

# ANTI-CORRUPTION HELPDESK

PROVIDING ON-DEMAND RESEARCH TO HELP FIGHT CORRUPTION

## REGULATING PRIVATE SECTOR CORRUPTION

### QUERY

Please provide an [update of the 2014 query](#) on regulating private sector corruption. We are particularly interested in papers, research and resources covering countries outside the European Union, especially China and South Korea.

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1. What is private-to-private corruption?
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<sup>1</sup> It was alleged that officials from FIFA and continental confederations solicited and received over US\$150 million in bribes and kickbacks from sports marketing executives in

### SUMMARY

Private-to-private corruption has gained increased attention over the past few years, not least due to several high-profile corruption scandals. The Fédération Internationale de Football Association (FIFA) scandal over payments allegedly made to high-ranked FIFA officials to influence decisions concerning future World Cup sites and exclusive branding rights is one prominent example.<sup>1</sup>

A number of studies provides the empirical evidence that corruption is commonplace within the business community, finding that the perceived likelihood of private-to-private bribery is nearly as high as bribery of public officials across all sectors (Transparency International 2011; cf. Jenkins 2018).

As a result of these well-publicised corporate corruption scandals, public expectations across the globe are reportedly converging around common standards of transparency and accountability (PricewaterhouseCoopers 2018). Indeed, PricewaterhouseCoopers (2018) identifies “a pronounced shift in the way the world looks at fraud and corruption” over the past few years with its 2018 Fraud Survey data reflecting a “deep-seated demand for accountability, from both the public and from regulators, across the private and public sectors”.

This demand for accountability has been reflected to some extent through an increased effort to criminalise private-to-private corruption in national legislation and through several self-regulatory commitments by the international business community.

connection with lucrative media and marketing rights to various soccer tournaments and matches.  
Indictment, [United States v. Webb et. al. \(E.D.N.Y. May 20, 2015\) \(No. 1:15-cr-00252-RJD\)](#).

## 1. WHAT IS PRIVATE-TO-PRIVATE CORRUPTION?

### Background

Transparency International defines corruption as “the abuse of entrusted power for private gain” (Transparency International 2018). Although this definition encompasses both corruption in the public and private sphere, historically attention has primarily focused on corruption involving public officials, which is widely criminalised. Corrupt forms of behaviour that occur entirely within the private sector such as insider dealing and bribes to secure private contracts have, until recently, been largely overlooked. There are plausible reasons for this.

First, previous definitions of corruption, such as “the abuse of public office for private gain” (World Bank 1997), did not encompass private-to-private corruption. In the aftermath of the Cold War, a powerful school of thought held free markets to be engines of efficiency; unlike monopolistic state-run enterprises, free markets were seen by pro-market reformers as self-evident that healthy competition would penalise inefficient behaviour like corruption in the long run (Johannsen et al. 2016). This meant that anti-corruption policies and reform programmes were focused solely on the failings of the public sector.

Second, while it is clear that public officials are expected to act on behalf of the public good, private sector employees are often seen – or see themselves – as accountable only to their shareholders.

The reality is much more complex, since powerful private interests often exert undue influence in shaping public policy, institutions and state legislation (Kaufmann 2005). Moreover, the emergence of forms of “crony capitalism” in many markets that have been deregulated and liberalised over the last 30 years casts doubt on claims that pro-market reforms are a cure-all for corruption (see Bakre and Lauwo 2016).

Indeed, in the decade since the 2008 global financial crisis, and particularly since the [Panama Papers](#) and the [Paradise Papers](#) revealed unsavoury behaviour on the part of private sector entities and the impact this can have on ordinary citizens, the discourse has shifted. Definitions of corruption now encompass transnational forms of malpractice occurring entirely within the private sector,<sup>2</sup> and issues around corporate compliance and malfeasance have risen to global prominence.

A commonly-cited definition of private corruption is “the type of corruption that occurs when a manager or employee exercises a certain power or influence over the performance of a function, task, or responsibility within a private organisation or corporation” that is contrary to the duties and responsibilities of his position in a way that harms the company or organisation in question and for his own benefit or the benefit of another person or organisation” (Argandoña 2003).

