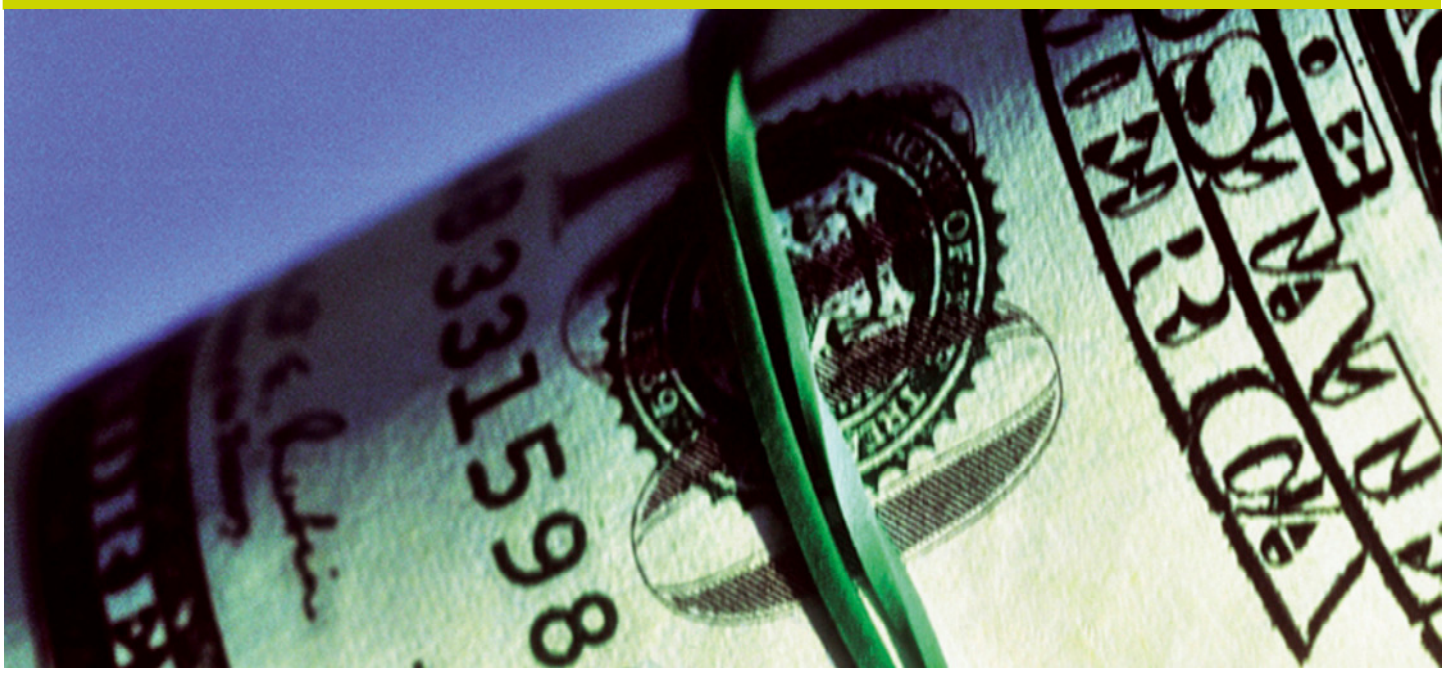
Hogan Lovells

UK Bribery Act

Are your Anti-Corruption Procedures Adequate?



The Hogan Lovells Bribery and Corruption Task Force

The Hogan Lovells Bribery and Corruption Task Force offers international clients informed advice in a number of areas of risk, from reactive incident response measures to the development of proactive strategies to manage potential exposure through compliance programmes.

The Task Force brings together a cross-jurisdictional team of partners from Hogan Lovells' international network with over 25 years experience in large-scale investigations. It has sector specific capabilities in industries where bribery and corruption issues are prevalent, including construction; pharma; energy, including oil and gas; defence and aerospace; manufacturing; IT and financial services.

