7.6 However, it is worth noting that a potential criminal judgement may have ramifications for the legal person, e.g voidance and retrospective annulment of decisions taken by the authorities or public officials.

7.7 Spanish Criminal laws do not contain specific provisions as regards verification of clear bribery records of the subsidiaries or agents that perform due diligence processes.

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### **8. Penalties/sanctions**

8.1 Article 423 of the Penal Code lists the penalties provided in relation to the existing offence of bribing a domestic public official, and by virtue of Article 445 bis applies in relation to the foreign bribery offence. The following penalties therefore apply:

#### 8.2 *Natural persons*

8.2.1 Imprisonment for a term of between 2 and 6 years and a fine between the value of the bribe and triple the value of the bribe, where the bribe is offered, etc. in order for the public official to carry out in the exercise of his/her duty an action or omission constituting a crime (Article 419 of the Penal Code).

8.2.2 Imprisonment for a term of between 1 to 4 years and a fine between the value of the bribe and triple the value of the bribe where the bribe is offered, etc. in order for the public official to execute an unfair act not constituting a crime, related to the exercise of his/her duty, and he/she executes it. Where the public official does not execute the act, the term of imprisonment is between 1 and 2 years and the fine is the same (Article 420 of the Penal Code).

8.2.3 A fine between the value of the bribe and triple the value of the bribe where the bribe is offered, etc. in order to prevent the public official from carrying out an act that he/she is required to carry out in the exercise of his/her post (Article 421 of the Penal Code).

#### 8.3 *Legal persons*

8.3.1 (As above) the Penal Code establishes criminal liability in relation to the manager of a legal person. The Spanish authorities have confirmed that Article 31 applies in respect of an offence under Article 445 bis. Managers of state-controlled or state-owned companies are subject to liability under Article 31; it is not necessary that the individual directly responsible for bribing a foreign public official under Article 445 bis be convicted in order for the manager to be found liable.

8.3.2 A legal person is also subject to a prohibition to contract with the Spanish public authorities (understood to mean the Central Government, the Governments of the Autonomous Communities and the local government bodies) where a criminal offence is committed by its administrator(s) or representative(s) on its behalf. The duration of the prohibition depends on the circumstances of the case, but cannot exceed 8 years. (Article 20.a of the 13/1995 Act Concerning Contracts with the Public Administration.)

8.3.3 Seizure of all the assets related to an offence is permitted in order to prevent their dissipation or destruction and to ensure that they are available for seizure rulings that could be made by the courts at the time of trial.

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8.3.4 Upon conviction for an offence, the Spanish courts can confiscate "effects, instruments and profits", which would appear to cover the bribe and the proceeds of bribery (Article 127 of the Penal Code).

9. **Other relevant national legislation**

Articles 419-427 of the Penal Code	- domestic bribery offences
Article 301 of the Penal Code	- money laundering
Articles 25, 29, 30, 34, 38 of the Commercial Code	- accounting requirements
Articles 203, 218, 221 of the Companies Act	- accounting requirements

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## **The Russian Federation**

### **1. Anti-bribery legislation in the Russian Federation**

There is no single anti-corruption act in the Russian Federation. The draft law "On Counteracting Corruption" is currently being considered in the State Duma (the Russian Federation's lower chamber of parliament). The majority of anti-bribery and anti-corruption provisions are contained in the Russian Criminal Code, Civil Code, Administrative Offences Code and a number of laws. It is an offence under the Russian Criminal Code for a public official to receive a bribe, and for someone to give a bribe to a public official. There is a separate offence of commercial bribery.

### **2. Extraterritorial effect**

The anti-bribery legislation is applicable in respect of all crimes committed in the Russian Federation and abroad (in the latter case – only in respect of crimes committed by citizens of the Russian Federation and stateless persons who are residents of the Russian Federation). Furthermore, foreign citizens may be subject to criminal liability under Russian law if the purpose of the crime committed is against the interests of the Russian Federation.

### **3. Definition of "public official" and any major differences in the treatment of corruption in the public and private sectors**

3.1 Russian legislation differentiates crimes of bribery of public officials ("**officials**") and of employees in the private sector ("**managers**"). The definition of "officials" is provided in the Criminal Code and includes individuals who exercise legislative, executive and judicial powers, have authority in relation to persons not subordinate to them or are empowered to pass decisions that are compulsory for individuals or organizations; select, position and manage personnel, enforce discipline, apply incentives or impose disciplinary penalties, etc.; manage or dispose of property or money, control property turnover, etc.

