



Is It a New Era of Anti-bribery Enforcement in China?

by

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Abstract

Bribery harms the global playing field as it distorts fair competition, undermines honest practices and increases transactional costs, which results in significant uncertainty in transnational business. The Chinese Ministry of Public Security (MPS)' crackdown on the pharmaceutical company GlaxoSmithKline (GSK)'s bribery and corruption, signals a broad trend toward elevated scrutiny of all foreign corporations operating in China. The case of GSK serves as a timely wake-up call indicating that China's anti-bribery law has shown its teeth against foreign multinational companies (MNCs). GSK's bribery may also invoke anticorruption enforcement across multiple major jurisdictions including both the U.S. and UK, as well as, China. The more global approach of enforcement agencies should incentivise greatly MNCs to design and implement anti-bribery compliance programmes commensurate with their risk of corruption, with a particular regard to China's unique business and legal culture.

1 Introduction

Bribery damages the long-term interests of both host and home countries as well as business itself. Since China's entry into the global anti-corruption enforcement arena, there has been a significant change in the enforcement landscape of its anti-bribery laws.¹ China has enacted new laws aimed at targeting corporate bribery in the wake of a global crackdown on overseas corporate corruption.² Due to the increased allegations of fraudulent behaviour and ethical misconduct on the part of multinational companies (MNCs), China has been targeting high-profile foreign MNCs on multiple fronts with harsh enforcement against bribery.³ Such an approach forces MNCs to defend their reputation in China where international brands often have a valuable edge over local competitors in terms of public trust.⁴

Part I introduces the contextual circumstances of China's lucrative but corrupt business environment, which includes arbitrary enforcement as well as a general campaign against bribery and corruption. The case of GSK serves as an epitome of the current anti-bribery campaign against foreign MNCs. Part II looks at China's anti-bribery legal and regulatory framework, including the Anti-Unfair Competition Law (AUCL 1993) and the The Chinese Communist Party (CCP) Disciplinary System, with a particular regard to an Supreme People's Procuratorate (SPP) & Supreme People's Court (SPC)-jointly issued Judiciary Interpretation 2012 based on the Criminal Law of China.⁵ Part III examines the remit of the US Foreign Corrupt Practices Act (FCPA), clarifying some controversial issues like the scope of foreign officials, foreign issuers, affirmative defences and exceptions. It also partly explains whether GSK should be liable under the FCPA's accounting and anti-bribery provisions. Part IV moves to the UK Bribery Act 2010, widely perceived as the most stringent Act in the anti-bribery arena. However, doubt is cast as to whether an adequate procedure could shield the firm covered from its strict liability under section 7 under UK Bribery Act 2010. Part V challenges GSK's internal compliance procedures and argues that GSK may not rely on the "rogue employee defence" established in the case of *Morgan Stanley*, in which vigorous compliance programmes have averted the US enforcement actions against the firm. Before

¹ P.R. China ratified the United Nations Convention against Corruption (UNCC) in January 2006; Elizabeth K. Spahn, 'Multijurisdictional Bribery Law Enforcement: The OECD Anti-Bribery Convention' (2012) 53 (1) *Virginia Journal of International Law* 1, 52: "Although China is not yet an OECD Convention member state, it enacted domestic laws criminalizing bribery of foreign officials abroad in 2011."

² Bribery Act 2010; The Foreign Corrupt Practices Act of 1977, as amended, 15 U.S.C. §§ 78dd-1, et seq

³ Michael Martina, 'GlaxoSmithKline Routed China Bribes through Travel Agencies-Police' Reuters (15 July 2013)

⁴ Cong Dai and Min Jiang, 'GSK Executives Admit to Bribery and Tax Crimes, China Claims' *British Medical Journal* (18 July 2013) <<http://www.bmj.com/content/347/bmj.f4541/rr/654217>>

⁵ On 26 December 2012, the SPC and SPP jointly promulgated the Interpretation of Several Issues Concerning the Application of Law for Handling Bribery Cases (Interpretation 2012) which became effective on 1 January 1 2013. The Judicial Interpretation includes significant provisions regarding entities who offer bribes as well as monetary thresholds for criminal prosecution.

turning to the general conclusion, Part VI explores how a foreign multinational could make its global compliance programmes compatible in China's unique business environment. Among other things, it is indispensable for the MNCs to undertake risk-based due diligence on overseas third parties as well as their subsidiaries.

2 Context

2.1 A Most Lucrative Pharmaceutical Market

As one of the most important markets for future growth, China is too lucrative a market to resist. Building personal relationships (*guanxi*), which is tantamount to bribery, is critical for successfully doing business in China, and thus engrained in Chinese business culture.⁶ Business courtesies constitute a grey area and the complexities of China's hospital and pharmaceutical network make it particularly thorny for foreign MNCs to navigate.⁷ In addition, China's healthcare system is controlled and owned by the state, along with a rooted practice of government patronage and gift-giving.⁸ The pharmaceutical manufacturers are more likely to encounter corruption, as such an area is characterised by a high preponderance of state-owned customers.⁹ More contentiously, China prefers discretionary administrative policy to predictability, opacity to transparency and decentralised enforcement of the law, which provides incentives for rent-seeking behaviour.¹⁰ Previously, much foreign anti-bribery enforcement did not trigger an investigation in China. With the Chinese agencies reshaping its enforcement landscape, a number of world's largest pharmaceutical companies have been facing corruptions investigation over claims of bribery.

China, being one of the fastest growing emerging markets is expected to overtake Japan as the world's second biggest pharmaceutical market behind the United States by 2016.¹¹ Sales of

⁶ Benjamin Shobert and Damjan DeNoble, 'Compliance after China's Healthcare Bribery Scandals' *China Business Review* (10 October 2013)

⁷ Seung Ho Park and Wilfried R. Vanhonacker, 'The Challenge for Multinational Corporations in China: Think Local, Act Global' *MIT Sloan Management Review* (1 July 2007)

⁸ 'Glaxo Looks into Alleged Bribery of Chinese Doctors' *Shanghai Business Review* (13 June 2013)

⁹ R. Christopher Cook, 'The Foreign Corrupt Practices Act: Enforcement Trends in 2010 and Beyond' (January 2010)

<<http://www.jonesday.com/The-Foreign-Corrupt-Practices-Act-Enforcement-Trends-in-2010-and-Beyond-01-12-2010/>>

¹⁰ Nathan Bush, 'Corruption & Fraud in China: Challenges for US Companies & Investors' (29 August 2011)

<<http://www.law.berkeley.edu/13597.htm>>

¹¹ Kazunori Takada, 'China to Launch Fresh Pharmaceutical Bribery Probe' *CNBC* (14 August 2013)

pharmaceuticals in China reached \$82 billion in 2012, up 18.2% from 2011.¹² China's health costs are expected to double and the demand for drugs will boom, which is projected to rocket from \$357 billion in 2011 to \$1 trillion in 2020.¹³ China is an increasingly important market for international pharmaceutical companies drug makers, such as GSK, which rely on growth in emerging markets to offset slower sales in Western markets with the loss of patent protection for key treatments.¹⁴ GSK earned \$1.42 billion from China in 2012, and has five manufacturing plants in the country employing 5000 people. Although it generates only 3% of GSK's global revenues, China represents one of the fastest-growing drug markets.¹⁵ Its revenue in China rose 17% in 2012 to nearly \$1.2 billion, compared with growth rates of 11% in Latin America and 10% in India.¹⁶ However, it is important to be aware of the unique Chinese business environment where the giant pharmaceutical firm has generated this impressive growth.

2.2 A Corrupt Business Environment?

2.2.1 *The Pervasive Corruption in the Chinese Market*

Bribery and corruption are rampant in China.¹⁷ Personal relationships are indispensable in China which is different from other jurisdictions, and the concept of business ethics is an oxymoron.¹⁸ Corruption is thought to be endemic in wide swaths of the Chinese health industry, and is perceived as a cost of doing business.¹⁹ The line is often blurred between what is appropriate and what is perceived as bribery.²⁰ The acquiescence to China's corrupt environment, however, can be a double-edged sword in that foreign MNCs' agents may view

¹² Laurie Burkitt and Jeanne Whalen, 'China Targets Big Pharma' *The Wall Street Journal* (16 July 2013)

¹³ 'Big Pharma in a Little Trouble in China' *Economist* (12 July 2013)

¹⁴ Ian Walker, 'GlaxoSmithKline Profit Slips, Too Early to Quantify China Impact' *The Wall Street Journal* (24 July 2013); 'GlaxoSmithKline Executives in China Confess to Bribery and Tax Violations' *Guardian* (11 July 2013)

¹⁵ Leslie Hook and Andrew Jack, 'GSK is test case in China's rules laboratory' *Financial Times* (15 July 2013)

¹⁶ GSK, 'GSK Delivers 2012 Core EPS of 112.7p and Returns £6.3 Billion (\$10.2billion) to Shareholders' (6 February 2013)

¹⁷ <<http://www.gsk.com/content/dam/gsk/globals/documents/pdf/Investors/quarterly-results/2012/Q4-2012-results-announcement.pdf>>; David Barboza, 'GlaxoSmithKline Is Investigated in China' *The New York Times* (1 July 2013); Michael Martina, 'Compliance the Buzzword for Foreign Firms in China after Glaxo' *Reuters* (17 July 2013)

¹⁷ Jamil Anderlini and Tom Mitchell, 'Bribery Built into the Fabric of Chinese Healthcare System' *Financial Times* (24 July 2013)

¹⁸ Stanley Lubman, 'Business in China: What Does 'Playing by the Rules' Mean?' *The Wall Street Journal* (22 December 2009)

¹⁹ Virginia Harrison, 'China Scandal Takes Toll on Glaxo' *CNNMoney* (23 October 2013)

²⁰ Steven R. Salbu, 'Transnational Bribery: The Big Questions' (2001) 21 (2) *Northwestern Journal of International Law & Business* 435, 470

bribery as endemic to Chinese business, and therefore tend to tolerate insufficient compliance with Chinese and foreign anti-bribery laws.²¹ Although foreign MNCs may need to adapt to the local environment, they must retain their own values.²² It is worth identifying certain social, economic and institutional factors that contribute to the corrupt environment in China.

Business courtesies constituting a customary fixture of normal business conduct can present challenges in China, where relationship building drives successful business developments.²³ As a result, China is a high-risk country where offering cash bribes and kickbacks are widespread; bribery and business go hand-in-hand in China.²⁴ Transparency International (TI) ranked China the 80th out of 176 countries in its 2012 corruption-perceptions index (CPI), which reflects how outsiders perceive levels of corruption in China.²⁵ Arguably, Chinese doctors do not swear the Hippocratic Oath, and their motivations for professional assistance are financially driven rather than being based upon a moral creed.²⁶ The bribing of doctors by pharmaceutical companies is an "open secret" in China.²⁷ Chinese patients must have a doctor's prescription to buy regulated medicine, and pharmaceutical sales persons meet regularly with doctors to promote their products.²⁸ It is common practice for pharmaceutical firms to offer doctors and hospitals bribes to have their products used. One of the primary concerns for MNCs is to balance the embedded and pervasive culture of gift-giving in China with foreign anti-corruption laws.²⁹ Foreign MNCs must renew their focus on strengthening global compliance programmes to ensure that they are not exposed to such vulnerabilities.³⁰ Apart from the fertile

²¹ Michael Martina 'Compliance the Buzzword for Foreign Firms in China after Glaxo' Reuters (17 July 2013)

²² Kirk O. Hanson and Stephan Rothlin, 'Taking Your Code to China' (2010) 3 (1) *Journal of International Business Ethics* 69, 80

²³ F. Joseph Warin, Michael S. Diamant and Jill M. Pfenning, 'FCPA Compliance in China and the Gifts and Hospitality Challenge' (2010) 5 *Virginia Law & Business Review* 33, 35

²⁴ Feng Jing, 'Combating Commercial Bribery' *Beijing Review* (25 May 2006); "In China's pharmaceutical industry, kickbacks for pharmaceuticals alone approach ¥RMB772 million (\$126million) of state assets every year, an amount equivalent to approximately 16% of the tax revenue for the whole pharmaceutical industry."