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OVERVIEW

The UK's new Bribery Act received Royal Assent on 8 April 2010 and came into force on 1 July 2011. The Act radically overhauls the UK's outdated and discredited corruption legislation and introduces a new regime which, in many respects, is more stringent even than the US Foreign Corrupt Practices Act of 1977 (the **"FCPA"**), which has historically been the "gold standard" in this area.

Most significantly, the Bribery Act introduces a new strict liability offence of *"failure to prevent bribery"* by a *"relevant commercial organisation"*. Where a bribe is paid for the benefit of a corporate, whether by an employee, agent, or subsidiary, the corporate will automatically be guilty of a criminal offence itself.

In a reversal of the usual burden of proof, the corporate will only be able to avoid conviction if it can prove that it had *"adequate procedures"* in place to prevent bribery, i.e. that the incident was a one-off anomaly rather than the result of institutional or management failure.

The jurisdictional scope of the Act is also unprecedented. It applies not only to UK individuals and companies, and to conduct which takes place in the UK, but to any foreign company which carries on business in the UK. There is no requirement for a UK listing such that the Act may give the UK authorities jurisdiction over the worldwide activities of many multi-nationals. In the case of the corporate offence, liability will arise even if the bribe is paid in an overseas jurisdiction by a foreign agent or subsidiary, and with no connection to the UK.

The potential ramifications of this are far-reaching, particularly when coupled with the increasingly aggressive approach to enforcement of the UK authorities. Following the damage to the UK's reputation caused by the decision to drop the investigation into BAE Systems' Saudi arms deals, there has been a sea change in the approach of the UK law enforcement agencies.

Even with the complications and deficiencies of the old law, this had already resulted in the prosecution of a number of companies including Mabey & Johnson and Innospec. Now with the new strict liability offence, the authorities will be significantly better placed to pursue prosecutions of major corporates. Unlike in years gone by, the UK authorities pose a genuine threat, and corporates cannot afford to ignore the potential exposure.

In the Innospec case, Lord Justice Thomas signalled that the financial penalties imposed by the English courts ought to be consistent with those imposed in the US. The scale of the penalties imposed in the US on corporates such as Siemens (US$800 million) and, more recently, Daimler (US$185 million) serves to illustrate the extent of the risk in this area.

That is of course to say nothing of the adverse publicity and disruption associated with a criminal investigation, or of the prospect for individual directors to be prosecuted. The sentencing of former DePuy executive Robert Dougall to a 12 month jail term emphasises the personal exposure in this area (even though it was ultimately suspended).

With the Act now in force, corporates are well advised to review and, as appropriate, update their compliance programmes without delay to ensure that they have in place *"adequate procedures"* to prevent bribery. Depending on the risk profile of the business, such procedures ought to cover a wide range of areas, including not merely written policies but also practical training, financial controls, due diligence on third parties, and reporting and investigation procedures.

It is also insufficient to assume that an established FCPA compliance programme will necessarily meet the standard set by the Act. In a number of respects, the Act goes further than the FCPA. Unlike the FCPA, for example, the Act contains no exception for "facilitation payments" or certain promotional expenditures. It also applies equally to bribes paid in either the public or the private sectors.

Key Points

- Companies will automatically be liable for bribes paid on their behalf, including by overseas agents and subsidiaries.
- The company will only avoid conviction if it can prove that it had *"adequate procedures"* in place to prevent bribery, i.e. that it was a one-off incident rather than an institutional failure.
- The basic bribery offences are broad in scope, and require no dishonest or corrupt intention. As such, a wide range of commercial practices are capable of being caught.
- The UK authorities will have jurisdiction over any corporate which conducts business in the UK, irrespective of whether the relevant conduct takes place in the UK or overseas.
- The Act increases the penalties applicable to bribery offences to 10 years' imprisonment and/or an unlimited fine.
- All businesses should act now to review and, as appropriate, update their compliance programmes. It cannot be assumed that an established FCPA compliance programme will be sufficient to meet the bar set by the Act.
- Unlike in years gone by, the UK authorities pose a real, and an increasing, threat in this area.