A particular difficulty of defining private sector corruption is that the distinction between the best interest of the company and its shareholders and the interests of its individual employees can be blurred. This can encourage corrupt forms of behaviour intended to maximise short-term profits, but which come at the expense of long-term firm performance (Guiso, Sapienza and Zingales 2013).

The occurrence of private corruption is reportedly high. Of the companies who indicated that they had experienced fraud in the last two years, according to PricewaterhouseCooper’s Global Economic Crime and Fraud Survey 2018, 28 per cent said that they had suffered from business misconduct, while 45 per cent had suffered from asset misappropriation (PricewaterhouseCoopers 2018).

## 2. TYPES OF PRIVATE-TO-PRIVATE CORRUPTION

Private corruption manifests in various forms such as bribery, extortion, collusion, nepotism, trading of

<sup>2</sup> The World Bank now defines corruption as “the offering, giving, receiving or soliciting, directly or indirectly, anything of value to influence improperly the actions of another party”.

information and undue influence (Argandoña 2003). Bribery can also be disguised through offering gifts or corporate hospitality to clients that are inappropriate in value or designed to influence decision making (Transparency International 2018).

## Bribery

Private bribery – or commercial bribery – is defined as bribery from a business operator to an entity or individual of a counterparty (Boles 2014). The commission of a private bribery offence implicates no public officials, rather it typically occurs during commercial activity where a company makes covert payments to another company’s employee, and the employee in return steers business to the bribing company to the exclusion of other competitors (Boles 2014).

Companies may engage in private-to-private bribery to secure business and facilitate the functioning of hidden business cartels. Employees from large companies may exploit their influence and buying power by demanding bribes or kickbacks from potential suppliers (Transparency International 2018).

## Embezzlement

Embezzlement occurs when a business entrusts someone with the responsibility for property or financial assets and the person exploits that trust to divert company money or property to themselves for personal gain without consent. Embezzlement by a company’s own employees, corporate fraud and insider trading can also be very damaging to enterprises. As the size of a firm increases, controlling the actions of its employees is increasingly difficult.

## Collusion

Collusion – an agreement between competitors to fix prices, allocate markets or rig bids – is both anti-competitive and corrupt behaviour. Through the collusive practice of bid rigging and excessive overpricing, construction companies extract huge financial gains for themselves at the expense of workers and the tax payers of host countries (Cottle & Capela 2013). Some of South Africa’s top construction companies were involved in a “construction cartel”

who colluded and inflated prices while building stadiums for the 2010 FIFA World Cup. Collusion on stadium projects is estimated to have added R14 billion (over US\$1 billion) to the construction costs borne by the municipalities (Steyn 2015).

## Trading of information

Trading of information occurs when employees of a company receive or offer bribes in exchange for confidential information (Martini 2014).

## Gifts and hospitality

Tangible or intangible gifts accepted in the course of employment may be perceived as a bribe or secret commission, generate a perception of undue influence or consciously or unconsciously affect decisions made by the receiving organisation. In addition, accepting gifts has the potential to create a conflict of interest between professional duties and personal interests.

## Conflicts of interest

Private-to-private corruption may also manifest itself in the form of conflicts of interest. A conflict of interest occurs when an agent has an undisclosed interest in a transaction that adversely affects their professional role. The ratings agencies at the centre of the 2008 global financial crisis were criticised for conflicts of interest when they provided inaccurate certification of complex securities as triple A standard. The potential for conflicts of interest in this area is particularly acute given that credit-rating agencies are paid not by the investors who rely upon their ratings, but by the issuers of the securities.

### 3. WHAT IS THE IMPACT OF PRIVATE-TO-PRIVATE CORRUPTION?

Like its public counterpart, private corruption affects both the private sector and the public at large. A sizeable and growing body of evidence has provided a clear indication that, at the aggregate level, corruption is bad for business (cf. Jenkins 2018). There is a symbiotic relationship between market and firm performance: aggregate growth and firm performance is lower in highly corrupt settings, while

markets perform poorly when corporate corruption becomes commonplace compared to markets in which firms typically refrain from corrupt behaviour.

The effects of private corruption can be felt through the entire supply chain, distorting markets and competition, increasing costs to firms, penalising the smaller companies that cannot afford to compete on these terms and those firms with high integrity that refuse to do so. This not only prevents a fair and efficient private sector but also reduces the quality of products and services provided to the consumer (Transparency International 2011).