²⁵ Transparency International 'Corruption Perceptions Index 2012' (December 2012)

<<http://www.transparency.org/cpi2012/results>>

²⁶ Dezan Shira, 'Why Corruption is Inevitable in China's Pharmaceutical Industry' *Caijing* (25 July 2013)

²⁷ Hongyi Wang and Zhenghua Wang, 'GSK Corruption Claims Trigger Wider Concerns' *China Daily* (3 July 2013)

²⁸ Christopher Matthews and Jessica Hodgson, 'Glaxo Probes China Bribe Claims' *Fidelity* (12 June 2013)

²⁹ Susan Rose-Ackerman, 'Corruption: Greed, Culture, and the State' (2010) 120 *The Yale Law Journal Online* 125, 140

³⁰ Samer Korkor and Nicole Saleem, 'Enforcement of the Foreign Corrupt Practices Act in the Healthcare Industry and Foreign Bribery's Adverse Consequences for Patients' (2013) 74 *Ohio State Law Journal Furthermore* 23, 40

soil for corruption in the pharmaceutical industry, the Chinese fragmented drug licensing system provides ample opportunity for rent seeking.³¹

2.2.2 Institutional Framework: A Highly-Regulated Market

Corruption in the drugs business is a direct result of the regulatory landscape controlling the sale and prescription of drugs.³² The government control of China's health-care system increases the risks for foreign companies.³³ Drug prices are set by the Chinese authorities, which dictate the margin structure for the state-controlled distributors as well as sub-distributors and hospitals.³⁴ Some Chinese officials often solicit or expect a "facilitation payment" merely for doing their routine job.³⁵ The direct or indirect extortion put foreign MNCs in a dilemma, that is, either taking the risk of prosecution or refusing to pay or risk adverse consequences for the business. As local entities are not similarly constrained by stringent anti-bribery laws, a Western firm may incur significant costs to avoid the risk of their home law, which arguably puts Western companies at a disadvantage.³⁶ In an era when the Chinese market is increasingly important, some over-eager MNCs may be tempted to bend the rule of zero tolerance for corruption so as to avoid being left out of business opportunities.³⁷ This may, to some extent, explain why GSK has failed to make its global compliance procedures compatible to China's more challenging business environment.

2.3 Arbitrary Prosecution: Protectionism or Politically-Driven Prosecution?

MNCs may complain that they have been penalised selectively. It is worth ascertaining whether the investigations are driven politically or in a protectionist way. Nationalism and protectionism have played a part which should not be overestimated. First, foreign MNCs may feel like scapegoats, in part, in reaction to the economic downturn and, in part, in an attempt to deflect attention from

³¹ Leslie Hook, 'Unorthodox Injections Sustain China's Healthcare System' *Financial Times* (16 July 2013)

³² Dezan Shira, 'Why Corruption is Inevitable in China's Pharmaceutical Industry' *Caijing* (25 July 2013)

³³ Samuel Rubinfeld, 'Chinese Health-Care System Rife with Corruption Risks' *The Wall Street Journal* (2 May 2012); Hannah Beech, 'How Corruption Blights China's Health Care System' *Time* (2 August 2013)

³⁴ 'China's Bitter Medicine for Foreign Drug Companies'

<http://knowledge.wharton.upenn.edu/article/chinas-bitter-medicine-foreign-drug-companies/>

³⁵ Emily N. Strauss, 'Easing Out' the FCPA Facilitation Payment Exception' (2013) 93 (1) Boston University Law Review 235, 273

³⁶ Irina Sivachenko, 'Corporate Victims of "Victimless Crime": How the FCPA's Statutory Ambiguity, Coupled with Strict Liability, Hurts Businesses and Discourages Compliance'(2013) 54 (1) Boston College Law Review 393, 431

³⁷ Richard McGregor, *The Party: The Secret World of China's Communist Rulers* (Harper Perennial, 2012) 122

China's own domestic drug concerns.³⁸ The slower economic growth may serve to fuel the public resentment toward those foreign multinationals that are scooping substantial profit. With China's accession to the World Trade Organisation (WTO), some of the more flagrant barriers imposed against foreign MNCs trying to compete on a very uneven playing field have been softened.³⁹ As a result, Chinese pharmaceutical companies often find themselves put at a disadvantage against their foreign counterparts with world-known brands and reputations.⁴⁰ Second, China has achieved its goals of accumulation of capital. It is a transformative period for the country to upgrade its technology and improve governance capacity. It is also the time for China to realise its vast economic potential primarily by stimulating its domestic consumption instead of relying heavily on exports and investment.⁴¹ The time has passed since China had to queue up to attract MNCs, with super-national treatments; such as the offering of tax breaks. In this vein, MNCs need China more than China needs them.⁴² When looking for easy targets to fulfil their quotas of corruption-bashing, local officials may find it simpler to pick on foreign firms than on local ones that have interwoven connections with local or national politicians.⁴³ Although an element of nationalism and even protectionism cannot be rooted out, it would not be wise to attribute bribery to such an excuse.

The judicial system in China is highly politicised.⁴⁴ The Chinese Communist Party (CCP) has effectively institutionalised an entire ecosystem of crony capitalism, which renders business and politics tightly intertwined.⁴⁵ The Chinese government is keen to cut the prices of medicines whilst trying to provide universal access to healthcare. The rising cost of pharmaceuticals and medical devices have been sparking widespread frustration, with national healthcare expenses expected to reach \$1 trillion annually by 2020.⁴⁶ Cost-effective health care represents a critical and challenging

³⁸ Simon Denyer, 'Amid Attacks by Chinese Government and Media, Foreign Companies Get Mixed Signals' *The Washington Post* (9 August 2013)

³⁹ Dezan Shira, 'Why Corruption is Inevitable in China's Pharmaceutical Industry' *Caijing* (25 July 2013)

⁴⁰ Shubha Ghosh and Brad Luo, 'Protection and Enforcement of Well-known Mark Rights in China: History, Theory and Future' (2009) 7(2) *Northwestern Journal of Technology and Intellectual Property* 119, 161

⁴¹ MJ Deen and Nicholas Ward, 'China pivots its growth strategy to focus on domestic consumption' *Financial Post* (21 February 2012)

⁴² James Moore, 'Multinationals, Like GSK, Now Need China More than China Needs Them.' *The Independent* (16 July 2013)

⁴³ 'GlaxoSmithKline in China: Bitter Pill' *The Economist* (20 July 2013)

⁴⁴ Victor Nee and Sonja Opper, 'On Politicized Capitalism' in Victor Nee and Richard Swedberg (eds.) *On Capitalism* (Stanford, Stanford University Press, 2007) 93-127

⁴⁵ David Barboza and Sharon LaFraniere, 'Princelings in China Use Family Ties to Gain Riches' *The New York Times* (17 May 2012)

⁴⁶ Franck Le Deu, Rajesh Parekh, et al., 'Healthcare in China: Entering Uncharted Waters' (September 2012)

<http://www.mckinseychina.com/wp-content/uploads/2013/04/mckinsey-healthcare-in-china.pdf>

policy objective, thus, the government's legitimacy would be jeopardised were it not to deliver affordable and accessible healthcare.⁴⁷

2.4 Crack-down on Bribery: A Toothless Watchdog?

There has been more enforcement by the U.S. agencies under the FCPA against Western firms operating in China than by the Chinese government itself.⁴⁸ The U.S. Department of Justice (DoJ) has aggressively pursued the pharmaceutical industry for violating the FCPA. Some multinational pharmaceutical giants were penalised for alleged FCPA violations based on their bribery in China. For instance, Pfizer Inc., Johnson & Johnson and Eli Lilly, have all reached FCPA settlements in recent years.⁴⁹ Although the corrupt business practices of the pharmaceutical giants were heavily penalised by the Securities and Exchange Commission (SEC) as well as the Department of Justice (DoJ), most of the incidences of the high profile China-related FCPA cases have turned up no parallel Chinese investigations, and have gone unpunished by the Chinese enforcement agencies.⁵⁰ The Chinese authorities have focused more on punishing bribe recipients than bribe givers,⁵¹ resulting in few actions against foreign MNCs paying bribes in China. They have finally escaped scrutiny largely because the anti-bribery agencies have typically not prosecuted non-Chinese companies for violations of law

⁴⁷ Michael Martina, 'Compliance the Buzzword for Foreign Firms in China after Glaxo' *Reuters* (17 July 2013)

⁴⁸ Michael B. Runnels and Adam M. Burton, 'The Foreign Corrupt Practices Act and New Governance: Incentivising Ethical Foreign Direct Investment in China and Other Emerging Economies' (2012) 34 *Cardozo Law Review* 295, 327

⁴⁹ DoJ, 'Pfizer H.C.P. Corp. Agrees to Pay \$15 Million Penalty to Resolve Foreign Bribery Investigation' (7 August 2012) <<http://www.justice.gov/opa/pr/2012/August/12-crm-980.html>>; SEC, 'SEC Charges Pfizer with FCPA Violations' (7 August 2012)

<<http://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171483696#.Ugo2ItJazE0>>: In Pfizer/Wyeth, employees allegedly used bribes to influence doctors at state-owned hospitals to recommend Wyeth nutritional products, ensure that the products were made available to new mothers at the hospitals. Pfizer paid a \$60 million fine in 2012 to settle allegations of making improper payments to government officials and physicians in China. SEC, 'SEC Charges Johnson & Johnson with Foreign Bribery: J&J to Pay \$70 Million to Settle Cases Brought by SEC and Criminal Authorities' (7 April 2011) <<http://www.sec.gov/news/press/2011/2011-87.htm>>; SEC, 'SEC Charges Eli Lilly and Company with FCPA Violations' (20 December 2012) <<http://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171487116#.UfE2Qm3F2uM>>: Employees from the company's China subsidiary had "falsified expense reports in order to provide gifts and cash payments to government-employed physicians," which resulted in a settlement that Eli Lilly had agreed to pay a \$29 billion fine.

⁵⁰ Rachel Beller, 'Whistleblower Protection Legislation of the East and West: Can it really reduce corporate fraud and improve corporate governance? A Study of the Successes and Failures of Whistleblower Protection Legislation in the U.S. and China' (2011) 7 *New York University Journal of Law and Business* 873, 929

⁵¹ 'Former Head of Chinese Drug Watchdog Appeals Death Sentence' *People's Daily* (12 June 2007); One of the most striking cases in the pharmaceutical industry was that Xiayu Zheng, former director of China's State Food & Drug Administration (SFDA). He was executed in 2007 after being convicted of taking bribes of ¥RMB 6.49 million (\$1.06million) in return for approving hundreds of new medicines, some of which proved to be dangerous.

involving corruption of public officials.⁵² As Transparency International observed, “the ineffectiveness of government regulation was initially caused by China’s sole emphasis on fighting the “demand side of corruption,” which involved close regulation of public officials but ignored the actions of the private sector “suppliers of corruption.”⁵³ Despite rampant corruption, the Chinese government has not efficiently prosecuted and punished such conduct. The lack of enforcement against foreign violators left observers thinking that the Chinese anti-bribery laws were little more than a “legal sleeping dog.”⁵⁴

This imbalance has begun to change in recent years with the Chinese government launching a campaign to crack down on foreign MNCs’ bribery activities.⁵⁵ The scrutiny of the MNCs operating in China has been heightened.⁵⁶ Multinational pharmaceutical companies in China face increasing challenges given that corruption is rampant in China’s health system. Although the crackdowns should be seen in a broader context and as a manifestation of developments in the legal arena,⁵⁷ the Chinese enforcement agencies are likely to take a hard line with foreign firms and show the teeth of its anti-bribery laws, especially in those markets that have a direct and immediate nexus to Chinese consumers.⁵⁸ The case of GSK represents a notable development because it reshaped China’s traditional corruption investigations, demonstrating that the enforcement agencies will target bribers as well as officials receiving bribes.⁵⁹