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INTRODUCTION

On 8 April 2010, the UK Bribery Bill, which had been some eighteen years in the making, finally made it onto the statute books, just in time before Parliament was dissolved for the General Election. The Bribery Act 2010 radically overhaul's and modernises the UK's anti-corruption laws.

Modelled on a draft Bill published by the Law Commission in November 2008, the Act repeals the existing patchwork of offences under the Prevention of Corruption Acts 1889 to 1916, which are widely regarded as anachronistic and inconsistent, as well as a number of common law offences. In their place the Act establishes:

- Two general criminal offences of bribery: one of offering, promising or giving a bribe; and one of requesting, agreeing or receiving a bribe. In each case, the offence is complete where there is an intention to induce or to reward improper conduct.
- A separate offence of bribery of a foreign public official, which more closely follows the model of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 1997 (the **"OECD Convention"**).
- A separate offence of failure of commercial organisations to prevent bribery. Significantly, this is a strict liability offence. Where a bribe is paid on the company's behalf, the company itself will only be able to avoid liability if it can prove that it had in place *"adequate procedures"* to prevent bribery.

TIMING

On 30 March 2011, the Ministry of Justice and the Director of Public Prosecutions published their guidance on the meaning of "*adequate procedures*"[1] and announced that the Act would come into force on 1 July 2011.

If they have not already, corporates are well advised to revisit and, as appropriate, update their compliance programmes without delay in light of the new corporate offence.

ACTIVE BRIBERY

The Act marks a radical departure from the UK's previous anti-corruption legislation, and also takes a different approach from both the US FCPA and the OECD Convention.

For the basic offence of bribery (section 1), the Act introduces an entirely new model based on an intention either to induce or to reward *"improper performance"* of a *"relevant function"*. Notably, and somewhat controversially, there is no requirement that the maker of the bribe (referred to in the Act as "P") has an intention to obtain or retain business or that they act corruptly.

Financial or other Advantage

The Act applies to the offer, promise or gift of a *"financial or other advantage"*. This is not defined, but is *"left to be determined as a matter of common sense by the tribunal of fact"*.[2] It is very likely to be subject to broad interpretation. As addressed below, it is capable, for example, of catching excessive corporate hospitality.

Relevant Function

Broadly speaking, this means a function of a public nature or any activity connected with a business, trade or profession. The Act therefore applies equally to the public and to the private sectors (unlike the US FCPA). It also applies to any activity performed either in the course of employment or on behalf of any body of persons (section 3).

Not every defective performance of a *"relevant function"* will engage the law of bribery. There must be an expectation that the function be carried out in good faith or impartially. Alternatively, the person performing the function must occupy a position of trust.

Improper Performance

"Improper performance" is defined as performance, including non-performance, that breaches that expectation or that trust (section 4). The relevant test is what a reasonable person in the UK would expect of a person performing the relevant function or activity. Where the relevant function was to be performed overseas, any *"local custom or practice"* is to be disregarded unless it is permitted or required by the *"written law"* (including published judicial decisions) of the country or territory concerned.

It should be noted that it is irrelevant whether any function or activity is in fact improperly performed, or whether P gains any commercial benefit. It is P's intention to induce or reward *"improper performance"* that counts, irrespective of whether he succeeds.[3]

It also does not matter whether the person to whom the advantage is offered, promised or given is the same person as the person who is to perform, or has performed, the *"relevant function"*. It is also immaterial whether the advantage is offered by P himself, or by P through a third party.

PASSIVE BRIBERY

Section 2 contains a corresponding offence of *"passive bribery"*, i.e. of requesting, agreeing to receive or accepting a bribe. Liability under this offence can arise in a number of ways. Where the receipt of the *"advantage"* itself constitutes *"improper performance"* of a *"relevant function"* the offence will be complete without more. As a result, any receipt of an undisclosed commission by an agent or fiduciary may amount to a criminal offence under the Act.

Even where a commission is disclosed, it will still come within the scope of section 2 if it was paid as a reward for *"improper performance"*. The intention of the recipient is irrelevant. A criminal

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offence will be committed if their *"function"* was in fact performed improperly, e.g. if they failed to act in their client's best interests, and the commission was paid as a reward for that improper performance. This has potentially far-reaching consequences, particularly for industries in which commission arrangements have traditionally been prevalent.