Where a company itself (or its employees) engages in corruption, there are also negative effects for that firm such as reduced employee morale, reduced productivity, loss of shareholder and investor confidence, damaged reputation and business relations. A few of these impacts are explored below. Conversely, in many contexts, “higher levels of firm integrity correspond with stronger commercial performance” (Jenkins 2018).

### Unfair competitive effects

Private bribery causes public and private sector harm through the anti-competitive effects it engenders. Private bribery provides the briber with an unfair competitive advantage by eliminating from consideration products or services offered by the bribing company’s competitors in the usual course of business (Boles 2014). This practice may severely disadvantage industry competitors, potentially forcing them from the marketplace, and distort the smooth functioning of domestic and international markets.

### Inflated costs

The anti-competitive effects of private-to-private corruption can harm consumers through higher prices and poorer quality goods and services. Professor Madeleine Leijonhufvud notes that, “To the extent that bribery in the private sector results in goods and services becoming more expensive, their quality becoming inferior, or that they are marketed without truthful information, it is ultimately the general public that suffers” (Boles 2014).

### Firm-level consequences

Indirect costs of private-to-private corruption include lost productivity, reputational damage and the related loss of business, as well as the costs associated with investigation and remediation of the issues that allowed them to occur. According to the Association of Certified Fraud Examiners bribery, more than any other type of occupational fraud, leads to substantial financial and reputational damage (Gasiorowski-Denis 2017). In addition, the actual money used to pay bribes can be a considerable expense. For example, in the case of Siemens, they amounted to 3 per cent of total sales (Healy and Serafeim 2016).

### Broader impacts

Private-to-private corruption can have wide and deep impacts. The 2008 financial crisis caused widespread harm to the public, including loss of property, employment and wealth. Private-to-private corruption has also led to the impeachment of people in the highest echelons of government. The South Korean Constitutional Court removed President Park Geun-hye from office over a graft scandal involving the country’s handful of family-controlled conglomerates, known as “chaebol”. Park was found guilty of pressuring 18 chaebol companies into donating US\$72 million to two foundations controlled by Choi Soon-sil, a long-time friend and confidant of the president (Sang-Hun 2018).

## 4. ISSUES TO CONSIDER WHEN REGULATING PRIVATE-TO-PRIVATE CORRUPTION

There is a number of issues to consider when regulating private-to-private corruption. Guidance can be drawn from international and regional anti-corruption frameworks, such as the United Nations Convention against Corruption (UNCAC); anti-corruption tools such as those published by Transparency International and the International Chamber of Commerce; and from the experience of the introduction of private-to-private corruption offences in other jurisdictions.

### Preventive measures

Preventive measures, such as accounting, auditing and bookkeeping requirements as well as enhancing

transparency with respect to the identities of persons who play important roles in the creation, management or operations of corporate entities, are important in creating a transparent business environment (UNODC 2006). Transparency International contends that such measures can mitigate the risk of corruption while public reporting by companies on their anti-corruption programmes allows for increased monitoring by stakeholders and the public at large, thereby making companies more accountable (Transparency International 2014).

### Scope of the offence

The scope of a private-to-private corruption offence should be drafted broadly to encapsulate a wide range of behaviours. For example, for the offence of commercial bribery, the offence should cover both active and passive bribery, committed directly or indirectly, of any undue advantage which may be something tangible or intangible, pecuniary or non-pecuniary, for that person or a third party (UNODC 2006).

### Broad scope of perpetrators

The offence should be broadly worded to cover all individuals who direct, manage or work for the private sector in any capacity, including intermediaries (Martini 2014).

### Liability of legal persons

Serious and sophisticated crime is frequently committed by, through or under the cover of legal entities, such as companies, corporations or charitable organisations. Complex corporate structures can effectively hide the true ownership, clients or specific transactions related to serious crimes. Introducing legal liability, in parallel with prosecution of the natural person, lifts this opacity and may also have a deterrent effect (UNODC 2006).

### Effective sanctions

Sanctions must be effective, proportionate and dissuasive, especially considering the large amounts of money that can be involved in private-to-private corruption.

### Broad jurisdictional reach

As many companies trade globally, it is important that anti-corruption measures effectively reflect the international nature of business. For this reason, regulation of private-to-private corruption should have broad extra-territorial reach.