⁵² Daniel Chow, ‘The Interplay Between China’s Anti-Bribery Laws and the Foreign Corrupt Practices Act’ (2012) 73 (5) *Ohio State Law Journal* 1015, 1037

⁵³ Transparency International, ‘Global Corruption Report 2009: Corruption and the Private Sector 254; Rachel Beller, ‘Whistleblower Protection Legislation of the East and West: Can it really reduce corporate fraud and improve corporate governance? A Study of the Successes and Failures of Whistleblower Protection Legislation in the U.S. and China’ (2011) 7 *New York University Journal of Law and Business* 873, 929 at 885

⁵⁴ Matthew Shabat, ‘SEC Regulation of Attorneys Under the Foreign Corrupt Practices Act: Decisions on Efficiency and Their Role in International Anti-Bribery Efforts’ (1999) 20 (4) *University of Pennsylvania Journal of International Law* 987, 999

⁵⁵ Benjamin Olken and Rohini Pande, ‘Corruption in Developing Countries’ (2012) 4 *Annual Review of Economics* 479, 509

⁵⁶ Tom Fox, ‘GSK in China, A Game Changer in Compliance’ *Corporate Compliance Insights*

<<http://www.corporatecomplianceinsights.com/gsk-in-china.pdf>>

⁵⁷ David B. Wilkins and Mihaela Papa, ‘The Rise of the Corporate Legal Elite in the BRICS: Implications for Global Governance’ (2013) 54 (3) *Boston College Law Review* 1149, 1184

⁵⁸ Kirk O. Hanson and Stephan Rothlin, ‘Taking Your Code to China’ (2010) 3 (1) *Journal of International Business Ethics* 69, 80

⁵⁹ Freshfields and Bruckhaus Deringer, ‘Anti-Bribery and Corruption: Frontier Market and Global Enforcement- An Update on Legislative and Enforcement Developments, 2013’ (September 2013)

3 Ministry of Public Security (MPS) v GlaxoSmithKline (2013)

3.1 Does GSK have Clean Hands?

GSK has been involved in widespread bribery between 2004 and 2010,⁶⁰ during which GSK's China sales staff provided doctors with speaking fees, cash payments, lavish dinners and all-expenses-paid trips in return for prescribing medication. Despite GSK's guarantee of operating ethically and with high standards of integrity, the Chinese Ministry of Public Security (MPS) charged GSK for breaching the anti-bribery laws based on substantial evidences that the firm had used travel agencies as vehicles to commit the flagrant and repeated bribery.

The charges against GSK resemble those leveled at other pharmaceutical MNCs by the SEC and DoJ,⁶¹ which have been looking into possible violations of the U.S. Foreign Corrupt Practices Act (FCPA) relating to sales in China since 2010. GSK paid \$3 billion according to a healthcare fraud settlement on 2 July 2010.⁶² The penalty illustrates the upward trend toward increased enforcement and harsh penalties.⁶³ GSK has been seeking to repair its corporate image after multibillion-dollar settlements with U.S. regulators tied to drug-marketing tactics, where the company admitted that its marketing practices relating to some of its drugs were illegal.⁶⁴ It is also executing a five-year corporate integrity agreement, requiring major changes in the way its sales force does business.⁶⁵

It seems that GSK has not been snagged in law that creates a double standard for its business practices. Just one year after the criminal and civil charges of its off-label marketing and related unlawful promotion of prescription drugs,⁶⁶ GSK has allegedly uncovered bribery involving \$450 million that had been funnelled through more than 700 travel agents and other third parties during the last six years.⁶⁷ It has used bribes, kickbacks and other fraudulent means to bolster drug sales in China. On 11 July 2013, the Ministry of Public Security (MPS) lodged a new investigation into the firm. The acceptance of kickbacks from the travel agents or other

⁶⁰ Laurie Burkitt and Jeanne Whalen, 'China Targets Big Pharma' *The Wall Street Journal* (16 July 2013)

⁶¹ Peter J. Henning, 'Be Careful What You Wish For: Thoughts on a Compliance Defence under the Foreign Corrupt Practices Act' (2012) 73 (5) *Ohio State Law Journal* 883

⁶² DoJ, 'GlaxoSmithKline to Plead Guilty and Pay \$3 Billion to Resolve Fraud Allegations and Failure to Report Safety' (2 July 2012) <<http://www.justice.gov/opa/pr/2012/July/12-civ-842.html>>

⁶³ Robert C. Blume and J. Taylor McConkie, 'Navigating the Foreign Corrupt Practices Act: The Increasing Cost of Overseas Bribery' (1997) 36 (8) *The Colorado Lawyer* 91, 100 at 97

⁶⁴ DoJ, 'GlaxoSmithKline to Plead Guilty and Pay \$3 Billion to Resolve Fraud Allegations and Failure to Report Safety Data' (2 July 2012) <www.justice.gov/opa/gsk-docs.html>; Jeanne Whalen, Devlin Barrett and Peter Loftus, 'Glaxo in \$3 Billion Settlement' *The Wall Street Journal* (3 July 2012)

⁶⁵ Wayne M. Carlin, 'White Collar and Regulatory Enforcement: Emerging Trends and What to Expect in 2013' *The Harvard Law School Forum on Corporate Governance and Financial Regulation* (30 January 2013)

⁶⁶ Duff Wilson, 'Glaxo Settles Cases With U.S. for \$3 Billion' *The New York Times* (3 November 2011)

⁶⁷ Peter Henning, 'Lessons from the Glaxo Case in China' *The New York Times* (29 July 2013)

third parties by such executives has constituted another violation of Chinese Criminal Law (CCL), since the payment or benefit far exceeded the threshold value of ¥RMB 5,000 (\$816).⁶⁸

GSK's reputation has been substantially tarnished. It may be worth examining how much of this allegation has been driven by anti-bribery efforts and how much of it is politically-motivated.⁶⁹ However, it is not well-justified that the case against GSK represents the targeting of foreign companies in competition with domestic industry, rather than an overarching crackdown on corrupt practices. Nevertheless, challenging the anti-bribery prosecution will make little sense. "When in Rome, do as the Romans", constitutes quite a weak defence in criminal proceedings anywhere. Despite bribery being widely considered as a most common practice in China's hyper-competitive pharmaceutical markets, it does not mean that foreign MNCs should engage in it. A better practice would be that the foreign MNCs strengthen their global compliance programmes to ensure that they are not exposed to similar vulnerabilities in the increasingly stringent anti-bribery environment.

3.2 Parallel Prosecutions

As possible parallel investigations unfold, MNCs will have to pay more attention to their bribery risk management under Chinese anti-bribery law, which presents some unique challenges. The charges against GSK may again lead to serious penalties. GSK's holdings and business are under the jurisdiction of the FCPA and the UK Bribery Act 2010, as well as China's anti-corruption laws. The breadth of GSK's activities could make the company vulnerable to enforcement action by both the UK's Serious Fraud Office (SFO) and the US Department of Justice (DoJ), which can levy heavy penalties under their sweeping respective anti-bribery laws if they find evidence of wrongdoing.⁷⁰ The charges of bribery make the GSK case the highest profile probe in China since four executives of mining giant Rio Tinto plc were jailed in March 2010 for taking bribes and stealing commercial secrets.⁷¹ The current prosecution of GSK is apparently the first such parallel investigation undertaken by the Chinese government. It provides further evidence that extraterritorial enforcement of anti-corruption laws is not limited to U.S. government actions. This does not only signal the end of that inaction era and the beginning of an industry-wide enforcement sweep, but also signal an

⁶⁸ CCL Article 163

⁶⁹ Susan Rose-Ackerman, 'International Actors and the Promises and Pitfalls of Anti-Corruption Reforms' (2013) 34 (3) University of Pennsylvania Journal of International Law 447, 489

⁷⁰ Kathrin Hille and John Aglionby 'China accuses GSK of bribing officials' *Financial Times* (11 July 2013)

⁷¹ David Barboza, 'China Sentences Rio Tinto Employees in Bribe Case' *New York Times* (29 March 2010); The four executives received jail terms of between seven and 14 years after being found guilty of getting information from confidential strategy meetings of the body representing China's steel industry in negotiations with iron ore suppliers.

inclination by the Chinese government to affirmatively pursue anti-bribery cases.⁷² Foreign MNCs should wake up and accept such a reality that China's anti-bribery agencies do not turn a blind eye to flagrant breaches of its Anti-bribery laws any more. To join the global fight against corruption, China has updated its laws to reflect the developing global standard in anticorruption enforcement. A brief overview of anti-bribery laws in China is next.

4 The Anti-bribery Framework in China

4.1 The Chinese Criminal Law on Anti-bribery

The flagrant bribery and corruption have posed a fundamental challenge to the legitimacy of the Chinese Communist Party (CCP),⁷³ which could cause "the collapse of the CCP" and the downfall of the state.⁷⁴ In response, China has instituted complex anti-bribery laws from criminal and administrative penalties to disciplinary regimes for CCP members to the standard adjudication process. The system consists of two main parts: the principal piece of Chinese Criminal Law (CCL) and the Anti-Unfair Competition Law (AUCL 1993). The latter prohibits business parties from engaging in "commercial bribery" by giving money or property to another business operator or individual for the purpose of selling or purchasing goods.⁷⁵ Firms are forbidden to give 'money or property' for the purpose of gaining a competitive advantage.⁷⁶ A bribery case under the AUCL 1993 is investigated by the State Administration of Industry and Commerce (SAIC).⁷⁷ In addition, it appears that the CCP Regulations on Disciplinary Penalties prohibit any official from accepting 'any gift that might affect his impartial exercise of a public function' without registering receipt of the gift and surrendering it to the state.⁷⁸ The perceived lack of specificity and guidance in the CCL confers considerable discretion to Chinese enforcement agencies.⁷⁹ The SPC and the SPP jointly promulgated a Judicial Interpretation on

⁷² Amy L. Sommers and Matt T. Morley, 'Multinational Executives Detained in China Due to Bribery Concerns' *Legal Insight* (26 July 2013)

⁷³ Michael J. Boskin, 'The Global Stake in China's Anti-Corruption Reform' *Project Syndicate* (10 September 2013)

⁷⁴ Jaime A. FlorCruz, 'Corruption as China's Top Priority' *CNN* (7 January 2013)

⁷⁵ AUCL 1993 Article 8

⁷⁶ The AUCL was adopted in the 3rd Session of the Standing Committee of the 8th National People's Congress (NPC) on 2 September 1993 and came into effect on 1 December 1993.

⁷⁷ AUCL 1993 Article 3

⁷⁸ Central Commission for Discipline Inspection (CCDI), *CCP Regulations on Disciplinary Penalties* (18 February 2004) <http://news.xinhuanet.com/weekend/2004-02/18/content_1320429.htm>; Patrick Norton, 'The Foreign Corrupt Practices Act: A Minefield for US Companies in China' *China Law & Practice* (November 2004)

⁷⁹ Irina Sivachenko, 'Corporate Victims of "Victimless Crime": How the FCPA's Statutory Ambiguity, Coupled with Strict Liability, Hurts Businesses and Discourages Compliance' (2013) 54 (1) *Boston College Law Review* 393, 431

Several Issues Concerning the Specific Application of the Law in the Handling of Criminal Cases of Bribery on 26 December 2012 (SPC & SPP *Interpretation 2012*).⁸⁰

There are a number of provisions incorporated under the CCL that relate to bribery of public officials for an improper interest.⁸¹ It constitutes a crime for a person to give "money or property"⁸² to a state functionary for the purpose of obtaining an undue advantage.⁸³ The CCL defines 'state functionaries' as individuals of government agencies who are engaged in public service.⁸⁴ Pursuant to *Interpretation 2012*, the threshold for a bribe to a state functionary that will trigger a criminal investigation is ¥RMB 10,000 (\$1632).⁸⁵ More specifically, the threshold for bribery to constitute an offence is ¥RMB 10,000 (\$1632) where committed by an individual,⁸⁶ and ¥RMB 200,000 (\$32639) by companies.⁸⁷ The CCL does not contain an exception for facilitation payments.⁸⁸ China has updated its criminal laws to reflect the developing global standards in anti-bribery enforcement.⁸⁹ Given these rather general standards and broad prosecutorial discretion, fashioning a set of compliance rules that are not only effective in avoiding the legal pitfalls, but also practical and realistic as a business matter will be difficult.⁹⁰

⁸⁰ The Interpretation 2012 was adopted respectively by the SPC Trial Committee Decree 1547 on 14 May 2012 and SPP Procurator Committee Decree 77 on 21 August 2012. It came into force on 1 January 2013.