BRIBERY OF A FOREIGN PUBLIC OFFICIAL

Section 6 establishes an entirely separate offence of bribery of a foreign public official (**"FPO"**) that is modelled more closely on the OECD Convention (and was intended to put the UK's compliance with the Convention beyond doubt).

FPO is defined broadly to include anyone holding a legislative, administrative or judicial position of any kind, or who exercises a public function, or who is an official or agent of an international organisation. This potentially captures all public sector workers and employees of state-owned enterprises.

As with the general offence, a bribe is defined as a *"financial or other advantage"*.

The offence will only be committed if the offer, promise or gift is made with the requisite intention. P must intend to influence the FPO in their capacity as a public official. In addition, P must also intend to obtain or retain business or an advantage in the conduct of business.

Unlike the US FCPA there is no further requirement that the conduct in question be corrupt.[4] Instead, liability turns simply on whether the FPO was permitted or required, by the *"written law"* applicable to them, to be influenced by the offer, promise or gift.[5]

There are, of course, numerous scenarios in which businesses seek to influence public officials. Invariably, businesses will be seeking some form of benefit. Where any *"advantage"* of any kind is offered or given to the FPO, criminal liability will in theory turn on the local law applicable to the FPO.

Like the general offence, the FPO offence will be committed if the advantage is offered to someone other than the FPO if that happens at their request, or with their assent or acquiescence. Similarly, it does not matter whether the offer, promise or gift is made by the defendant themselves or through a third party.

TERRITORIAL SCOPE

Both the general offence and the FPO offence are committed if any part of the relevant conduct takes place in England and Wales. In addition, in the case of British citizens, persons ordinarily resident in England and Wales, and companies incorporated in any part of the UK, the offence will still be committed even if the actions take place entirely overseas.

As addressed below, the territorial scope of the separate offence of failure to prevent bribery by commercial organisations is much greater, and potentially extends to the activities of most multi-nationals anywhere in the world.

FAILURE OF COMMERCIAL ORGANISATIONS TO PREVENT BRIBERY

One of the most controversial aspects of the Act is section 7: Failure of commercial organisations to prevent bribery. Following the recommendation of a Parliamentary Committee, the offence has become one of strict liability. As such, there is no longer any requirement for the prosecution to prove negligence on the part of the organisation itself.

Where a bribe is paid on the organisation's behalf, whether by an employee, agent, or subsidiary, the organisation itself will automatically be guilty of a criminal offence. It will only be able to avoid liability if it can prove, on a balance of probabilities, that it had *"adequate procedures"* in place to prevent bribery, i.e. that the incident was a one-off anomaly rather the result of institutional failure. Critically, the burden of proof rests on the defendant, not the prosecution.

Relevant Commercial Organisation

Section 7 applies to any *"relevant commercial organisation"*, which includes both companies and partnerships. Significantly, the definition extends to foreign companies and partnerships carrying on a business, or part of a business, in the UK (irrespective of whether they have a listing in the UK). While it will be for the courts to make the final determination of when an organisation "*carries on a business*" in the UK, the Ministry of Justice has indicated that the phrase should be given a *"common sense*" interpretation, such that organisations that "*do not have a demonstrable business presence in the United Kingdom*" will not be caught. The Ministry of Justice's view is that the mere fact that a foreign corporate has securities listed in the UK or has a subsidiary in the UK will not necessarily mean that the corporate itself will be subject to the Act. In the case of a subsidiary, this will depend on the degree to which the subsidiary acts "*independently*". Some recent speeches by the Director of the SFO suggest that he takes a broader approach to this issue. It remains to be seen whether the courts adopt the same approach.

Associated Person

The starting point for an offence under section 7 is that a person *"associated with"* the organisation pays a bribe. A person is *"associated"* with the organisation if they perform services for it or on its behalf (section 8).

The question of whether or not the person was performing services *"on behalf of"* the company is to be determined on the basis of a substantive rather than a formal test (e.g. one based on their notional status or technical disclaimers). Furthermore, it is expressly provided that the relevant

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person may be the company's employee, agent or subsidiary.

