MACFARLANES

THE BRIBERY ACT 2010: THE DIRECT EFFECT OF NEW UK LAWS ON COMPANIES AND PARTNERSHIPS

BRIEFING

After more than ten years of the last Government blowing hot and cold over the need to radically reform and modernise the UK's criminal anti-bribery and corruption laws, the Bribery Act 2010 (the Act) received Royal Assent on 8 April 2010, and came into force on 1 July 2011. The Act simplifies UK anti-corruption laws and includes unlimited fines for a new corporate criminal offence of failure to prevent bribery and corruption at home and abroad.

INTRODUCTION

In recent years, whilst anti-corruption laws in the UK had largely evolved to combat abuse of powers by public officials, international anti-corruption initiatives had gained considerable momentum in targeting corporations and corruption in business.

A high-profile example of the global anti-corruption crackdown on corporations by prosecutors and regulators, including fines in two different jurisdictions, is the case of the German engineering group, Siemens. On 15 December 2008, after a year of negotiations and plea bargaining, the group reached a settlement with the US Department of Justice (the US DoJ) in the amount of approximately $450m in relation to charges of bribery and attempts to falsify corporate records. At the same time, the group agreed to pay $350m to the Securities and Exchange Commission in relation to similar charges under the Foreign Corrupt Practices Act 1977 (FCPA 1977). In addition, Siemens agreed to pay a fine of €395m as part of its settlement with the Munich prosecutor in connection with corruption charges involving the failure of the former board to fulfil its duties of supervision.

Bribery has been described by the English Court as *"an evil practice which threatens the foundations of any civilised society"*,[1] and which *"corrupts not only the recipient but also the giver of the bribe"*.[2] Given these judicial sentiments, it is perhaps surprising that it took so long for the UK to enact a modern and efficient set of anti-bribery and corruption laws to combat this *"evil"*. The UK criminal law, which was replaced when the Act came into force, had long been out of date; it provided for corruption offences in three statutes dating from the 19th and early 20th centuries, whilst the common law offence of bribery of a person in public office was even older. As a result, current UK criminal law was fragmented, complex and much in need of modernisation.

SLOW PACE OF UK LAW REFORM

The UK had been very slow to catch up in seeking to align itself with international developments. Indeed, it had been sharply criticised by the Organisation for Economic Co-operation and Development (the OECD)[3] for its failure to bring its anti-bribery laws into line with its international obligations under the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the Convention). The OECD said that it was *"disappointed and seriously concerned"* about the UK's continued failure to address deficiencies in its laws on bribery of foreign public officials and on corporate liability for foreign bribery,[4] and continually urged the rapid introduction of new legislation.

Although the UK ratified the Convention in December 1998, which then came into force on 15 February 1999, it had until 2009 failed successfully to prosecute any bribery case against a company. At the time of the Convention's ratification, the Law Commission recommended updating the UK's existing law and consolidating the existing offences in one statute providing for new offences (Report 248 – Legislating the Criminal Code: Corruption, 1998), which eventually led to a draft Bill being published in March 2003. However, the Bill was heavily criticised, subjected to a further consultation process, and then quietly withdrawn in early 2007.

US ANTI-CORRUPTION LAWS

Following SEC investigations in the mid-1970s, more than 400 US companies admitted making questionable or illegal payments in excess of $300m to foreign government officials, politicians and political parties. As a result, Congress enacted FCPA 1977 to bring a halt to the bribery of foreign officials and to restore public confidence in the integrity of the US business system.

In stark contrast to the pace of reform in the UK, Congress commenced negotiations with the OECD in 1988 to obtain the agreement of the US's major trading partners to enact legislation similar to FCPA 1977. Therefore, the Convention was substantially driven by the US in order to establish international measures similar to those contained in FCPA 1977. Congress was motivated by its concern that following the passage of FCPA 1977, US companies were operating at a disadvantage to foreign companies which routinely paid bribes and, in some countries, were permitted to deduct the cost of bribes as business expenses against their taxes. When the US subsequently ratified the Convention in 1998 it made significant amendments to FCPA 1977, including an extension of its jurisdiction to foreign individuals or companies acting in furtherance of corruption whilst in the US. For example, the provisions of FCPA 1977 cover any overseas company that has traded on an exchange or raised capital in the US.