### Private sector whistleblower legislation

Prevention and criminalisation of corrupt practices needs to be supported by measures and mechanisms that enable detection of corrupt behaviour. Generally, public sector employees have greater whistleblowing protection than those in the private sector. However, it is important that whistleblowing protection be afforded to those in the private sector.

## 5. REGULATORY FRAMEWORKS TO COMBAT PRIVATE-TO-PRIVATE CORRUPTION

Sööt et al. (2016) identify two measures for preventing corruption in the private sector. One channel is internal to the company and includes the establishment of auditing procedures, codes of conduct, training programmes, guidelines on specific issues and action plans for how the management will tackle the issue, should a case arise (Argandoña 2003). The second channel is external to the organisation and includes regulation on whistleblowing, disclosure of information about allegations and effective law enforcement (Sööt 2016).

International, regional and national anti-corruption frameworks have historically focused on corruption in the public sector. However, in recent years, there have been a number of initiatives aimed at preventing and criminalising private-to-private corruption. This trend is more evident at the national and regional level than at the international level.

### International frameworks

International anti-corruption initiatives have mostly targeted public sector corruption. Article 21 of the [United Nations Convention against Corruption](#) (UNCAC) encourages, but does not require, state parties to criminalise commercial bribery. Similarly,

article 22 of the UNCAC only encourages the criminalisation of embezzlement in the private sector. Article 12 requires states parties to take measures “to prevent corruption involving the private sector, enhance accounting and auditing standards in the private sector and, where appropriate, provide effective, proportionate and dissuasive civil, administrative or criminal penalties for failure to comply with such measures”.

The [OECD Anti-Bribery Convention](#) focuses on the prohibition of illegal payments to foreign public officials by companies acting in foreign countries. It does not cover private-to-private corruption despite pressure from the International Chamber of Commerce to do so (International Chamber of Commerce 2006).

The [United Nations Global Compact](#) is a voluntary initiative based on CEO commitments to implement universal sustainability principles and to undertake partnerships in support of UN goals. The UN Global Compact asks companies to commit to ten universal sustainability principles, and to support broader UN and societal objectives such as the Sustainable Development Goals. The UNCAC provides the legal framework for the United Nations Global Compact 10 principle: “Businesses should work against corruption in all its forms, including extortion and bribery.”

## Regional frameworks

At the European level, the [Criminal Law Convention on Corruption](#), which is overseen by the Council of Europe’s Group of States Against Corruption (GRECO), requires member states to adopt legislation criminalising bribery in the private sector. Further, the European Union Council has adopted a [Framework Decision \(2003/568/JHA\) on Combating Corruption in the Private Sector](#), which provides that member states must criminalise both active and passive bribery in the private sector.

The [African Union Convention on Preventing and Combating Corruption](#) was adopted on 11 July 2003. Parties to this convention undertake to criminalise, among other things, bribery in the private sector.

The [Inter-American Convention Against Corruption](#) (IACAC) was adopted by the member countries of the Organisation of American States on 29 March 1996 and entered into force on 6 March 1997, though it does not cover private-to-private corruption.

Unlike Europe, Africa and the Americas, the Asia-Pacific does not have a region-wide inter-governmental system. The Asia-Pacific Economic Cooperation (APEC) Anti-Corruption and Transparency Working Group is tasked with coordinating the implementation of the [Santiago Commitment to Fight Corruption and Ensure Transparency](#) and the [APEC Course of Action on Fighting Corruption](#).

Under these frameworks, APEC leaders commit to develop effective actions to: fight all forms of bribery (including private bribery); adopt and encourage measures to prevent corruption in the private sector; and support the recommendations of the APEC Business Advisory Council “to operate their business affairs with the highest level of integrity and to implement effective anticorruption measures in their businesses, wherever they operate”. In 2014, the working group adopted the [Beijing Declaration on Fighting Corruption](#) which reaffirms the continued commitment to counter corruption across all sectors, including public and private, in the Asia-Pacific region.

## Self-regulatory frameworks

As many of the recent corporate scandals have shown, acts of corruption are very often aided by the use of opaque company structures and secrecy jurisdictions (Transparency International 2014). However, companies can mitigate the risks posed by lack of transparency and ownership arrangements by shedding more light on their corporate structures and making basic financial information public (Transparency International 2014).