Payment of Bribe

For the purposes of this offence, an associated person bribes another person if they are, or would be, guilty of an offence under section 1 or 6 (i.e. either the general offence of active bribery or the FPO offence). It is unnecessary for there to have been a prior prosecution of the associate.

It is also irrelevant if the associated person would escape conviction on technical grounds because they are a foreign individual or entity and the relevant conduct took place outside the UK. Entities falling within the definition of *"relevant commercial organisation"* are liable for the actions of all their "*associated persons*", wherever in the world they are located.

Relevant Intention

In order for the organisation to be liable for the bribe, it must have been made with the intention to obtain or retain business (or an advantage in the conduct of business) for the organisation itself. In effect, it must have been paid for the benefit of the organisation, rather than simply for the "*associated person's*" own purposes.

This is an important provision, which was effectively the *quid pro quo* for the offence becoming one of strict liability. It remains to be seen how this provision will be applied in practice, but it may help to limit the scope of organisations' liability for third parties, particularly in scenarios, such as joint ventures and minority shareholdings, where there is no effective control at an operational level.

Significantly, the Ministry of Justice guidance states that parent companies will not automatically be liable for the acts of their subsidiaries on the basis that they ultimately benefit from those acts (e.g. in the form of dividends). Clear evidence will be needed that the intent was to benefit the parent in a more direct or immediate manner. Similarly, it is said that a joint venture company will not necessarily be "*associated with*" any of its members. In a clarification of the previous draft guidance, the Ministry of Justice also acknowledges that a mere supplier of goods is unlikely even to come within the scope of "*associated person*".

Nevertheless, it remains to be seen how the Act will be applied and recent speeches by the Director of the SFO have taken a broader approach to corporate liability.

ADEQUATE PROCEDURES

If these requirements are satisfied, the onus will be on the organisation to show that it had in place *"adequate procedures"* to prevent associated persons from paying bribes. In other words, the organisation can escape criminal liability if it can demonstrate that any failings were not systemic.

This represents a reversal of the ordinary burden of proof. It is not for the prosecution to prove that the organisation was culpable, but for the organisation itself to prove (albeit only to the civil standard of a balance of probabilities) that it had proper compliance procedures.

The Act itself does not prescribe what is meant by *"adequate procedures"*. However, the Act required the Ministry of Justice to publish guidance on the issue, which it did on 30 March 2011. We consider the guidance in further detail below.

COMPLIANCE PROGRAMMES

As the Act came into force on 1 July 2011, corporates are well advised to review and, if necessary, update their compliance programmes without delay to ensure that they have in place *"adequate procedures"* to prevent bribery.

The Ministry of Justice's guidance on "*adequate procedures*" sets out a broad framework on the basis of which corporates can develop their own "*adequate procedures*". This does place the onus on companies to evaluate the particular risks of the environment in which they operate, but equally has the benefit of avoiding the unnecessary burden which would inevitably have resulted had the guidance been heavily prescriptive. The overall emphasis is on proportionality.

The guidance focuses on the following six principles:

- **Proportionate procedures**:

Corporates need to have clear policies which articulate their commitment to preventing bribery. Where appropriate, specific policies on matters such as corporate hospitality, political and charitable contributions and whistle-blowing may also be necessary.

Crucially, corporates must not allow policies to simply be a dead letter. Steps should be taken to ensure that the policies are properly implemented. This means ensuring that the policies are readily accessible and properly communicated both internally and externally. Where appropriate, consideration will also need to be given to how potential bribery risks can be assessed and managed in contexts from recruitment to book-keeping, and from oversight of contractors to disciplinary procedures.

- **Top-level commitment**:

Throughout the guidance, considerable emphasis is placed on the responsibility of management for fostering an anti-bribery culture and ensuring that policies and procedures are fit-for-purpose. Management must take the lead in raising awareness of the organisation's ethical principles, in monitoring bribery risks and in adapting systems and practices to meet new challenges as they arise. Decision-making processes may need to be formalised so that, where a greater risk of corruption is perceived to exist, the decision is taken by a suitably senior individual.