1 Att. Gen. 4 Hong Kong v. Reid [1994] 1 AC 324 at 330-1, per Lord Templeman.
2 Daraydan Holdings Ltd v. Solland International Ltd [2005] Ch 119 at paragraph 1, per Collins J.
3 OECD Working Group on Bribery Reports: 17 March 2005 and 16 October 2008.
4 OECD Working Group on Bribery Report: 16 October 2008.

The significant extra-territorial reach of the US authorities is no more evident than in a case in which, on 8 January 2009, the US DoJ filed a forfeiture action against accounts located in Singapore that allegedly contained the proceeds of a conspiracy to bribe public officials in Bangladesh. According to the US authorities this action *"shows the lengths to which US law enforcement will go to recover the proceeds of foreign corruption"* and that the US would continue *"to use [its] forfeiture laws to recapture the illicit facilitating payments …"*.[5]

LONG-OVERDUE REFORM

As if stung by the OECD criticisms, the Law Commission published new recommendations (Report 313 -Law Com) for reforming the law of bribery on 20 November 2008. The Law Commission recognised that the effective combating of corrupt practices required an effective law of bribery, whilst existing UK criminal laws were riddled with uncertainty and in need of rationalisation.

At the heart of the Law Commission proposals, was the replacement of the patchwork of offences with the following:

- two general offences of bribery, one concerned with giving bribes and one concerned with taking them;
- a new offence of bribing a foreign public official; and
- a new corporate offence applicable to companies and LLPs of negligently failing to prevent bribery by an employee or agent.

It was also recommended that the law of bribery be extended to cover foreign nationals who reside in the UK or who conduct their business in the UK.

Subsequently, in March 2009, the Government published a draft Bribery Bill which was *"informed"* by the recommendations of the Law Commission.

The Government's desire to crack down on corrupt business practices was further highlighted by the conviction in September 2009 of Mabey & Johnson, the British bridge-building company, for systematically bribing foreign public officials in Ghana, Angola, Madagascar, Mozambique, Bangladesh and Jamaica. In late 2009, the Serious Fraud Office (SFO) also launched its first prosecution of an individual, a former market development executive at Johnson & Johnson's DePuy unit, for payments made and inducements given to medical professionals working in the Greek public health care system between 2002 and 2005.

Even more high-profile results for the SFO in the fight against corruption followed when BAE Systems and Innospec agreed large settlements with the US DoJ and the SFO in relation to charges of bribery.

After a few drafting amendments, the most significant of which jettisoned the corporate offence of negligently failing to prevent bribery in favour of a strict liability offence for companies, LLPs and partnerships, the Bill was enacted as the Bribery Act 2010 on 8 April 2010.

THE LAW PRIOR TO THE COMING INTO FORCE OF THE ACT

The Act will not have retrospective effect. Therefore, the old law continues to be relevant in that it will apply to offences committed before 1 July 2011.

The common law offence

The common law offence of bribery entails *"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"*.[6] Therefore, one of the parties involved must be the holder of a public office but the offence will be committed whether or not the intended bribe was actually given. A "public officer" is an officer who discharges any duty which is in the public interest, more clearly so if he is paid out of a fund provided by the public.[7] Finally, the payer of the bribe (P) must intend to influence the behaviour of the recipient (R) and incline R to act *"contrary to the known rules of honesty and integrity"*.[8] Although this includes paying R to act in breach of his or her duties of office, this may not be a necessary feature; for example, it would be sufficient that P, charged with attempting to bribe a Justice of the Peace, had intended to produce any effect at all on the Justice's decision.[9]

In practice, the common law offence of bribery is rarely charged by the Public Prosecutor, because there is a significant overlap with statutory criminal offences. The primary statutes are the Public Bodies Corrupt Practices Act 1889, the Prevention of Corruption Act 1906 and the Prevention of Corruption Act 1916. All of these statutes have long been considered to be complex and inadequate to combat the changes in both political and commercial practice that have developed over the many years since their enactment.

5 Press release, US Department of Justice (9 January 2009): www.usdoj.gov .

6 Russell on Crime (12 ed., 1964), 364.
7 R. v. Whitaker [1914] 3 KB 1283, at 1296.
8 Russell on Crime (12th ed 1964), supra.
9 See R. v. Gurney (1867) 10 Cox CC 550.