⁸¹ CCL Articles 389-393

⁸² Supreme People's Court (SPC) and the Supreme People's Procuratorate (SPP), *Opinion on Some Issues Concerning the Application of the Law in Criminal Commercial Bribery Cases (20 November 2008)*: The concept of "property" in the crime of bribery under the CCL was clarified to include any "property interest" that can be quantified with a monetary value.

⁸³ CCL Articles 389

⁸⁴ CCL Article 93

⁸⁵ SPC&SPP Interpretation 2012 Article 1; CCL Article 390

⁸⁶ CCL Articles 164, 389

⁸⁷ CCL Article 391; SPP, *The Threshold for Criminal Prosecution in Bribery Cases (22 December 2000)*

⁸⁸ The Amendments to the Criminal Law of the People's Republic of China (VIII) was promulgated by the Standing Committee of the National People's Congress on 25 February 2011, and became effective on 1 May 2011. <http://www.npc.gov.cn/huiyi/cwh/1119/2011-02/25/content_162_5618.htm>; Bribery Act 2010 s6

⁸⁹ The newly enacted Amendment of PRC Criminal Law adds a second provision to Article 164 that criminalizes bribes given to foreign public officials or officials of an international public organization, which came into effect on 1 May 2011.

⁹⁰ William L. Rosoff and Yuanming Wang, 'Recent Developments in Chinese Anti-bribery Laws and Enforcement' (6 August 2013) <<http://cdn.akingump.com/images/content/2/4/v2/24261/Recent-Developments-in-Chinese-Antibribery-Laws-and-Enforcement.pdf>>

4.2 SPC & SPP Judicial Interpretation 2012

Under the CCL, the severity of punishment of individuals for bribing government officials depends on the degree of culpability.⁹¹ The *Interpretation 2012* sets out some factors and financial thresholds that will determine the level of ‘seriousness’ of the bribery offence, with associated penalties for each categorisation from ‘serious’,⁹² to ‘extraordinarily serious’.⁹³ The crime of bribery is “extraordinarily serious” if the amount proffered is more than ¥RMB 1 million (\$163,192);⁹⁴ or if the amount proffered is more than ¥RMB 500,000 (\$81,596), but less than ¥RMB1 million(\$163,192,⁹⁵ and the defendant has paid bribes to

- (i) more than three people;⁹⁶
- (ii) to government officials who are responsible for supervising and administering matters in relation to food, pharmaceuticals, manufacturing safety or the environment, etc. that endanger public health or the security of public property;⁹⁷
- (iii) to a judicial or administrative authority, thereby interfering with administrative law enforcement and judicial justice;⁹⁸ or
- (iv) the bribes are sourced from the offender’s illegal gains.⁹⁹

For instance, individuals found to have engaged in “extraordinarily serious” bribery face lifetime imprisonment.¹⁰⁰ The Chinese enforcement agencies usually charge individuals, largely because of complex pre-conditions for charging an enterprise.¹⁰¹ Although the prosecution of companies, as opposed to individuals, has been far less frequent for various evidentiary and technical reasons, the government has now fully implemented a database that documents all cases of convictions for bribery and lists all parties involved, whether or not those parties have been criminally pursued.¹⁰² This makes greater sense because it is much easier for foreign

⁹¹ CCL Article 390: (i) Payment of bribes is punishable by imprisonment of one month to five years; (ii) If the circumstances are severe or if severe damage has been caused to the interests of the State, punishment is increased to between 5 and 10 years of imprisonment; and (iii) If the circumstances are extraordinarily severe, the defendant is subject to imprisonment of more than 10 years or life imprisonment and all of his/her property may also be confiscated.

⁹² SPC&SPP Interpretation 2012 Article 2

⁹³ SPC&SPP Interpretation 2012 Article 4

⁹⁴ SPC&SPP Interpretation 2012 Article 4 (1)

⁹⁵ SPC&SPP Interpretation 2012 Article 4 (2)

⁹⁶ SPC&SPP Interpretation 2012 Article 4 (2) (i)

⁹⁷ SPC&SPP Interpretation 2012 Article 4 (2) (iii)

⁹⁸ SPC&SPP Interpretation 2012 Article 4 (2) (iv)

⁹⁹ SPC&SPP Interpretation 2012 Article 4 (2) (ii)

¹⁰⁰ CCL Article 390

¹⁰¹ Daniel Chow, ‘China under the Foreign Corrupt Practices Act’ (2012) 2 *Wisconsin Law Review* 573, 607

¹⁰² SPP, *Centralizes Database of Bribery Convictions* (16 February 2012)

MNCs to undertake their risk assessment to avoid potential successor liability. Furthermore, «major loss to the national interest»¹⁰³ shall be deemed to have been caused to the interests of the State if the direct economic losses are more than ¥RMB1million (\$163,192).¹⁰⁴ The *Interpretation 2012* clarifies a number of key terms and issues under the CCL with respect to paying bribes and the consequence of the criminal liability. It provides long-awaited guidance and fills gaps in the CCL, with precise financial thresholds and specified aggravating circumstances to assist the courts in producing fair and predictable decisions.

4.3 Implication from the Distinction between the CCL and *the Interpretation 2012*

Despite the lack of separation of powers in China, the SPC plays a pivotal role in China's judicial practice, with a particular regard to its indispensable guidance in the judicial enforcement.¹⁰⁵ Arguably, the SPC is not constitutionally mandated with the power to interpret the law, but issues statute-like judicial interpretations only when the NPC delegates it the power to do so.¹⁰⁶ Generally, *Interpretation 2012* is equivalent to law, although it cannot make new rules without the existing legal ground.¹⁰⁷ The *Interpretation 2012* does provide significant insight into how Chinese judicial organs interpret key principles of anti-bribery laws. The more detailed guidance allows lower-level courts to make more consistent and predictable decisions. In this vein, the Judicial Interpretation helps to insure national standards of justice. Furthermore, Judicial Interpretation enables the court to adapt promptly to legal developments without necessarily revising the relevant laws through the NPC.¹⁰⁸ Given China's long standing civil law jurisdiction, however, the *Interpretation 2012* may impede judges to exercise their discretions in making a decision. Keith and Lin observed that the SPC's interpretation has "narrowed the function of the Court to a more tightly disciplined judicial role as well as for plugging the holes in legal process and structure by creating guiding case law and supporting the freedom of judge's decision making."¹⁰⁹ Such a unique approach in China's judicature

¹⁰³ CCL 390

¹⁰⁴ SPC&SPP Interpretation 2012 Article 3

¹⁰⁵ The Organic Law of People's Court Article 33; The Decision of the Standing Committee of the National People's Congress on Strengthening Legal Interpretation (1981) Article 2 : "Issues of applying laws and regulations in court proceedings shall be interpreted by the Supreme People's Court"

¹⁰⁶ Constitution of the PRC Article 67; PRC Law on Legislation Article 42; Randall Peerenboom, *China's Long March toward Rule of Law* (Cambridge, CUP, 2002) 317

¹⁰⁷ Chengguang Wang, 'Law-Making Functions of the Chinese Courts: Judicial Activism in a Country of Rapid Social Changes' (2006) 3 *Frontiers of Law in China* 29

¹⁰⁸ Björn Ahl, 'Retaining Judicial Professionalism: The New Guiding Cases Mechanism of the Supreme People's Court' (2014) 216 *The China Quarterly* 1-19

¹⁰⁹ Ronald Keith and Zhiqiu Lin, 'Judicial interpretation of China's Supreme People's Court as "secondary law" with special reference to criminal law' (2009) 23 (2) *China Information* 223, 256 at 229

mechanism may be arguably referred to as codification of SPC's judicial interpretation.¹¹⁰ This may result in the discretion of local procuratorate and court to be further restricted. In the pursuit of rule of law and the judicial independence,¹¹¹ it remains a long-standing controversy as to whether the current approach would strike a balance between the facilitation of judicial efficiency and the enhancement of the judges' description in the decision making.

5 The Anti-Bribery Framework in the United States: The Remit of Foreign Corrupt Practices Act (FCPA)

5.1 American and Foreign companies under the FCPA

The Foreign Corrupt Practices Act (FCPA) is a far-reaching statute which is aggressively enforced.¹¹² It forbids bribing foreign government officials to gain illicit interests. The anti-bribery provision of the FCPA prohibits U.S. 'issuers,' and their officers, directors and agents from bribing foreign officials with 'anything of value' to corruptly influence an official decision or to obtain a business benefit.¹¹³ It is illegal for companies with significant U.S. operations to bribe foreign officials in exchange for business.¹¹⁴ The FCPA imposes certain accounting requirements on foreign issuers in the U.S.,¹¹⁵ which provision is designed to ensure corporate accountability.¹¹⁶ Maintaining an effective compliance programme will not only mitigate a firm's exposure to FCPA liability, but also minimise the risk of enforcement action in case of a systematic failure to prevent a violation.

Foreign firms registered with the SEC must comply with U.S. securities laws and rules, including requirements that the issuer maintains certain books and records.¹¹⁷ The FCPA's anti-

¹¹⁰ Ronald Keith and Zhiqiu Lin, 'Judicial interpretation of China's Supreme People's Court as "secondary law" with special reference to criminal law' (2009) 23 (2) *China Information* 223, 256 at 224

¹¹¹ Taisu Zhang, 'The Pragmatic Court: Reinterpreting the Supreme People's Court of China' (2012) 25 (1) *Columbia Journal of Asian Law* 1, 61

¹¹² Mike Koehler, 'The Foreign Corrupt Practices Act in the Ultimate Year of Its Decade of Resurgence' (2010) 43 *Indiana Law Review* 389, 421

¹¹³ The Foreign Corrupt Practices Act of 1977, as amended, 15 U.S.C. §§ 78dd-1, et seq

¹¹⁴ H. Lowell Brown, 'The Foreign Corrupt Practices Act Redux: The Anti-Bribery Provisions of the Foreign Corrupt Practices Act' (1994) 12 (2) *Berkeley Journal of International Law* 260, 290

¹¹⁵ 15 U.S.C. § 78m(b)(2) (2006)

¹¹⁶ 15 U.S.C. § 78m; SEC, 'SEC Sanctions Statoil for Bribes to Iranian Government Official' (13 October 2006)

<<http://www.sec.gov/news/press/2006/2006-174.htm>>

¹¹⁷ SEC and DoJ, *A Resource Guide to the FCPA U.S. Foreign Corrupt Practices Act* (14 November 2012) 42-45; Stuart H. Deming, 'The Potent and Broad-Ranging Implications of the Accounting and Record-Keeping Provisions of the Foreign Corrupt Practices Act' (2006) 96 (2) *Journal of Criminal Law and Criminology* 465, 502

bribery provisions prohibit issuers¹¹⁸ from giving anything of value to a foreign official for the purpose of influencing the official's actions or decision-making.¹¹⁹ Designed to operate in tandem with the anti-bribery provisions,¹²⁰ the FCPA requires companies whose securities are listed in the U.S. to meet its accounting provisions, requiring the company covered to

- (a) make and keep books and records that accurately and fairly reflect the transactions of the corporation; and
- (b) devise and maintain an adequate system of internal accounting controls.¹²¹

The issuers are responsible for ensuring that their consolidated subsidiaries and affiliates comply with the accounting provisions,¹²² reflecting the breadth and complexity of the FCPA's extraterritorial reach. For instance, it is illegal for foreign issuers in the NYSE to bribe foreign officials in exchange for business,¹²³ even if it may be common practice in China. Since the term "issuer" covers any business entity that is registered¹²⁴ or required to file reports,¹²⁵ a foreign firm whose American Depositary Receipts (ADRs) are listed on a U.S. exchange is recognised as an "issuer", too. It demonstrates that the government has a commitment to vigorously enforce the FCPA against all international business whose conduct falls within such a wide scope.¹²⁶ It is no wonder that many foreign subsidiaries of U.S. issuers based in China have been charged with conspiring to violate the FCPA.¹²⁷ Although GSK is a multinational company based in the UK, its extensive holdings in the U.S. make it subject to U.S. law no matter where the bribery actually takes place. In this vein, the GSK bribes in China fall within the jurisdiction for purposes of the FCPA.