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- **Risk Assessment**:

Organisations should evaluate where they face exposure to bribery on a regular basis. The results of risk assessments should then feed back into policies and procedures.

- **Due diligence**:

Before entering into any business relationship or project, the organisation should carry out due diligence on the country in which the business is to be conducted, on its potential business partners, agents used and on the proposed project or transaction in order to identify, as far as reasonably possible, the risk of corruption.

If the due diligence process identifies possible risks, it is important that the organisation addresses them appropriately. It may be necessary to evaluate the anti-bribery procedures of the potential business partners. Alternatively, it may be necessary for the organisation to reconsider whether it is really necessary to employ an agent or other third party whose actions cannot be sufficiently controlled.

- **Communications (including training)**:

It is important for commercial organisations to ensure that their codes of conduct and other policies are properly embedded throughout their businesses. This requires training and regular updates.

The guidance emphasises the importance of "speak up" procedures which allow secure, confidential and accessible means for bribery-related concerns to be raised.

Organisations are also encouraged to promote their anti-bribery stance to third parties as this can have a strong deterrent effect.

- **Monitoring and review**:

The guidance envisages "*adequate procedures*" as an on-going, iterative process. Corporates need to ensure that they are prepared to deal with new risks as they arise. To make this possible, corporates need to ensure that procedures are periodically reviewed and that management is regularly updated. Equally, if problems do come to light, it is essential that they are properly dealt with and appropriate lessons learned.

Many of these requirements have in recent years become standard elements of an FCPA compliance programme. Nevertheless, even where such a programme is relatively well established, it cannot be assumed that it will meet the standards set by the Act, which in a number of respects are different from, and more stringent than, the FCPA.

SENTENCE

The Act increases the maximum penalty for a bribery offence from 7 to 10 years' imprisonment plus an unlimited fine in respect of individuals.

Where a company is convicted of any offence on indictment, the maximum sentence is an unlimited fine.

In the Innospec case, Lord Justice Thomas signalled that the financial penalties imposed by the English courts ought to be consistent with those imposed in the United States. The scale of the penalties imposed in the US on corporates such as Siemens (US$800 million) and, more recently, Daimler (US$185 million) serves to illustrate the extent of the risk for corporates in this area.[6]

PERSONAL LIABILITY OF DIRECTORS

Section 14 provides that, where a company is convicted of either the general bribery offence or the FPO offence (but not the failure to prevent bribery offence), a director or manager of the company is guilty of the same offence if he or she consented to or *"connived"* at the commission of the offence. As a result, the director or manager is liable to the same sentence of up to 10 years' imprisonment.

Unlike the section 7 offence, there is no defence for the director to show that the company had in place *"adequate procedures"* to prevent bribery.

Section 14 provides a simplified basis on which the authorities can pursue prosecutions of individual executives where an offence has been committed by the corporate. The sentencing of former DePuy executive, Robert Dougall, to 12 months' imprisonment illustrates the personal exposure in this area (notwithstanding that it was ultimately suspended).

FACILITATION PAYMENTS

One of the more difficult issues with which the Law Commission and the Government grappled concerns facilitation payments, i.e., modest payments given to public officials in order to speed up the exercise of a routine administrative function, such as the grant of a permit or licence, to which the payer is legally entitled.

Historically, UK legislation has had no carve-out for facilitation payments, unlike the US FCPA. The Law Commission recommended maintaining that position referring, amongst other things, to drafting difficulties in distinguishing a facilitation payment from a bribe, and to the corrosive social impact of facilitation payments.

That recommendation has been followed. Whilst facilitation payments are not specifically addressed in the Act, the general consensus is that they are caught by both the general bribery offence (section 1) and the separate FPO offence (section 6).

Instead of including a specific carve-out, the Law Commission recommended that *"facilitation payments are best handled through sensible use of the discretion not to prosecute ... we suggest that it will rarely be in the public interest to prosecute individuals or organisations for the payment of small sums to secure the performance of routine tasks"*.