The Public Bodies Corrupt Practices Act 1889 (the 1889 Act)
The 1889 Act is restricted to corruption involving *local* Government officials. Section 1 of the 1889 Act created two complex offences which can be committed by either the giver (P) or the taker (R) of a bribe. In essence, the 1889 Act covers one or more persons who should *"corruptly solicit or receive, or agree to receive ... any gift, loan, fee, reward, or advantage whatever as an inducement to, or reward for ... doing or forbearing to do anything"*, or *"corruptly give, promise, or offer any gift, loan, fee, reward, or advantage whatsoever ... as an inducement to or reward for ... doing or forbearing to do anything ..."*, connected to the public body in question. However, the terms "gift", "loan", "fee" and "reward" are not defined, nor is the term "corruptly", which has been held not to mean dishonestly but *"purposely doing an act which the law forbids as tending to corrupt"*.[10] It is clear from the definition of "public body" in the 1889 Act,[11] that it is limited to local bodies and does not include the Crown or Government departments.

The Prevention of Corruption Act 1906 (the 1906 Act)
The 1906 Act extended the anti-corruption legislation to the private sector by making it an offence for an agent to act corruptly in relation to a principal's affairs.[12] It also extended the law to cover *central* Government officials.

As with the 1889 Act, the prosecution does not need to establish dishonesty.[13] Recent prosecutions have included a manager receiving approximately £900,000 in return for placing substantial orders on behalf of his company, and a Ministry of Defence official who received more than £200,000 from a US company for the provision of information pertaining to an arms contract.

The Prevention of Corruption Act 1916 (the 1916 Act)
As well as broadening the definition of "public body" and increasing the maximum sentence for bribery in relation to contracts with the Government or public bodies (to seven years), the 1916 Act introduced the presumption of corruption.[14] The presumption shifts the burden of proof so that the defence must prove (on a balance of probabilities)[15] that a given payment was not corrupt. It applies only to payments made to employees of the Crown, Government departments or public bodies, and not to agents who are not so classified, such as employees of private companies engaged in contracted-out work or private sector secondees to Government departments. It also only applies to cases involving contracts.

10 Cooper v. Slade [1858] 6 HL 746; approved in R. v. Godden-Wood [2001] Crim LR 810.
11 Section 7 (as amended by the Anti-Terrorism, Crime and Security Act 2001); see also section 4(2) of the Prevention of Corruption Act 1916, extending the definition to encompass "local and public authorities of all descriptions".
12 Section 1(1).
13 See Cooper v. Slade (supra), approved in connection with the private sector in R. v. Harvey [1999] Crim LR 70.
14 Section 2.
15 R. v. Carr-Briant [1943] KB 607.

The Anti-Terrorism, Crime and Security Act 2001 (ATCSA 2001)
Following the acts of terrorism on 11 September 2001, ATCSA 2001 was introduced, including provisions that criminalised corruption overseas. Since 14 February 2002, UK Courts have had the power, under Part 12 of ATCSA 2001, to impose criminal sanctions under UK law in relation to corrupt acts involving UK citizens or companies, even if those acts occurred overseas and even if payments were made to agents of overseas principals.[16]

References to public bodies in the 1889 and 1916 Acts were amended to include *"any body which exists in a country or territory outside the United Kingdom"*.[17] It is also immaterial that R's functions have no connection with the UK and are carried out in another country.[18]

The presumption of corruption does not apply to anything that would not have been an offence prior to Part 12 coming into force.[19]

PROBLEMS WITH THE OLD LAW
There are many unsatisfactory features of the old law arising from the general lack of clarity in the midst of its complexity. There is not even a consistent definition of "bribe" which is defined as "undue reward" under the common law, "gift, loan, fee, reward or advantage" under the 1889 Act, and "gift or consideration" under the 1906 Act. There is also an imperfect distinction between public and private sector bribery; the 1889 Act is confined to bribery of public officials, whereas the 1906 Act applies to bribery of "agents" regardless of the sector in which they are employed. In the past, this has led to procedural errors in the charging of suspects such as an employee of the Home Office Immigration Department who was wrongly charged under the 1889 Act because, although he was working in the public sector, the 1889 Act does not encompass bribery of Crown employees.[20]

As for those who are capable of being bribed, at common law R must be a public officer, whilst under the 1889 Act R must be a "member, officer, or servant of a public body". Even if the two expressions are interchangeable, they remain in sharp contrast with the "agent" terminology used by the 1906 Act, which applies across both public and private sectors.