¹¹⁸ 15 U.S.C. § 78dd-1(a)

¹¹⁹ 15 U.S.C. §§ 78dd-1(a), 78dd-2(a); 78dd-3(a)

¹²⁰ The Foreign Corrupt Practices Act of 1977, as amended, 15 U.S.C. §§ 78dd-1, et seq

¹²¹ 15 U.S.C. § 78m

¹²² SEC and DoJ, *A Resource Guide to the FCPA U.S. Foreign Corrupt Practices Act* (14 November 2012) 43

¹²³ *United States v. Statoil, ASA*, 1:06-cr-00960-RJH-ALL (S.D.N.Y.2006); DoJ, 'U.S. Resolves Probe against Oil Company that Bribed Iranian Official' (13 October 2006)

<http://www.usdoj.gov/opa/pr/2006/October/06_crm_700.html>

¹²⁴ 15 U.S.C. § 78l

¹²⁵ 15 U.S.C. § 78o (d)

¹²⁶ Robert C. Blume and J. Taylor McConkie, 'Navigating the Foreign Corrupt Practices Act: The Increasing Cost of Overseas Bribery' (1997) 36 (8) *The Colorado Lawyer* 91, 100 at 97

¹²⁷ *United States v. DaimlerChrysler China Ltd.*, No. 10-cr-66 (D.D.C. 2010); *United States v. Alcatel-Lucent France, S.A.*, No. 10-cr-20906 (S.D. Fla. Dec. 27, 2010)

5.2 Broader Interpretation of Foreign Official

Under the FCPA, a foreign official includes any officer or employee of a foreign government or any instrumentality.¹²⁸ The definition has been further clarified in a DoJ & SEC jointly-issued *Guide* that any employee of a foreign-government instrumentality, including state-owned hospitals, is a foreign official, in light of their ownership, control, status and function.¹²⁹ Consistently, the term "state functionaries" is widely defined in China to include not only public officials, but also employees in state-owned enterprises and other state institutions and persons who perform public services authorised by the state.¹³⁰ An entity is unlikely to qualify as an instrumentality if a government does not own or control a majority of its shares, minority-state-owned entities are "instrumentalities" only in exceptional circumstances.¹³¹ The DoJ and the SEC take an expansive view and consider doctors who are employees of overseas state-owned hospitals to be "foreign officials".¹³² According to *Pfizer*, government officials included doctors who held positions on registration committees and other employees of "hospitals, clinics, and pharmacies in countries with national healthcare systems."¹³³ In this regard, the majority of Chinese companies are state-owned/controlled or are instrumentalities of the government.¹³⁴ Conceptually, all employees of state-run hospitals should fall within the remit of the term of foreign officials.¹³⁵

¹²⁸ 15 U.S.C. § 78dd-2(h)(2)(A)

¹²⁹ DoJ & SEC, *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (14 November 2012) 19-21

¹³⁰ CCL Article 93

¹³¹ *United States v. Alcatel-Lucent France, S.A.*, No. 10-cr-20906 (S.D. Fla. Dec. 27, 2010); SEC and DoJ, 'A Resource Guide to the U.S. Foreign Corrupt Practices Act' (14 November 2012) 21

¹³² SEC and DoJ, *A Resource Guide to the FCPA U.S. Foreign Corrupt Practices Act* (14 November 2012); DoJ, 'Pfizer H.C.P Corp. Agrees to Pay \$15million Penalty to Resolve Foreign Bribery Investigation' (7 August 2012)

<<http://www.justice.gov/opa/pr/2012/August/12-crm-980.html>>

¹³³ *United States of America v Pfizer H.C.P. Corporation* (7 August 2012) District Court for Columbia

<www.justice.gov/criminal/fraud/fcpa/.../pfizer/2012-08-07-pfizer-dpa.pdf>; *U.S. Securities Exchange Committee v Pfizer INC.* (2012) District Court for Columbia

<www.sec.gov/litigation/complaints/2012/comp-pr2012-152-pfizer.pdf>

¹³⁴ Court E. Golumbic and Jonathan P. Adams, 'The "Dominant Influence" Test: The FCPA's "Instrumentality" and "Foreign Official" Requirements and the Investment Activity of Sovereign Wealth Funds' (2011) 39 (1) *American Journal of Criminal Law* 1, 51

¹³⁵ Mike Koehler, 'Why Compliance with the US Foreign Corrupt Practices Act Matters in China' (February) 2008 *China Law & Practice* 54, 56

5.3 Exceptions and Affirmative Defences

5.3.1 *The Narrow Formulation of the Facilitation Payment Exception*

The contours of the FCPA's facilitating payments exception have been long debated,¹³⁶ which provides an exception for payments made to further “routine governmental action.”¹³⁷ It would not constitute an FCPA violation in the context of “reasonable” and “bona fide” expenditures directly related to promotional or performance functions.¹³⁸

One exception to the anti-bribery provisions is the ‘facilitation/grease payment’ exception, which is exempt from FCPA liability.¹³⁹ The sole exception is for “facilitating or expediting payments” to government officials who perform “routine governmental action”,¹⁴⁰ which refers to actions that are ordinarily and commonly performed by the foreign official and do not entail any decision making or discretion.¹⁴¹ It has been typically defined in terms of “non-discretionary acts,” but court decisions and the statute's terms have left significant ambiguity as to what qualifies.¹⁴² There is no universally accepted standard of what constitutes a permissible facilitation payment. The conception remains unclear with particular regard to how a company should treat gift-giving as a deep-rooted tradition exists in China’s cultural contexts.¹⁴³ It is safer to reinforce the narrow formulation of the facilitation payments exception.¹⁴⁴

5.3.2 *Affirmative Defences*

The first affirmative defence applies where the payment at issue “was lawful under the written laws and regulations of the foreign official’s country.”¹⁴⁵ Notably, common conduct, such as the

¹³⁶ Andrew Brady Spalding, ‘Four Unchartered Corners of Anti-Corruption Law: In Search of Remedies to the Sanctioning Effect’ (2012) 2 *Wisconsin Law Review* 661, 688

¹³⁷ 15 U.S.C. § 78dd-1(b)

¹³⁸ 15 U.S.C. §§ 78dd-1(c)(2), -2(c)(2), -3(c)(2) (2006)

¹³⁹ 15 U.S.C. §§ 78dd-1(b) and (f)(3) [Section 30A of the Securities & Exchange Act of 1934]

¹⁴⁰ 15 U.S.C. §§ 78dd-1(b), 78dd-2(b), and 78dd-3(b)

¹⁴¹ 15 U.S.C. § 78dd-1(f)(3)

¹⁴² Irina Sivachenko, ‘Corporate Victims of “Victimless Crime”’: How the FCPA's Statutory Ambiguity, Coupled with Strict Liability, Hurts Businesses and Discourages Compliance’ (2013) 54 (1) *Boston College Law Review* 393, 431

¹⁴³ Michael B. Runnels and Adam M. Burton, ‘The Foreign Corrupt Practices Act and New Governance: Incentivising Ethical Foreign Direct Investment in China and Other Emerging Economies’ (2012) 34 *Cardozo Law Review* 295, 327

¹⁴⁴ Arthur F. Mathews, ‘Defending SEC and DOJ FCPA Investigations and Conducting Related Corporate Internal Investigations: The Triton Energy/Indonesia SEC Consent Decree Settlements’ (1998) 18 (2) *Northwestern Journal of International Law & Business* 303, 456

¹⁴⁵ 15 U.S.C. §§ 78dd-1(c)(1), 78dd-2(c)(1), and 78dd-3(c)(1)

overwhelmingly pervasive practice of gift-giving, is insufficient to satisfy this requirement.¹⁴⁶ This virtually refutes the unlawful approach in China, that is, “in Rome, do as the Romans do”.¹⁴⁷ Despite the Chinese culture of gift-giving, Chinese law explicitly bars government officials from accepting lavish gifts.¹⁴⁸ Second, the expenditures “will not give rise to prosecution only if they are reasonable, *bona fide* and directly related to the promotion, demonstration, or explanation of products or services or the execution or performance of a contract.”¹⁴⁹ Regardless of the *Guide*, many companies are grappling to address where to draw a line between “reasonable and *bona fide*” payments and those that may constitute a violation of the law.¹⁵⁰ The FCPA contains no *de minimis* for prohibited gifts or payments, including both tangible and intangible benefit.¹⁵¹ The applicability of the affirmative defence for reasonable and *bona fide* expenditures necessarily requires a fact-specific analysis.¹⁵² In practice, DoJ and SEC have focused on small payments and gifts only when they comprise part of a systemic or long-standing course of conduct that evidences a scheme to corruptly pay foreign officials to obtain or retain business.¹⁵³ Notably, the tension between China’s aims of preventing corruption whilst not penalising modern business practices, such as legitimate corporate hospitality for a *bona fide* business purpose, creates a significant grey area.¹⁵⁴ As to the evidential requirement, a defendant bears the burden of proof that the payment falls within one of the above two categories.¹⁵⁵ It is illustrative to look into GSK’s compliance programmes before determining whether its conduct could trigger the FCPA violations.

¹⁴⁶ Alejandro Posadas, ‘Combating Corruption under International Law’ (2000) 10 Duke Journal of Comparative & International Law 345, 414

¹⁴⁷ Chen Weihua, ‘Multinationals under scrutiny for corruption’ China Daily (8 September 2010)

¹⁴⁸ CCL Article 389

¹⁴⁹ SEC and DoJ, ‘A Resource Guide to the U.S. Foreign Corrupt Practices Act’ (14 November 2012) 24

¹⁵⁰ Andrew Brady Spalding, ‘Unwitting Sanctions: Understanding Anti-Bribery Legislation as Economic Sanctions against Emerging Markets’ (2010) 62 (2) Florida Law Review 351, 427

¹⁵¹ SEC, A Resource Guide to the U.S. Foreign Corrupt Practices Act (14 November 2012) 15

¹⁵² SEC and DoJ, ‘A Resource Guide to the U.S. Foreign Corrupt Practices Act’ (14 November 2012) 24

¹⁵³ SEC and DoJ, ‘A Resource Guide to the U.S. Foreign Corrupt Practices Act’ (14 November 2012) 15

¹⁵⁴ Margaret Ryznar and Samer Korkor, ‘Anti-Bribery Legislation in the United States and United Kingdom: A Comparative Analysis of Scope and Sentencing’ (2011) 76 (2) Missouri Law Review 415, 453

¹⁵⁵ Barbara Black, ‘The SEC and the Foreign Corrupt Practices Act: Fighting Global Corruption Is Not Part of the SEC’s Mission’ (2012) 73 (5) Ohio State Law Journal 1093, 1119

5.4 Compliance Programmes under the FCPA

The DoJ and SEC's enforcement of the FCPA has been extraordinarily aggressive, which represents a primary compliance concern facing most MNCs.¹⁵⁶ A competent compliance programme is usually considered as a mitigating factor in determining whether to charge a company and the extent of any penalty.¹⁵⁷ The SEC & DoJ's joint *Guide* provides a useful resource for evaluating an effective compliance programme, in which the enforcement agencies provide appropriate credit to corporate compliance efforts.