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The Joint Prosecution Guidance published on 30 March 2011 by the Director of the SFO and the Director of Public Prosecutions[7], who share responsibility for the prosecution of bribery offences, indicates that prosecution will be much more likely where there is a repeated pattern of facilitation payments which are simply accepted as part and parcel of doing business. Conversely, prosecutions for single, small payments are relatively unlikely. Corporates are nevertheless well-advised to ensure that procedures are in place which set out how employees should act if facilitation payments are requested.

CORPORATE HOSPITALITY

In practice one of the most common issues for any business is corporate hospitality. Unlike the US FCPA, the Bribery Act does not include an affirmative defence whereby reasonable and bona fide expenditure incurred in connection with the promotion of products or the execution of contracts is expressly deemed not to constitute bribery. The Ministry of Justice's guidance has now gone a long way to allaying concerns that the Bribery Act would prohibit or severely curtail corporate hospitality. It is clearly stated that the Act does not prohibit *"[b]ona fide hospitality and promotional, or other business expenditure which seeks to improve the image of a commercial organisation, better to present products and services, or establish cordial relations."*

The guidance also notes that it will be incumbent upon the prosecution to demonstrate that the corporate hospitality is offered with the intention of influencing the recipient. In the absence of direct evidence, this will depend on a range of factors, including whether the recipient in fact has the capacity to make decisions which are of significance to the provider's business.

The lavishness of the hospitality relative to common market practice will equally be a factor to be taken into account.

However, corporates should not become complacent in merely treating industry norms as acceptable; the guidance warns that those norms should be "*reasonable and proportionate*."

In the final analysis, it is left it to prosecutors to differentiate between legitimate and illegitimate corporate hospitality and to decide whether it would be in the public interest to pursue a prosecution. In a similar vein to the guidance of the Ministry of Justice, the Joint Prosecution Guidance of the Director of the SFO and the Director of Public Prosecutions states that the Act does not penalise "*[h]ospitality or promotional expenditure which is reasonable, proportionate and made in good faith*."

This clearly leaves open the possibility that the authorities and the business community will disagree regarding what is "*reasonable*" or "*proportionate*". Businesses are left with judgements to make concerning the level of hospitality they are prepared to provide, and the circumstances in which it will be given.

Nevertheless, in so doing, they can take considerable comfort from the Secretary of State for Justice's view that "*no one wants to stop firms getting to know their clients by taking them to events like Wimbledon and the Grand Prix*."[8] Significantly, the Ministry of Justice guidance indicates that this applies both in the private sector and also to dealings with the FPO's.

CONCLUSION

The Bribery Act radically overhauls the UK's outdated and discredited corruption legislation and introduces a stringent regime of strict liability for corporates. Coupled with the UK authorities' aggressive new approach to enforcement, the business community should carefully consider the implications of the Act and ensure that compliance programmes meet the new standards being set. Even an established FCPA compliance programme may not fully satisfy the requirements of this tough new legislation.

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1 Guidance available at http://www.justice.gov.uk/guidance/docs/bribery-act-2010-guidance.pdf

2 Ministry of Justice's Explanatory Notes to the original draft of the Bill, March 2009, paragraph 12.

3 The offering, promising or giving offence is also committed, without proof of the ulterior intention, if P knows or believes that the acceptance of the advantage would itself constitute the improper performance of a relevant function (section 1(3)).

4 Unlike the general offence, there is also no requirement that the action expected of the FPO itself be improper.

5 The relevant written law is that of the UK if the functions of the FPO which P intends to influence would be subject to the law of any part of the UK. Otherwise, it is the law of the relevant country or territory or the applicable rules of the relevant public international organisation (section 6(7)).

6 *Regina v Innospec Limited*, sentencing remarks of Lord Justice Thomas, 26 March 2010.

7 Available at http://www.sfo.gov.uk/media/167348/bribery%20act%20joint%20prosecution%20guidance.pdf

8 Foreword to Ministry of Justice Guidance on "Adequate Procedures".

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If you would like further information on any issues in relation to bribery and corruption please contact a person mentioned below or the person with whom you usually deal.

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