16 Section 109.
17 Section 7 of the 1889 Act.
18 Section 108 of ATCSA 2001.
19 Section 110.
20 R. v. Natji [2002] 1 WLR 2337.

As has already been seen above, both the 1889 and 1906 Acts require the Defendant to have acted "*corruptly*", but neither provides a definition. It took many years for the UK courts to decide that *"corruptly"* does not mean *"dishonestly"* but rather *"doing an act which the law forbids as tending to corrupt"*.

Perhaps most surprisingly of all, although ATCSA 2001 extended the UK courts' jurisdiction to acts of bribery committed abroad by UK nationals or bodies incorporated under UK law, this extension does not apply to foreign nationals committing bribery offences abroad, even if those nationals are domiciled or habitually resident in the UK. It is considered to be unfair that persons who reside and conduct their business in the UK should not be vulnerable to prosecution when UK nationals would be vulnerable to prosecution for the same behaviour.

NEW OFFENCES UNDER THE BRIBERY ACT 2010

The common law offence of bribery, together with the whole of the 1889, 1906 and 1916 Acts, and sections 108 to 110 of ATCSA 2001, have been repealed by the Act. The existing offences have essentially been replaced by four new offences: two general offences of bribery relating to the payer and the recipient; one specific offence of bribing a foreign public official; and a new corporate offence covering "commercial organisations". A commercial organisation includes companies incorporated in the UK (whether or not carrying on business in the UK), any company (wherever incorporated) carrying on business or part of a business in the UK, and partnerships including LLPs.

First general offence – Payer (P)

Under the first general offence P will be guilty if, directly or indirectly, he offers, promises or gives an advantage (financial or otherwise) to another, intending it to induce another person to do something *improper* (see below), or to reward someone for behaving improperly. P will also be guilty where P knows or believes that the acceptance of the advantage would itself constitute improper behaviour.

It is not necessary for the person to whom the advantage is promised or given to be the same person as the person who is to engage in the improper performance of an activity or function or to be rewarded for having engaged in such improper performance. Therefore, it can be an intermediary who is promised or receives the advantage.

Second general offence – Recipient (R)

Under the second general offence R will be guilty in a number of cases: (1) if R requests or accepts an advantage, intending that he or another should in consequence behave improperly or (2) the request or acceptance by R (and in this case it can only be R) itself constitutes improper behaviour (see below); (3) if R asks for, agrees to receive, or accepts an advantage as a reward for improper behaviour (by R or another); or (4) R (or another at R's request or with R's assent or acquiescence) behaves improperly in anticipation or in consequence of requesting or accepting an advantage.

In all cases, it does not matter whether R or someone else through whom R acts, requests, agrees to receive or accepts the advantage. The advantage itself can be for the benefit of R or another person. In cases (2) to (4), it is immaterial whether R knows or believes that the performance of the function is improper. In case (4), where the function or activity is to be performed by someone other than R, it is immaterial whether that person knew or believed the performance of the function to be improper.

Matters applicable to the general offences

The Act provides that performance of a function or activity (business, professional or public), wherever performed, will be *"improper"* if it is carried out in breach of one or more expectations (being "expectations" that a reasonable person would have) that someone will perform a function or activity in good faith or impartially; or an expectation created by the fact that someone is in a position of trust.

The purpose of these provisions is to ensure that the law of bribery will apply equally to public and to selected private functions without discriminating between the two. Relevant functions or activities may be carried out either in the UK or abroad and would not need to have any connection with the UK, thereby preserving section 108 of ATCSA 2001.

Under the Act, a person's performance of a function or activity should be in keeping with what a reasonable person would expect of a person performing that relevant function or activity. "Improper performance" includes non-performance.

The Act also provides that the general offences will apply to acts done outside the jurisdiction, if they would have amounted to an offence within the jurisdiction and the person accused is, among other possibilities, a British citizen, an individual ordinarily resident in the UK, or a body incorporated in the UK. This territorial provision also applies to the offence of bribery of a foreign public official (see below).