The *Guide* illustrates a roadmap of DoJ and SEC's expectations regarding corporate compliance programmes.¹⁵⁸ Both enforcement agencies have been reluctant to create a formal compliance defence, arguing that the adequacy of the procedures utilised by the company is assessed *in casu* in the actual process.¹⁵⁹ A company may still be held liable for an FCPA violation even if it has conducted a due diligence check of a third party as part of its corporate compliance programmes.¹⁶⁰ This may seem contradictory to the concept of both reasonableness and foreseeability which are firmly rooted in law of due process.¹⁶¹ Despite the lack of a guaranteed formal defence, the rigorous anti-bribery compliance programmes reduce the likelihood of acts of bribery and can serve to mitigate the severity of any penalty imposed under the FCPA.¹⁶² Furthermore, DoJ and SEC provide that "in a global marketplace, an effective compliance programme is a critical component of a company's internal controls and is essential to detecting and preventing FCPA violations."¹⁶³

While the *Guide* did not adopt an absolute compliance defence to corporate liability,¹⁶⁴ it seems that SEC and DoJ are truly committed to giving meaningful credit to corporate compliance

¹⁵⁶ Jessica Tillipman, 'A House of Cards Falls: Why "Too Big to Debar" is All Slogan and Little Substance' (2012) 80 *Fordham Law Review Res Gestae* 49, 58 at 53

¹⁵⁷ James Barta and Julia Chapman, 'Foreign Corrupt Practices Act' (2012) 49 (2) *American Criminal Law Review* 825, 862

¹⁵⁸ SEC and DoJ, *A Resource Guide to the FCPA U.S. Foreign Corrupt Practices Act* (14 November 2012)

¹⁵⁹ Mike Koehler, 'Revisiting a Foreign Corrupt Practices Act Compliance Defence' (2012) (2) *Wisconsin Law Review* 609, 659

¹⁶⁰ Daniel J. Grimm, 'The Foreign Corrupt Practices Act in Merger and Acquisition Transactions: Successor Liability and Its Consequences' (2010) 7 (1) *NYU Journal of Law & Business* 247, 331

¹⁶¹ Rosalie Berger Levinson, 'Reining in Abuses of Executive Power through Substantive Due Process' (2008) 60 (3) *Florida Law Review* 519, 587 at 523

¹⁶² Rashna Bhojwani, 'Deterring Global Bribery: Where Public and Private Enforcement Collide' (2012) 112 *Columbia Law Review* 66, 111

¹⁶³ SEC and DoJ, *A Resource Guide to the FCPA U.S. Foreign Corrupt Practices Act* (14 November 2012) 56

¹⁶⁴ Thomas Gorman and William McGrath, Jr., 'The New Era of FCPA Enforcement: Moving toward a New Era of Compliance' (2012) *Securities Regulation Law Journal* 369, 370

efforts in the FCPA context.¹⁶⁵ When appropriately designed and effectively implemented, a robust compliance programme presents a real opportunity to prevent questionable conduct before it occurs. This stance is perfectly enshrined in the *Guide* that enforcement agencies “place a high premium on self-reporting, along with cooperation and remedial efforts, in determining the appropriate resolution of FCPA matters.”¹⁶⁶ Even so, the *Guide* does not provide a bright-line rule on whether companies could use compliance programmes as a defence against criminal prosecution.¹⁶⁷ Both SEC and DoJ view a company’s prompt response to the discovery and immediate self-reporting as commendable.¹⁶⁸ It is imperative that companies implement robust FCPA compliance programmes which are well-designed and tailored to the companies’ specific business operations, geography and areas of corruption risk and that they are enforced.¹⁶⁹

5.5 Evaluation of the Actions of GSK under the FCPA Provisions: The Interplay between the Two Provisions?

5.5.1 Anti-Bribery Provisions

GSK’s headquarters are in the UK, but it meets the definition of an «issuer» in the US. Therefore it is also subject to the FCPA,¹⁷⁰ which makes it potentially liable to penalties under the US anti-bribery laws.

Criminal penalties for violations of the FCPA have been increased, under which the anti-bribery fine for a firm was raised from \$1 million to \$2 million and for individuals from \$10,000 to \$100,000.¹⁷¹ The maximum imprisonment for bribery for an individual remained

¹⁶⁵ Lauren Giudice, ‘Regulating Corruption: Analyzing Uncertainty in Current Foreign Corrupt Practices Act Enforcement’ (2011) 91(1) Boston University Law Review 347, 378

¹⁶⁶ SEC and DoJ, *A Resource Guide to the FCPA U.S. Foreign Corrupt Practices Act* (14 November 2012) 54

¹⁶⁷ Kayla Feld, ‘Controlling the Prosecution of Bribery: Applying Corporate Law Principles to Define a “Foreign Official” in the Foreign Corrupt Practices Act’ (2013) 88 (1) Washington Law Review 245, 280

¹⁶⁸ SEC and DoJ, *A Resource Guide to the FCPA U.S. Foreign Corrupt Practices Act* (14 November 2012) 54-55; Arthur F. Mathews, ‘Defending SEC and DOJ FCPA Investigations and Conducting Related Corporate Internal Investigations: The Triton Energy/Indonesia SEC Consent Decree Settlements’ (1998) 18 (2) Northwestern Journal of International Law & Business 303, 456

¹⁶⁹ Keith M. Korenchuk, Samuel M. Witten and Mauricio J. Almar, ‘Emerging Global Standard for Effective Anti-Corruption Compliance: Meeting the Expectations of Governments Worldwide’ *Bloomberg BNA* (21 February 2013) <<http://www.bna.com/emerging-global-standard-n17179872475/>>

¹⁷⁰ 15 U.S.C. § 78dd-1 (2006); Drury D. Stevenson and Nicholas J. Wagoner, ‘FCPA Sanctions: Too Big to Debar?’ (2011) 80 (2) Fordham Law Review 775, 820

¹⁷¹ H. Lowell Brown, ‘The Foreign Corrupt Practices Act Redux: The Anti-Bribery Provisions of the Foreign Corrupt Practices Act’ (1994) 12 (2) Berkeley Journal of International Law 260, 290

five years.¹⁷² The FCPA also provides for civil penalties of up to \$10,000 for violations of the bribery provisions.¹⁷³ As a foreign issuer, GSK could only be subject to the FCPA's anti-bribery provisions to the extent a "means or instrumentality of interstate commerce" were used in connection with any improper payment scheme.¹⁷⁴ GSK certainly would violate the FCPA if it evinced a corrupt intent,¹⁷⁵ which includes conscious disregard and deliberate ignorance.¹⁷⁶ The term of "knowing" is defined broadly as basically being aware that a payment will raise red flags and not taking any avoidable measures.¹⁷⁷ In this case, GSK knowingly gave cash and some other monetary incentives to state-owned hospitals, and kept the money in its coffers rather than truthfully recording it in its accounts,¹⁷⁸ GSK could, on principle, be criminally liable for bribing doctors. Despite China's pervasive customary gift-giving, GSK could not refer to the affirmative defence that "its payment is lawful under the laws of the foreign country",¹⁷⁹ because China criminalises the kind of payment identified as bribery.¹⁸⁰

5.5.2 Accounting Provisions

The 'Books and Records and Internal Control' FCPA provisions, together known as the accounting provisions, are enforced by the SEC and apply to any company listed on a U.S. stock exchange.¹⁸¹ The *Guide* makes it clear that an issuer's books and records include those of its consolidated subsidiaries and affiliates.¹⁸² Thus, GSK's obligations under the FCPA extend to ensuring that its consolidated subsidiaries and affiliates in China comply with the FCPA's accounting provisions. Since bribery is often disguised on a company's books and rerecorded through mischaracterisation, GSK should under the accounting provisions of the FCPA have ensured that costs and expenses had been accurately recorded in the company's books and

¹⁷² 15 U.S.C. § 78dd-2(g); Michael V. Seitzinger, 'Foreign Corrupt Practices Act (FCPA): Congressional Interest and Executive Enforcement' (October 21, 2010) <<https://www.fas.org/sgp/crs/misc/R41466.pdf>>

¹⁷³ 15 U.S.C. § 78dd-2(g)

¹⁷⁴ The Foreign Corrupt Practices Act of 1977, as amended, 15 U.S.C. §§ 78dd-1, et seq; Issuers refer to a company listed on a securities exchange in the U.S. either Stock or American Depository Receipts, or the company's stock traded in the over-the-counter market in the U.S.

¹⁷⁵ SEC and DoJ, 'A Resource Guide to the U.S. Foreign Corrupt Practices Act' (14 November 2012)18

¹⁷⁶ 15 USC §§ 78dd-1(f)(2)(A)

¹⁷⁷ Patricia Brown Holmes, Valarie Hays and Schiff Hardin, 'Corporate Officials Beware: Knowledge May No Longer Be Required for FCPA Liability' (2010) 3 (4) Bloomberg Law Report: Risk & Compliance <www.schiffhardin.com/binary/hays-holmes_bloomberg_april2010.pdf>

¹⁷⁸ Bruce W. Klaw, 'A New Strategy for Preventing Bribery and Extortion in International Business Transactions' (2012) 49 (2) Harvard Journal on Legislation 303, 371

¹⁷⁹ 15 U.S.C. §§ 78dd-1(c)(1), -2(c)(1), -3(c)(1) (2006)

¹⁸⁰ CCL Article 389

¹⁸¹ 15 U.S.C. § 78m

¹⁸² SEC and DoJ, A Resource Guide to the U.S. Foreign Corrupt Practices Act (14 November 2012) 42-45

records which fairly reflected the issuer's transactions.¹⁸³ Failure to maintain accurate books and records may result in both civil and criminal liability.¹⁸⁴ Engaging in systemic efforts to falsify its corporate books and records and knowingly failing to enforce and circumventing existing internal control would violate the accounting provisions.

Notably, a payment that does not violate the anti-bribery provisions may nonetheless violate the accounting provisions if inaccurately recorded or attributable to an internal control deficiency.¹⁸⁵ In reality, the accounting provisions may provide a secondary offence for prosecution charges,¹⁸⁶ and violations thereof may include commercial bribes that would typically fall outside of the 'foreign official' caveat otherwise needed for liability.¹⁸⁷ Accounting provisions violations may result in fines of up to \$25 million for a company, and \$5 million and/or imprisonment of up to 20 years for culpable individuals.¹⁸⁸ Thus, in theory, the SEC could invoke the accounting provisions against GSK for bribery of its Chinese subsidiary, because the payments were not accurately and sufficiently recorded, and because GSK and its subsidiary lacked reasonable controls to prevent, detect or correct such corrupt conduct.¹⁸⁹ In order to limit legal exposure, it is imperative for GSK to implement and enforce an effective compliance programme. Charges by the Chinese MPC potential charges by the DoJ and SEC could, if proven, put GSK also at risk of prosecution under the Bribery Act of 2010 in the UK.