Many businesses adopt their own preventive measures such as codes of conduct, anti-bribery policies, appointing a person to oversee anti-bribery compliance, training, risk assessments and due diligence on projects and business associates,

implementing financial and commercial controls, and instituting reporting and investigation procedures.

There is a number of publicly available tools for businesses to adopt to prevent corruption. The International Chamber of Commerce (ICC) [Business Integrity Compendium](#) provides guidance on responsible business conduct for companies of all sizes and includes the [ICC Rules on Combating Corruption](#) and the [ICC Anti-Corruption Clause](#). The rules are in three parts. Part I states the rules related to prohibiting bribery, extortion and solicitation; Part II deals with policies which enterprises should enact to support compliance with the rules; and Part III lists the suggested elements of an effective corporate compliance programme. The ICC Anti-Corruption Clause is a proforma clause intended to be included in contracts whereby parties commit to complying with ICC Rules on Combating Corruption or commit to put in place and maintain a corporate anti-corruption compliance programme.

In 2016, the International Organisation for Standardisation (ISO) released the first set of standards designed to help organisations prevent and detect bribery. [ISO 37001, Anti-bribery management systems](#), specifies a series of measures to help organisations prevent, detect and address bribery.

The standard specifies mandatory requirements for organisations when establishing or updating anti-bribery management programmes in a manner that is proportionate to the potential bribery risk. They include a commitment from management to establish a clear anti-bribery policy and compliance function, with adequate training provided as part of the bribery risk assessments and due diligence procedures.

Transparency International also publishes its [Business Principles for Countering Bribery](#), which provide a framework for enterprises to develop, benchmark or strengthen their anti-bribery programmes (Transparency International 2013). There are two business principles identified: i) the enterprise shall prohibit bribery in any form, whether

direct or indirect; and ii) the enterprise shall commit to implementing a programme to counter bribery – including values, codes of conduct, detailed policies and procedures, risk management, internal and external communication, training and guidance, internal controls, oversight, monitoring and assurance.

The Global Reporting Initiative's (GRI) [Sustainability Reporting Standards](#) represent global best practice for reporting publicly on a range of economic, environmental and social impacts. [GRI 205](#) sets out reporting requirements on the topic of anti-corruption. The disclosures under this standard provide information about an organisation's corruption related impacts and how it manages them. According to a 2013 survey by KPMG, close to 80 per cent of the largest 100 companies in 41 countries worldwide issuing corporate responsibility reports now use the Global Reporting Initiative's Sustainability Reporting Guidelines (which have now been superseded by the GRI Sustainability Reporting Standards) (KPMG 2013).

The commitment by companies to anti-corruption measures is varied. According to PricewaterhouseCooper's Fraud Survey, fewer than a third of those surveyed said that their company performed risk assessments in the areas of anti-bribery and corruption, anti-money laundering, or sanctions and export controls (PricewaterhouseCoopers 2018).<sup>3</sup>

However, in a benchmarking survey of 76 companies conducted by Trace International, 90 per cent of respondents said that their company's anti-bribery policy covered private sector commercial bribery. A 2014 report by Transparency International evaluating the transparency of corporate reporting by the world's 124 largest publicly listed companies found that although increasing numbers of global public companies are disclosing their anti-corruption programmes, they are still deficient in making public the full range of their corporate holdings and key financial information (Transparency International 2014).

<sup>3</sup> PricewaterhouseCooper's 2018 Global Economic Crime and Fraud Survey was completed by 7,228 respondents from 123 territories. Of the total number of respondents, 52 per cent were

senior executives of their respective organisations, 42 per cent represented publicly listed companies and 55 per cent represented organisations with more than 1,000 employees.

## Legislative measures

A number of countries have started to focus on private-to-private corruption and commercial bribery in their legislative reform processes. Several nations have strict laws criminalising commercial bribery. A 2017 Global Compliance News Survey reported that 54 out of 74 countries assessed had a specific provision that makes commercial bribery a criminal offence (Global Compliance News 2017).

Due to the increasingly international nature of business, companies have had to be cognisant of overseas legislation as corporate liability may arise under foreign laws even where there is no obvious jurisdictional nexus. International business contracts may require that companies vet their compliance against foreign anti-corruption laws or provide annual certificates of compliance with these laws.