An individual director, manager or equivalent person who consents to or connives at the commission of one of these offences will also commit the relevant offence. This provision will also apply to bribery of a foreign public official, but not to the new corporate offence of failure to prevent bribery.

Upon conviction on indictment, an individual may be sentenced to up to ten years' imprisonment. A body corporate convicted on indictment may be liable to an unlimited fine. The new corporate offence (see below) can only be tried upon indictment and upon conviction, an entity may be liable to a fine.

Bribery of a foreign public official

There is a separate offence of bribing a foreign public official (FPO), being an individual who holds a legislative, administrative or judicial position of any kind (whether appointed or elected) in a country or territory outside the UK, or exercises a public function for or on behalf of a country or territory outside the UK, or for any public agency or enterprise of that country or territory, or is an official agent of a public international organisation.

The offence will be committed if P offers, promises or gives any advantage to an FPO or to another person at or with the FPO's request or assent where the written law applicable to the FPO neither permits nor requires the FPO to be influenced in his or her capacity as an FPO by the offer, promise or gift. P must offer, promise or give the advantage (a) intending to influence the FPO in his or her capacity as an FPO, and (b) intending to obtain or retain business or an advantage in the conduct of business.

The written law applicable to the FPO is the written law (whether contained in any written constitution, legislation or published judicial decision) of the country or territory in relation to which the person in question is an FPO, or if the person is an official or agent of a public international organisation, the applicable rules of that organisation.

This offence will only cover the offering, promising or giving of bribes, and not the acceptance of them. Provided that P's intention is to influence the FPO and to obtain or retain a business advantage, it will not be necessary for the action expected in return itself to be improper for an offence to be committed.

As with the general offences, this offence will apply to acts done outside the jurisdiction, if they would have amounted to an offence within the jurisdiction and the person accused is, among other possibilities, a British citizen, an individual ordinarily resident in the UK, or a body incorporated in the UK.

The new corporate offence

The second new specific offence brought in by the Act is where somebody associated with a commercial organisation commits bribery in the performance of services on behalf of the organisation[21] in question (for example, an employee, agent or subsidiary), intending to obtain or retain business or an advantage in the conduct of business, for C.

A commercial organisation (C) will be guilty of the new offence, on a strict liability basis, punishable by unlimited fine, unless it can show that it has adequate procedures in place, designed to prevent persons committing bribery.

Bribery in the context of this offence relates only to the offering, promising or giving of a bribe (as with bribery of an FPO). There is no corresponding offence of failure to prevent the *taking* of bribes. In addition, it would not matter whether the briber had been prosecuted for an offence.

A relevant offence committed by C's associate will include the secondary offences of aiding, abetting, procuring or counselling.

Punishment for corporate failure to have adequate procedures in place designed to prevent bribery and corruption has been highlighted in the civil sector. On 8 January 2009, the Financial Services Authority (the FSA) fined Aon Limited £5.25m for its failure, in breach of Principle 3 of the FSA's Principles for Businesses, to take reasonable care to establish and maintain effective systems and controls to counter the risks of bribery and corruption associated with making payments to overseas firms and individuals. The FSA found that, between 14 January 2005 and 30 September 2007, Aon had failed properly to assess the risks involved in its dealings with overseas firms and individuals who helped it win business and failed to implement effective controls to mitigate those risks. As a result of a weak control environment, the firm had made various suspicious payments amounting to approximately $7m to a number of overseas firms and individuals. This is the largest financial crime related fine imposed by the FSA to date and it sends a clear message to the UK financial services industry that it is completely unacceptable for a regulated firm to conduct business overseas without having in place appropriate anti-bribery and corruption systems and controls.

The new corporate criminal offence contained in the Act now makes it crucial for all companies, not only those that conduct investment business under the financial services regime, to install adequate anti-bribery and corruption procedures.