6 The Anti-Bribery Framework in the United Kingdom: The UK Bribery Act

6.1 A New Strict Liability Corporate Offence

The UK Bribery Act 2010 represents a most significant reformulation of the UK's anti-bribery laws.¹⁹⁰ It adds a set of compliance requirements parallel but not identical to those of the FCPA

¹⁸³ Section 13(b) (2) (A) of the Securities Exchange Act of 1934 [15 U.S.C. §78m]

¹⁸⁴ *United States v. Siemens AG*, No. 08-CR-367-RJL (D.D.C. Dec. 12, 2008)

<<http://www.justice.gov/criminal/fraud/fcpa/cases/siemens/12-15-08siemensakt-plea.pdf>>

¹⁸⁵ Thomas P. Cimino, Jr., Junaid A. Zubairi et al., 'Foreign Corrupt Practices Act Trends' *The National Law Review* (7 April 2011)

¹⁸⁶ Lauren Giudice, 'Regulating Corruption: Analyzing Uncertainty in Current Foreign Corrupt Practices Act Enforcement' (2011) 91(1) *Boston University Law Review* 347, 378

¹⁸⁷ Lauren Ann Ross, 'Using Foreign Relations Law To Limit Extraterritorial Application of the Foreign Corrupt Practices Act' (2012) 62 (2) *Duke Law Journal* 445, 485

¹⁸⁸ 15 U.S.C. § 78ff(a); Michael V. Seitzinger, 'Foreign Corrupt Practices Act (FCPA): Congressional Interest and Executive Enforcement' (October 21, 2010) <<https://www.fas.org/sgp/crs/misc/R41466.pdf>>

¹⁸⁹ SEC and DoJ, *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (14 November 2012) 57

¹⁹⁰ Margaret Ryznar and Samer Korkor, 'Anti-Bribery Legislation in the United States and United Kingdom: A Comparative Analysis of Scope and Sentencing' (2011) 76 (2) *Missouri Law Review* 415, 453

that affect MNCs doing business overseas.¹⁹¹ To invoke a defence, a company must have adequate procedures in place designed to prevent persons associated with it from committing bribery.¹⁹² Unlike the controversial exception under the FCPA, there is no exemption for facilitation payments which can constitute bribery of another person,¹⁹³ or bribery of a foreign public official¹⁹⁴ and can trigger the failure to prevent bribery offences.¹⁹⁵

The Bribery Act 2010 creates a new criminal offence for failure to prevent bribery by a person associated with the organisation, which aims to be an even more stringent anti-bribery act than the FCPA.¹⁹⁶ The UK Bribery Act 2010 makes it illegal to either pay or receive an advantage to/from another person with the intent to:

- i) induce a person to perform improperly a relevant function or activity;¹⁹⁷ or
- ii) reward a person for the improper performance of a relevant function or activity.¹⁹⁸

The Bribery Act 2010 essentially makes it a criminal offence for a person to bribe a foreign public official,¹⁹⁹ which also applies to a company associated with a person who bribes.²⁰⁰ Bribes carried out by third party associates may not constitute grounds for a defence of ignorance by the covered company because it may be assumed that such a company will have appropriately vetted its partners before engaging in business.²⁰¹ Prosecutors do not have to demonstrate prior knowledge, or 'corrupt intent' on the part of the company or its officials to charge them under the Bribery Act 2010.²⁰²

¹⁹¹ Lauren Ann Ross, 'Using Foreign Relations Law To Limit Extraterritorial Application of the Foreign Corrupt Practices Act' (2012) 62 (2) Duke Law Journal 445, 485

¹⁹² BA 2010 s7(2); Michael W. Johnson, 'The UK Bribery Act and Beyond-Preparing for Change' *The World Financial Review* <<http://www.worldfinancialreview.com/?p=244>>

¹⁹³ BA 2010 s1

¹⁹⁴ BA 2010 s6

¹⁹⁵ BA 2010 s7

¹⁹⁶ BA 2010 s7

¹⁹⁷ BA 2010 s1 (1) (b) (i)

¹⁹⁸ BA 2010 s 1 (1) (b) (ii)

¹⁹⁹ BA 2010 s6

²⁰⁰ BA 2010 s7

²⁰¹ Ministry of Justice, 'The Bribery Act 2010 Guidance' (March 2011): Government policy and Section 7 of the Bribery Act-Section 7: Failure of Commercial Organisations to Prevent Bribery 16-18, §§37-43

<<http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>>

²⁰² Cecily Rose, 'The UK Bribery Act 2010 and Accompanying Guidance: Belated Implementation of the OECD Anti-Bribery Convention' (2012) 61 (2) International and Comparative Law Quarterly 485, 499

The Bribery Act 2010 does not include a carve-out for facilitation payments, which, although exempt from the FCPA, are prohibited under the Bribery Act 2010.²⁰³ The Serious Fraud Office (SFO) *Guidance* reaffirms the zero tolerance approach to facilitation payments irrespective of their size and frequency.²⁰⁴ Nevertheless, reasonable corporate hospitality is not something that is prohibited. *Bona fide* hospitality, promotional or other legitimate business expenditure is recognised as an established and important part of doing business.²⁰⁵ Notably, bribes may sometimes be disguised as legitimated business expenditure.²⁰⁶ Any concerns about criminalising reasonable corporate hospitality would be addressed in the prosecutorial discretion.²⁰⁷ A broad test used is: whether it is likely to influence someone to make a decision that they might not otherwise make.²⁰⁸

The anti-bribery enforcement actions often involve overseas third parties making improper payment on behalf of a company.²⁰⁹ Potential liability of GSK under the UK Bribery Act 2010 results from its extraterritorial effect, the extent to which GSK has instigated a review of all third party relationships appears vital.²¹⁰ Any company, wherever incorporated, which “carries on a business, or part of a business” in the UK falls within the Bribery Act’s remit.²¹¹ A corporate offence can be committed irrespective of whether the acts or omissions which form part of the offence take place in the UK or elsewhere.²¹² Prosecutors will be able to tackle the overseas operations of any company that conducts commerce in the UK, seeking unlimited fines for those suspected of bribing foreign public officials or buying influence of commercial counterparts and pursuing company executives with the threat of up to 10 years in prison.²¹³

²⁰³ Michael S. Diamant and Jesenka Mrdjenovic, ‘Don’t You Forget About Me: The Continuing Viability of the FCPA’s Facilitating Payments Exception’ (2012) 73 Ohio State Law Journal Furthermore 19, 26

²⁰⁴ Ministry of Justice, ‘The Bribery Act 2010 Guidance’ (March 2011)

<<http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>>

²⁰⁵ SFO & DPR, *Bribery Act 2010: Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions*

<<http://www.sfo.gov.uk/bribery~corruption/the-bribery-act/business-expenditure.aspx>>

²⁰⁶ SFO, *The Revised Policies on Facilitation Payments, Business Expenditure (Hospitality) and Corporate Self-Reporting* (9 October 2012)

<<http://sfo.gov.uk/press-room/latest-press-releases/press-releases-2012/revised-policies.aspx>>

²⁰⁷ Letter from Lord Tunncliffe to Lord Henley, House of Lords, (14 January 2010)

<<http://www.justice.gov.uk/publications/docs/letter-lord-henley-corporate-hospitality.pdf>>

²⁰⁸ Richard Tyler, ‘Bribery Act: Lord Goldsmith Says Look to the US’ *Telegraph* (5 January 2011)

²⁰⁹ Andrew Brady Spalding, ‘Unwitting Sanctions: Understanding Anti-Bribery Legislation as Economic Sanctions against Emerging Markets’ (2010) 62 (2) Florida Law Review 351, 427

²¹⁰ ‘Developments in the Law-Extraterritoriality’ (2011) 124 (5) Harvard Law Review 1226, 1304

²¹¹ BA 2010 s7(5) (a)

²¹² BA 2010 s12(7)

²¹³ BA 2010 s11(1)(b)

6.2 Statutory Defence to the Corporate Offence: Law in Place ≠ Law in Practice

The Bribery Act 2010 contains the strictest laws against corruption, but enforcement has been minimal since it was passed in 2010.²¹⁴ Arguably, it consists of a safe harbour provision for a corporation, that is, it has instituted in place “adequate procedures” to prevent such bribes from occurring.²¹⁵ A company will not be liable if it can prove, on the balance of probabilities, that adequate procedures were in place to prevent persons associated with the company from paying bribes.²¹⁶ This is in contrast to the U.S. approach where compliance procedures are evaluated as part of the charging process, not as a defence.²¹⁷ The statutory defence appears to soften the envisioned “strict liability” for all company operations.²¹⁸ It seems that by putting such an affirmative defence in place, companies may well go down the paper compliance defence route and not dedicate the time and resources to make it compatibly effective.²¹⁹

In respect to the charges against GSK in China, an *irrefutable point is that GSK admittedly has not followed its own stated protocols.*²²⁰ GSK may try to defend itself by attributing to its compliance which has been challenged by the scale of the company's growth in China.²²¹ If GSK could prove that it “had in place adequate procedures designed to prevent persons associated with [the company] from undertaking such conduct”,²²² it could escape a criminal prosecution, although this is quite a high hurdle to overcome. It remains ambiguous as to what “adequate procedures”²²³ can be put in place as a defence against the corporate offence of failing to prevent bribery. Even so, a prerequisite condition for GSK to rely on the statutory

²¹⁴ Jon Jordan, ‘Recent Developments in the Foreign Corrupt Practices Act and the New UK Bribery Act: A Global Trend Towards Greater Accountability in the Prevention of Foreign Bribery’ (2011) 7 (2) NYU Journal of Law & Business 845, 871

²¹⁵ BA 2010 s7(2)

²¹⁶ SFO & DPP, Bribery Act 2010: Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions <http://www.cps.gov.uk/legal/a_to_c/bribery_act_2010/>

²¹⁷ Howard Sklar, ‘Against an FCPA Compliance Defence’ Forbes (18 October 2011)

²¹⁸R. Zachary Torres-Fowler and Kenneth Anderson, ‘The Bribery Act’s New Approach to Corporate Hospitality’ (2011) 52 Virginia Journal of International Law Digest 39, 53; Cheryl L. Evans, ‘The Case for More Rational Corporate Criminal Liability: Where Do We Go from Here?’ (2011) 41 Stetson Law Review 21, 39; Bruce W. Bean and Emma H. MacGuidwin, ‘Expansive Reach-Useless Guidance: An Introduction to the U.K. Bribery Act 2010’ (2012) 18 ILSA Journal of International and Comparative Law 323, 346

²¹⁹ Thomas Fox, ‘GlaxoSmithKline and the Death Knell for the Compliance Defence’ *Corporate Compliance Insight* (25 July 2013)

²²⁰Thomas Fox, ‘The Grim Reaper, GlaxoSmithKline and the Death Knell for the Compliance Defence’ *LexisNexis Legal Newsroom Corporate* (2 August 2013)

²²¹ Elvira N. Loredo, Karlyn D. Stanley and Michael D. Greenberg, ‘Anti-Corruption Regulations in Emerging and Expeditionary Markets: New Markets, New Challenges’ (RAND Centre for Corporate Ethics and Governance, 2012) <http://www.rand.org/content/dam/rand/pubs/conf_proceedings/2012/RAND_CF304.pdf>

²²² BA 2010 s7(2)

²²³ BA 2010 s7(2)

defence is that it must prove that GSK has not only put adequate procedures in place, but also has effectively enforced them.²²⁴

7 GSK's Dysfunctional Internal Compliance Regimes

7.1 Internal Compliance Mechanism: A Code on the Books but Not in Practice

MNCs usually have strict internal controls, such as limits on gift value to doctors, entertainment fees, or a number of days limit for organising overseas trips for doctors so that gift giving or entertaining is not defined as bribery.²²⁵ Indeed, GSK's Code of Conduct states explicitly that:

“The GSK attitude towards corruption in all its forms is simple: it is one of zero tolerance, whether committed by GSK employees, officers, complementary workforce or third parties acting for or on behalf of the company... GSK has an active system of internal management controls to identify company risks, issues and incidents with appropriate corrective actions taken....provides the framework for these internal controls, to ensure significant risks are escalated to the proper levels of senior management.”²²⁶

The above code should, in principle, be aimed at identifying potential compliance risks with embedded preventive measures before serious problems arise, such as massive fines, long-running monitor-ships and harm to reputation.²²⁷ Assumingly, the compliance programme could enable the company to detect wrongdoings in response appropriately to flagrant and systematic bribery.²²⁸

In reality, GSK HQ received information about widespread bribery in China in January 2013. However, just a week before the Chinese government detained the GSK employees, GSK HQ official stated that they had investigated and found no evidence of bribery and corruption.²²⁹

²²⁴Michael Peterson, 'Amending the Foreign Corrupt Practice Act: Should the Bribery Act 2010 Be a Guideline?' (2013) 12 *Richmond Journal of Global Law and Business* 417, 431

²²⁵Xinyuan Wang, 'Pharma Giant GSK Investigated for Bribery' *Global Times* (12 July 2013)

²²⁶GSK, 'The Code of Conduct: One Company One Approach'

<http://www.gsk.com/content/dam/gsk/globals/documents/pdf/Policy-Code-Conduct.pdf>

²²⁷Nicholas Elliott, 'AlixPartners Survey Shows Multinationals Building Anti-Bribery Compliance, But Resource-Constrained' *WSJ BLOGS* (26 March 2012)