3.2 A person who gives a bribe is released from criminal liability if the bribe has been extorted or if the bribe-giver voluntarily informs an authorized government body of the bribery.

3.3 Commercial bribery is bribery of managers of commercial and non-commercial organizations other than state and municipal bodies and institutions. For the purposes of the criminal legislation a "manager" is a person who exercises organisational and administrative powers permanently, provisionally or by specific power in commercial or non-commercial legal entities. A person who gives a bribe is released from criminal liability if the bribe has been extorted or if the bribe-giver voluntarily informs an authorized government body of the bribery.

3.4 Sanctions for private sector corruption are less than sanctions for public sector corruption.

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### **4. Corporate hospitality, business gifts and facilitation payments**

4.1 The Russian courts may also deem corporate hospitality to be a bribe.

4.2 As regards business gifts, some commentaries on the Criminal Code support the view that a gift that does not exceed 5 times the statutory minimum monthly wage (approx. US\$ 15) cannot be deemed a bribe. However, the Criminal Code does not contain any references to the amount of a bribe. Therefore, hypothetically, any benefit, irrespective of its value, may be deemed a bribe.

4.3 Facilitation payments may be also deemed a bribe. However, we note that only "officials" may be convicted for bribery (as opposed to commercial bribery). For example, many employees of state and municipal bodies and institutions, such as secretaries, cleaners etc., are not officials.

### **5. Tax and accounting offences**

Expenditures for illegal purposes (such as bribes) are not deductible in computing Russian taxable profits.

### **6. Corruption and the public procurement process**

There are no specific provisions in the Russian Federation public procurement legislation on corruption.

### **7. Due diligence and subsidiaries / agents**

There are no requirements in Russian Federation law pursuant to which due diligence must be performed or specific provisions regarding bribery of subsidiaries, agents and business intermediaries.

### **8. Penalties/sanctions**

8.1 The Criminal Code provides for criminal liability of an official who has accepted a bribe. Such official may be fined up to RUR 1,000,000 (approx. US\$ 34,485) or the amount of his/her salary or income for a period of up to five years. The term of possible imprisonment is up to 12 years (depending on the circumstances of the crime committed). Additional punishment may be imposed, such as deprivation of the right to occupy certain positions or to engage in certain activities ("**deprivation**") for up to 5 years, or confiscation of the official's property.

8.2 The bribe-giver can also be punished with a fine of up to RUR 500,000 (approx. US\$ 17,241) or imprisonment for up to 8 years, and several other types of punishment are possible depending upon circumstances of the crime.

8.3 The Criminal Code imposes criminal liability on such managers for their actions (omissions), where such actions (omissions) are in connection with their official position, in the form of a fine of up to RUR 500,000 (approx. US\$ 17,241) or

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imprisonment for up to 5 years. Besides, certain other types of punishment are available, such as deprivation for up to 5 years (depending on the circumstances of the crime committed).

- 8.4 The bribe-giver can also be punished with a fine of up to RUR 300,000 (approx. US\$ 10,345) or imprisonment for up to 4 years, and several other types of punishment are possible (depending on circumstances of the crime committed).

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**The United Kingdom**

**1. Relevant laws and statement of the offence**

The Public Bodies Corrupt Practices Act 1889

The Prevention of Corruption Act 1906

The Prevention of Corruption Act 1916

The Anti-terrorism, Crime and Security Act 2001

*"Every person who shall by himself or by or in conjunction with any other person corruptly solicit or receive, or agree to receive, for himself or for any other person, any gift, loan, fee, reward, or advantage whatever as an inducement to, or reward for, or otherwise on account of any member, officer, or servant of a public body as in this Act defined, doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed, in which the said public body is concerned, shall be guilty of a misdemeanour.*

*Every person who shall by himself or by or in conjunction with any other person corruptly give, 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 or otherwise on account of any member, officer, or servant of any public body as in this Act defined, doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed, in which such public body as aforesaid is concerned, shall be guilty of a [crime and offence]."*  
(Section 1, Public Bodies Corrupt Practices Act 1889)

**1.1 The 1906 Act made bribery of agents an offence:-**

*"If any person corruptly gives or agrees to give or offers any gift or consideration to any agent as an inducement or reward for doing or forbearing to do, or for having after the passing of this Act done or forborne to do, any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business ... he shall be guilty of a [crime and offence]"* (Section 1, Prevention of Corruption Act 1906).