21 See definition under "New offences under the Bribery Act 2010", above.

In its May 2009 response to the first draft of the Bribery Bill, the Association of General Counsel and Company Secretaries of the FTSE 100 (the GC100) suggested that a commercial organisation should consider:

- having a clear code of compliance in place which is communicated to staff on induction and regularly as part of training sessions and published on the company's website;
- designating a responsible person to oversee compliance matters;
- ensuring that monitoring systems are in place at all levels, adopting a clear policy on gifts, expenses and corporate hospitality, keeping records of gifts and centrally monitoring payments;
- ensuring that the directors or partners take responsibility for the anti-corruption programme;
- establishing procedures to assess the likely risks of corruption arising in the commercial organisation's business;
- carrying out sufficient due diligence on any potential business partners, agents used, and the country in which business is to be conducted to identify as far as possible the risk of corruption;
- including anti-corruption terms in contracts entered into between the company and its business partners, particularly where agents are being used;
- including express contractual obligations and penalties in relation to corruption in employment contracts and putting in place appropriate disciplinary procedures; and
- developing and implementing reporting and investigation procedures.

Also of note is the OECD's Good Practice Guidance on Internal Controls, Ethics, and Compliance, adopted on 18 February 2010. As the title of its guidance suggests, the OECD suggests a number of good practices which largely echo the GC100's suggestions. The key message is that, "*Effective internal controls, ethics, and compliance programmes or measures for preventing and detecting foreign bribery should be developed on the basis of a risk assessment addressing the individual circumstances of a company, in particular the foreign bribery risks facing the company (such as its geographical and industrial sector of operation). Such circumstances and risks should be regularly monitored, re-assessed, and adapted as necessary to ensure the continued effectiveness of the company's internal controls, ethics, and compliance programme or measures.*"

MINISTRY OF JUSTICE AND JOINT PROSECUTION GUIDANCE

On 30 March 2011 the Ministry of Justice (MoJ) published its guidance in relation to the Act and, in particular, about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing (Section 9 of the Act). At the same time, the Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions was published.

Together, the MoJ and Joint Prosecution Guidance provide substantial further clarity for businesses and senior management in relation to how the Act will be interpreted and applied in practice in respect of a number of areas of concern.

At the same time, the MoJ has placed an emphasis, within its six guiding principles, on taking a risk-based approach whilst implementing proportionate procedures.

FAILURE BY COMMERCIAL ORGANISATIONS TO PREVENT BRIBERY (SECTION 7)

In relation to the Section 7 offence of failure to prevent bribery, the MoJ Guidance highlights the fact that when prosecuting a commercial organisation, the prosecution first has to prove beyond reasonable doubt that the associated person (whether an individual or a corporate entity) performing services on behalf of the commercial organisation has, on the facts of the case, committed an offence under Section 1 (active bribery) or Section 6 (bribing a foreign public official). Therefore, unless the prosecution is satisfied that it can prove such a case, the Section 7 offence will not be triggered. Even then, the commercial organisation has a complete defence if it can satisfy the court on a balance of probabilities that it has adequate procedures in place to prevent bribery. The MoJ Guidance recognises that no procedures will be capable of preventing bribes at all times, and so the very fact of an act of bribery being committed on behalf of a commercial organisation will not in itself render the commercial organisation guilty of the offence.

EXTRA-TERRITORIAL SCOPE

Another very important piece of clarification that should alleviate the concerns of overseas businesses relates to the extra-territorial scope of the Act. Although Section 7 covers an overseas company carrying on a business or part of a business in the UK irrespective of its place of incorporation or formation, the Government "anticipate that applying a common sense approach would mean that organisations that do not have a demonstrable business presence in the UK would not be caught." In particular, the Government would not expect the mere fact that a company's securities have been admitted to the UK Listing Authority's Official List (and therefore admitted

to trading on the London Stock Exchange), in itself to cause that company to be carrying on a business or part of a business in the UK. In addition, the Government clarified something that had not been apparent before, namely that simply by having a subsidiary company in the UK will not, in itself, mean that an overseas parent company is carrying on a business in the UK, "since a subsidiary may act independently of its parent or other group companies."

MEANING OF ASSOCIATED PERSON (SECTION 8)

In terms of persons or entities that might be considered to perform services on behalf of a commercial organisation and, therefore, constitute an associated person under Section 8, the MoJ Guidance provides further clarity in relation to contractors, supply chains/suppliers and joint ventures.