Although some legal systems have criminalised commercial bribery, others have no such legislation and rely on other legal provisions, such as anti-trust laws or breaches of fiduciary duties.

### *Breach of fiduciary duties*

In a company context, the relationship between corporate directors and their company's shareholders are traditionally considered fiduciary in nature. Private-to-private corruption results in a violation of the bribed agent's fiduciary duty of loyalty. A universal facet of contract law recognises that agents owe a general duty of loyalty in relation to their principals' affairs or business. Agents violate this duty and thereby harm their principals when they accept bribes in their role as agents.

### *Anti-trust legislation*

Competition/anti-trust law regulates the conduct and organisation of businesses to promote fair competition for the benefit of consumers and in the economic interests of society. For example, in Australia, private-to-private bribery is not criminalised at the federal level. However, the federal Competition and Consumer Act 2010 can apply to private bribery because it prohibits conduct such as price fixing, market sharing and other cartel conduct. The

Japanese shipping company, Nippon Yusen Kabushiki Kaisha, was recently convicted and fined AUD\$25 million (approximately US\$20 million) under Australia's competition laws for criminal cartel conduct in the transport of vehicles (CDPP v Nippon Yusen Kabushiki Kaisha [2017] FCA 876).

### *United Kingdom*

The United Kingdom's Bribery Act criminalises both active and passive bribery regardless of whether the target of the bribe is a UK public official or the officer of a private company. The act refers to "a financial or other advantage" which may cover a wide range of things, such as gifts and hospitality or awarding a contract to a particular company.

Under section 11 of the act, an individual guilty of active or passive bribery is liable for a maximum ten-year imprisonment or a fine, or both. Any other legal person (such as a corporate body) guilty of an active or passive bribery offence is liable to a fine. An organisation guilty of an offence under section 7 (failure of commercial organisations to prevent bribery) is liable to a fine.

For a corporate body to be convicted of active or passive bribery, it needs to be shown that a very senior person in the organisation, such as the CEO or managing director, committed the offence as that person's activities would then be attributed to the organisation. Historically, this has been difficult to prove. However, the Bribery Act also criminalises a company's failure to prevent bribes by one of its employees or agents related to the company's business (Bribery Act 2010 (UK) s7). The act provides an affirmative defence for companies whereby a company is not liable for such acts where it had in place "adequate procedures designed to prevent persons associated with" the commercial organisation from making bribes (Bribery Act 2010 (UK) s7).

The UK Bribery Act has a broad jurisdictional reach, applying not only to acts by British citizens and organisations, but also to acts by companies that do business in the UK. British courts could also seek to exercise jurisdiction where any bribery-related acts take place in the UK.

One of the main criticisms directed at the UK has been its lack of enforcement of its anti-bribery provisions. However, recent years have witnessed several high-profile investigations and prosecutions by both the Serious Fraud Office and the Financial Conduct Authority, involving companies such as Balfour Beatty, AON Ltd, AMEC plc, BAE Systems plc, Innospec Ltd, DePuy International Limited and Rolls-Royce (Ashurst 2017).

### *Republic of Korea*

Article 357 of the criminal code prohibits giving an economic benefit to a person who is entrusted with conducting the business of another person in connection with such person's duties. This essentially concerns the bribery of private sector employees. The offence requires that an improper request be made (such as a request to award a bid in exchange for cash). Reportedly, however, prosecutors have tended to gloss over the requirement that an improper request be made in commercial bribery cases, and the courts have not insisted in requiring that element of the offence be satisfied (Moon, Nam & Lee 2018).

Once private commercial bribery is established, both the recipient and the giver of the bribe can be penalised. The giver of a bribe to a private sector employee may face imprisonment of up to two years or a fine of up to KRW5 million (approximately US\$4,800). The recipient of a bribe may face imprisonment of up to five years or a fine of up to KRW10 million (approximately US\$9,500).

In South Korea, corporations can be criminally liable only if the relevant laws expressly provide for vicarious liability. The criminal code is silent on the issue of vicarious liability. Thus, a corporation cannot be held liable under the criminal code. On the other hand, certain other statutes, which regulate specific industries, provide for vicarious liability for corrupt conduct. However, even if vicarious liability is expressly provided for, a corporation cannot be found liable for the actions of its employees if the corporation can demonstrate that it discharged its duty to adequately supervise those employees (Lee 2016).