**1.2 There is also a common law offence of bribery, generally 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, 12<sup>th</sup> Ed 1964, p. 381).

**2. Do these laws have extraterritorial effect?**

Yes. The Anti-terrorism, Crime and Security Act 2001 extended UK jurisdiction to acts of bribery and corruption committed outside the UK by UK nationals or bodies incorporated under the law of any part of the UK.

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### **3. Definition of public official and any major differences in the treatment of corruption in the public and private sectors**

3.1 The 1889 Act applies to members, officers or servants of a public body. "Public body" is defined in the legislation as:

*"any council of a county or county of a city or town, any council of a municipal borough, also any board, 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 which exists in a country or territory outside the United Kingdom and is equivalent to any body described above" (Section 7, Public Bodies Corrupt Practices Act 1889).*

3.2 This has been further extended to include:

*"local and public authorities of all descriptions including authorities existing in a country or territory outside the United Kingdom and companies which, ... are under the control of one or more local authorities." (Section 4, Prevention of Corruption Act 1916).*

3.3 Although there has been considerable uncertainty as to whether the UK statutes and/or common law apply to bribery of Members of Parliament, the most recent OECD review decided that there was "no reason to doubt that the bribery of members of foreign parliaments falls within the scope of the common law offence" and there has been a prosecution of a UK MP (though unsuccessful).

3.4 Whether public international organisations will be treated as "public authorities" or their officials or agents will be considered to be occupying a "public office" is not clear, but anyone employed by or acting for such an organisation would be an agent for the purposes of the 1906 Act.

3.5 The main difference between treatment of corruption in the public and private sectors is that, where any money, gift, or other consideration has been paid or given to or received by a person employed by a government department or a public body, by or from a person (or his agent) holding or seeking to obtain a contract from a government department or public body, then it is presumed that the money, gift or consideration was paid or given or received corruptly.

### **4. Facilitation payments**

There is no specific exemption in UK law for facilitation payments. Each payment must be judged according to whether it fulfils the criteria for the offence of bribery or corruption.

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### **5. Tax and accounting offences**

5.1 Section 577A, Income and Corporation Taxes Act 1988 ("ICTA"), enacted under the Finance Act 1993, renders any expenditure incurred on or after 11 June 1993 "the making of which constitutes the commission of a criminal offence" not deductible in computing UK taxable profits. A conviction is not necessary in order to deny deductibility. The Finance Act 2002 (section 68) further clarified the applicability of s577A to payments that take place wholly outside the United Kingdom on or after 1 April 2002. Section 577 ICTA denies tax relief for any form of business entertainment, hospitality or gift.

5.2 Company legislation requires every company to keep accurate accounting records. False or fraudulent accounting is an offence under the Theft Act 1968. Companies with a turnover of more than £350,000 (as well as certain other specified types of companies) must have an external audit. Listed companies are subject to the specific corporate governance provisions, recently revised. The Companies (Audit, Investigations and Community Enterprise) Bill, currently before Parliament will further tighten up company audit requirements.

### **6. Corruption and the public procurement process**

There are no specific provisions in UK public procurement legislation (which implements EU procurement directives) on corruption.

### **7. Due diligence and subsidiaries / agents**

There are no requirements in UK law to carry out due diligence. The 1906 Act deals specifically with agents and makes it an offence for an agent to corruptly receive or attempt to obtain any gift or consideration as an inducement or reward for doing or forbearing to do any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business.

### **8. Penalties**

8.1 The maximum penalty under statute is imprisonment for a term not exceeding 7 years or a fine, with no upper limit, or both. There are no prescribed penalties for the common law offence.

8.2 Upon conviction, the offender may be ordered to pay a sum equal to the "benefit" received from the commission of the offence. A confiscation order is also enforceable against property in the possession of third parties who have received a gift from the defendant, up to the value of the gift.

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9. **Other relevant national legislation**

Criminal Law Act 1997	} conspiracy
Criminal Justice (Terrorism and Conspiracy) Act 1998	}
Criminal Justice Act 1998	} seizure and confiscation
Proceeds of Crime Act 1995	}
Criminal Justice Act 1993	- money laundering
Companies Act 1985	- accounting
Criminal Justice (International Cooperation) Act 1990	
Extradition Act 1989	

**Note:** The laws outlined above apply to England, Wales and Northern Ireland. Some of the laws also apply to Scotland, but separate advice should be sought on the applicability in Scotland. This note does not apply to UK Crown Dependencies and Overseas Territories.

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