Only direct contractual counterparties are likely to be found to be performing services for or on behalf of a commercial organisation, whether contractors in the technical sense or suppliers, and not sub-contractors in the supply chain. The MoJ Guidance recommends that commercial organisations should introduce risk-based due diligence and the use of anti-bribery terms and conditions in their relationships with contractual counterparties and request those counterparties to adopt a similar approach with the next party in the chain. As for joint ventures, the mere existence of a joint venture entity will not of itself mean that it is "associated" with any of its members. A bribe paid on behalf of the joint venture entity by one of its employees or agents will not, therefore, trigger liability for members of the joint venture simply by virtue of them benefiting indirectly from the bribe through their investment in or ownership of the joint venture. In situations where the joint venture is conducted through a contractual arrangement, the degree of control that a participant has over that arrangement is likely to be one of the "relevant circumstances" that would be taken into account in deciding whether a person who paid a bribe in the conduct of the joint venture business was "performing services" for or on behalf of a participant in that arrangement. Furthermore, the MoJ Guidance is at pains to point out that an offence will only be committed if an agent, subsidiary or other person performing services on behalf of a commercial organisation intended to obtain or retain business or an advantage in the conduct of business for the organisation. Without proof of the required intention, liability will not accrue through simple corporate ownership or investment, or through the payment of dividends or provision of loans by a subsidiary to its parent.

HOSPITALITY, PROMOTIONAL AND OTHER BUSINESS EXPENDITURE

The MoJ Guidance makes clear that hospitality and promotional or other similar business expenditure can, in certain circumstances, be considered to have been employed as a means of bribery. However, bona fide hospitality etc which seeks to improve the image of a commercial organisation, better to present products and services, or establish cordial relations, is recognised as an established and important part of doing business and it is not the intention of the Act to criminalise this sort of behaviour. In the preamble to the MoJ Guidance the Secretary of State for Justice said: "Rest assured – no one wants to stop firms getting to know their clients by taking them to events like Wimbledon or the Grand Prix".

As before, this subject is covered within the MoJ Guidance in the context of bribery of foreign public officials and whilst there is no doubt that hospitality etc in the private sector is not immune from prosecution, it is clear that the principal focus of the Act and, therefore, the prosecuting authorities, in this area, is the public sector. The standards or norms applying in a particular sector may be relevant and businesses should be alive at all times to keeping levels of expenditure within any such standards or norms even if the norms in question are extravagant. Any excessive or lavish hospitality etc will carry a risk, although the necessary intention to induce improper performance by another or to influence a foreign public official will be fundamental to any effective prosecution.

FACILITATION PAYMENTS

Although there is no exemption for facilitation payments the Government recognises the problems that commercial organisations face in some parts of the world and in certain sectors. The Guidance offers an indication of how the problem may be addressed through the selection of bribery prevention procedures. The Joint Prosecution Guidance sets out factors tending against prosecution, including:

- a single small payment likely to result in only a nominal penalty;
- payments coming to light as a result of a genuinely proactive approach involving self-reporting and remedial action;
- where a commercial organisation has a clear and appropriate policy setting out procedures an individual should follow if facilitation payments are requested and these have been correctly followed; and
- that the payer was in a vulnerable position arising from the circumstances in which the payment was demanded.

PROSECUTORIAL DISCRETION

In deciding whether to proceed, prosecutors must first decide if there is a sufficiency of evidence and, if so, whether a prosecution is in the public interest. The more serious the offence, the more likely it is that a prosecution will be required in the public interest. In cases where hospitality, promotional expenditure or facilitation payments do, on their face, trigger the provisions of the Act, prosecutors will consider very carefully what is in the public interest before deciding whether to prosecute.

CONTACT DETAILS

If you would like further information or specific advice please contact your usual Macfarlanes contact or:

BARRY DONNELLY
DD: +44 (0)20 7849 2950
barry.donnelly@macfarlanes.com

IAIN MACKIE
DD: +44 (0)20 7849 2299
iain.mackie@macfarlanes.com

CHARLES LLOYD
DD: +44 (0)20 7849 2338
charles.lloyd@macfarlanes.com

DAN LAVENDER
DD: +44 (0)20 7849 2606
dan.lavender@macfarlanes.com

MACFARLANES LLP
20 CURSITOR STREET LONDON EC4A 1LT

T: +44 (0)20 7831 9222 F: +44 (0)20 7831 9607 DX 138 Chancery Lane www.macfarlanes.com

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