The criminal laws of South Korea apply to Korean nationals and foreign nationals who commit crimes within the territory of South Korea (Article 2, criminal code); all Korean nationals who commit crimes outside the territory of South Korea (Article 3, criminal code); and foreign nationals who commit crimes outside the territory of South Korea, if and only if such crime is against South Korea or its nationals, provided that the criminal laws of South Korea shall not apply if the act is lawful under the laws of the nation in which the act occurred (Article 6, criminal code). Bribery is considered a crime against South Korea and its nationals. Because of this, a foreign national can be held liable for his or her actions under the bribery offences in the criminal code, even if those actions occurred outside South Korea (Lee 2016).

In 2017, South Korean prosecutors charged Samsung Group chief Jay Y. Lee with bribery and embezzlement. The charges against Lee included pledging bribes to a company and organisations tied to impeached President Park Geun-hye's confidant, Choi Soon-sil, to cement his control of the smartphones-to-biopharmaceuticals business empire (Sydney Morning Herald 2017). Lee was sentenced to five years in prison for his offences (Jeong 2017; Kim 2017).

### *People's Republic of China*

China amended its Anti-Unfair Competition Law on 4 November 2017 – the first time the law had been amended since it was promulgated in 1993. The amendments, which came into effect on 1 January 2018, redefine commercial bribery, making it clear that employers can be held liable for bribery committed by their employees, increase penalties and give greater investigative powers to enforcement agencies.

Article 7 of the new law states that: "Business operators must not use financial or other methods to bribe the following entities or individuals in seeking business opportunities or competitive advantages:

- staff members of transaction counterparties
- entities or individuals entrusted by transaction counterparties to handle relevant matters

- entities or individuals that may take advantage of the work position or influential power to exercise influence on transactions”

The range of penalties has significantly increased, as a result of the amendments, from RMB100,000 (approximately US\$16,000) to RMB3 million (approximately US\$480,000), in addition to the confiscation of any illegal gains. The authorities also have the power to revoke the company’s business licence in cases of severe violations. Although there is no penalty for bribe recipients in the amendment, recipients of commercial bribes could still be punished under other applicable laws in China.

The amendments also provide for vicarious liability. Bribery committed by an employee of a business is deemed to have been committed by the business. The new law makes it a defence for the business if the business can prove that the act of the employee is irrelevant to seeking a transaction opportunity or competitive advantage for the business.

As these amendments are only very recent, it is too early to comment on their effectiveness.

### *Singapore*

Singapore’s anti-corruption laws are found in its Prevention of Corruption Act (PCA). Section 5 of the PCA covers those who corruptly receive and corruptly give gratification as an inducement or reward for a person performing or withholding performance of a transaction. Section 6 of the PCA covers the actions of agents, such as employees, who act on behalf of others and public servants.

The maximum fine under the PCA is \$100,000 (approximately US\$76,000) per charge. This has been criticised as disproportionate to the severity and amount of money that may be involved in bribes (Leong 2018).

It is possible for a company to be held liable for criminal conduct. The PCA states that any “person who commits corruption shall be guilty of an offence”. The Interpretation Act defines a “person” as including any company or association or body of persons,

corporate or unincorporated. However, there are no specific liabilities against Singapore directors and boards under the PCA unless they paid the bribe, approved it or otherwise abetted it (Leong 2018).

The PCA has extra-territorial jurisdiction in relation to acts committed by Singapore citizens. However, it does not cover non-Singaporeans who commit corruption offences abroad where they are agents of a Singapore company (Leong 2018).

The PCA covers both public and private sector bribery and is considered to have been effectively enforced. For example, in 2016 a director was jailed for nine months for seeking to give \$49,500 (approximately US\$38,000) to a staff member of Louis Vuitton to help secure projects for his company (Vijayan, 2016). The Singapore High Court recently issued a decision relating to sentencing guidelines for public and private sector bribery. The court made it clear that private sector bribery was equally abhorrent as public sector corruption, tripling the jail term (from two to six months) of a marine surveyor convicted on corruption charges related to the receipt of bribes to omit safety breaches in his report (Public Prosecutor v Syed Mostofa Romel (2015) SGHC 117).

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