²²⁸Stephen A. Fraser, 'Placing the Foreign Corrupt Practices Act on the Tracks in the Race for Amnesty' (2012) 90 (4) *Texas Law Review* 1009, 1040

²²⁹Kathrin Hille and John Aglionby, 'China Accuses GlaxoSmithKline of Bribing Official over Prices' *Financial Times* (11 July 2013)

Many UK companies would not stand detailed scrutiny should they be investigated. Much worse, they are notoriously defensive in response to any claim, challenge or allegation. The structural inefficiency ensures much time and energy is expended and heavy costs incurred trying to maintain an artificial separation “on the books” for what is, in reality, a single organization.²³⁰ As sophisticated as they are, such an internal compliance mechanism is in place, but surprisingly futile.²³¹ GSK found no evidence of wrongdoing after completing a four-month investigation into a whistle-blower’s claims of corruption and bribery, which clearly indicates a lack of immediate remediation in response to an emergent crisis.²³² GSK should have ensured that it had implemented effective anti-bribery compliance systems. However, GSK has not adequately addressed applicable anti-bribery and corruption rules, neither has it conducted an adequate anti-bribery risk assessment.²³³

7.2 The Corporate Rogue Employees Defence to FCPA Liability

As an additional enforcement tool, a non-prosecution agreement (NPA) has been used in connection with Morgan Stanley’s anti-bribery efforts.²³⁴ SEC and DoJ have declined to pursue charges against the company, where one of its executives “used a web of deceit” to evade the investment bank’s efforts to maintain adequate anti-corruption internal controls.²³⁵ The case involved a Chinese state-owned enterprise (SOE), which is at the heart of a growing number of

²³⁰ Dezan Shira, ‘Why Corruption is Inevitable in China’s Pharmaceutical Industry’ *Caijing* (25 July 2013)

²³¹ Philip M Nichols, ‘The Psychic Costs of Violating Corruption Laws’ (2012) 45 (1) *Vanderbilt Journal of Transnational Law* 145, 210

²³² Benjamin W. Heineman, Jr., ‘Wal-Mart Bribery Case Raises Fundamental Governance Issues’ Harvard Law School Program on Corporate Governance and Harvard Kennedy School of Government

<<http://blogs.law.harvard.edu/corpgov/2012/04/28/wal-mart-bribery-case-raises-fundamental-governance-issues/>>

²³³ Ministry of Justice, *Bribery Act 2010 Guidance* (March 2011) 15-19

<<http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>>

²³⁴ David M. Zornow, Charles F. Walker et al., ‘The United States Foreign Corrupt Practices Act: SEC and DOJ Enforcement Trends’ (22 April 2013)

<http://www.law.yale.edu/documents/pdf/cbl/Skadden_FCPA_SEC_and_DOJ_Enforcement_Trends.pdf>

²³⁵ SEC and DoJ, A Resource Guide to the FCPA U.S. Foreign Corrupt Practices Act (14 November 2012) 56-58, 61; DoJ, ‘Former Morgan Stanley Managing Director Pleads Guilty for Role in Evading Internal Controls Required by FCPA’ (25 April 2012) <<http://www.justice.gov/opa/pr/2012/April/12-crm-534.html>>; SEC, SEC Charges Former Morgan Stanley Executive with FCPA Violations and Investment Adviser Fraud (25 April 2012); The compliance programmes included “a robust compliance department with direct reporting lines to Morgan Stanley’s Board of Directors; significant compliance training for Asia-based personnel; regular monitoring and auditing of particular transactions, employees, and business units; extensive due diligence for all new business partners; annual employee certifications regarding adherence to Morgan Stanley’s code of conduct; and a regular review and update of the compliance program.”

FCPA enforcement actions.²³⁶ Peterson, a former managing director based in Shanghai, bribed a Chinese government official to illegally win business. Peterson has been characterised as a “rogue” employee, whose deceptions circumvented Morgan Stanley’s robust internal control. Ignoring his fiduciary duties, Peterson made every effort to enrich himself and the Chinese government official millions of dollars through a matrix of off-shore shell companies and unknowing payment by Morgan Stanley. The SEC and DoJ found no wilful blindness on the part of Morgan Stanley. Given the bank’s adequate compliance programme, along with its voluntary disclosure of the misconduct and cooperation with the U.S. government’s investigation, no FCPA enforcement action has been taken against the bank. This decision has profound implications for cases involving executives and foreign officials charged with FCPA violations, which is also instructive for multinational companies in several respects.

In *Peterson*, a rigorous compliance programme protected Morgan Stanley from the actions of an employee that violated the FCPA.²³⁷ Self-reporting has particularly been one of the significant factors weighted in the agencies’ exercise of prosecutorial discretion. Morgan Stanley had maintained a system of internal controls and enforced its anti-bribery policies consistently, which provided reasonable assurances that its employees were not bribing government officials.²³⁸ DoJ and SEC gave the bank unusual credit for its longstanding and comprehensive FCPA compliance programmes, voluntary reporting of the matter and its extensive cooperation with the agencies’ investigations. It should be noted that “the existence and effectiveness” of the compliance program, and “the company’s remedial actions”, were the source of credit.²³⁹

In April 2012, the DOJ charged Peterson with violations of the FCPA’s anti-bribery provisions.²⁴⁰ Peterson pled guilty to one count of conspiring to circumvent the system of internal controls that the bank maintained to prevent violations of the FCPA.²⁴¹ The SEC also charged him with violating the FCPA and securities laws for investment advisors.²⁴² The *Peterson* settlement with the SEC included surrendering a \$3.4 million interest in Shanghai real estate and \$250,000 in damages, a permanent bar from the securities industry and 9 months in a U.S.

²³⁶ SEC and DoJ, A Resource Guide to the FCPA U.S. Foreign Corrupt Practices Act (14 November 2012); *States v Carson* No. 8:09-cr-00077 (C.D. Cal. April 8, 2009)

²³⁷ Laura Fraedrich and Jamie A. Schafer, ‘What Is In It For Me: How Recent Developments in FCPA Enforcement Affect the Voluntary Disclosure Calculus’ (2013) 8 (9) *Global Trade and Customs Journal* 257, 264

²³⁸ DoJ, Former Morgan Stanley Managing Director Pleads Guilty for Role in Evading Internal Controls Required by FCPA (25 April 2012) <<http://www.justice.gov/opa/pr/2012/April/12-crm-534.html>>

²³⁹ SEC and DoJ, A Resource Guide to the FCPA U.S. Foreign Corrupt Practices Act (14 November 2012) 56

²⁴⁰ Section 13(b) (5) of the Securities Exchange Act of 1934, et al

²⁴¹ *United States v. Peterson*, Cr. No. 12-224 (JBW) (E.D.N.Y. April 25, 2012)

²⁴² *SEC v. Peterson*, No. 12-2033 (JBW) (E.D.N.Y. April 25, 2012)

jail.²⁴³ Due to the bank's robust and well-enforced system of internal controls, neither the DoJ nor SEC charged Morgan Stanley itself, highlighting the bank's effective ethics and compliance programme as the primary basis for the decision.²⁴⁴ This provides a perfect example to confirm the value of well-formulated and meticulously implemented corporate compliance policies in deflecting the results of FCPA enforcement actions at the entity level.²⁴⁵

The assessment of risk is fundamental to developing a strong compliance programme.²⁴⁶ The compliance programme is designed to effectively militate against violations, along with its rigorous periodic review. Paradoxically, it would be difficult to monitor all sales practices. No compliance program can ever prevent all criminal activity by a corporation's employees.²⁴⁷ There will always be employees who decide to take matters into their own hands, and even the best compliance program may not stop fraud or corruption from occurring.²⁴⁸ Morgan Stanley not only discovered the violations and reported it, but also cooperated fully in the investigation by the SEC and DoJ. It is the bank's pre-existing ethics and compliance programme that made a decisive difference for the DoJ and SEC not to prosecute it. This case underscores the importance of establishing adequate and effective internal anti-bribery controls for global companies in protecting both the entity and individual personnel from such enforcement. The *Morgan Stanley* case illustrates that an effective compliance program can provide companies facing FCPA enforcement actions with tangible benefits in the form of a more favourable settlement term.²⁴⁹

Could the *Morgan Stanley* rule apply to GSK? Enforcement agencies can give meaningful credit to a company which in good faith applies a comprehensive and risk-based compliance programme,²⁵⁰ on the condition that the company did devote greater resources in higher-risk

²⁴³ Section 15(b) (4) (C) of the Exchange Act, 15 U.S.C. § 78o; A court injunction allows the SEC to permanently bar a defendant from the securities industry, if it finds such sanction in the public interest; 30A(g) and 13(b)(5) of the Securities Exchange Act of 1934; Investment Advisers Act 1940 s206(1) (2); SEC, 'SEC Charges Former Morgan Stanley Executive with FCPA Violations and Investment Adviser Fraud' (25 April 2012) <<http://www.sec.gov/News/PressRelease/Detail/PressRelease/1365171488702>>

²⁴⁴ Wayne M. Carlin, 'White Collar and Regulatory Enforcement: Emerging Trends and What to Expect in 2013' The Harvard Law School Forum on Corporate Governance and Financial Regulation (30 January 2013)

²⁴⁵ Mike Koehler, 'Revisiting a Foreign Corrupt Practices Act Compliance Defence' (2012) (2) Wisconsin Law Review 609, 659

²⁴⁶ House of Representatives, Sub-Committee on Crime, Terrorism, and Homeland Security, Committee of the Judiciary, *Foreign Corrupt Practices Act* (Washington, DC., 14 JUNE 2011) <http://judiciary.house.gov/hearings/printers/112th/112-47_66886.PDF>

²⁴⁷ Ministry of Justice, *The Bribery Act 2010 Guidance* (March 2011) 15; Mike Koehler, 'Revisiting a Foreign Corrupt Practices Act Compliance Defence' (2012) (2) Wisconsin Law Review 609, 659

²⁴⁸ Jessica Tillipman, 'A House of Cards Falls: Why "Too Big to Debar" is All Slogan and Little Substance' (2012) 80 Fordham Law Review Res Gestae 49, 58; Howard Sklar, 'Against an FCPA Compliance Defence' *Forbes* (18 October 2011)

²⁴⁹ SEC and DoJ, *A Resource Guide to the FCPA U.S. Foreign Corrupt Practices Act* (14 November 2012) 56, 75

²⁵⁰ SEC and DoJ, *A Resource Guide to the FCPA U.S. Foreign Corrupt Practices Act* (14 November 2012) 59

areas, such as China. In this vein, the quality and effectiveness of the compliance programme plays a vital role for the agencies to determine whether the company could be given credit despite a confirmed violation. It remains uncertain as to whether GSK could use the defence against the failure to prevent the actions of its employees in China.²⁵¹ GSK may raise a defence by showing that it has taken reasonable steps to prevent wrongdoing, although it is ultimately powerless if somebody really wants to break the law.

GSK seems to have adequate systems in place for supervising adherence to those rules. The practical challenges of effectively implementing such programmes, however, should not be underestimated.²⁵² It appears that having a best practices compliance program without effective implementation did not lead to GSK doing business more ethically. As stated above, GSK conducted a four month internal investigation which yielded no evidence of bribery. This is indicative of a dysfunctional compliance system. GSK may encounter two challenges: proving rigorousness of its earlier investigation and giving reasons why the internal procedures failed to detect the flagrant and systemic violations.²⁵³ The likely inability to meet the first challenge and excusing the resulting inaction will make GSK vulnerable to enforcement action by the UK's Serious Fraud Office (SFO) and the U.S. Department of Justice (DoJ) and Securities Exchange Commission (SEC), both of which can levy severe penalties under their sweeping anti-bribery laws, i.e. Bribery Act 2010 and the FCPA.²⁵⁴

While the authorities have discretion, it is more likely in the public interest to prosecute cases where there has been a systemic and major breach of corruption laws.²⁵⁵ After all, a parent is liable for bribery by a subsidiary's employees on the ground that it has sufficient knowledge and control of its subsidiary's actions.²⁵⁶ Since GSK has confessed to authorising and participating

²⁵¹ Irina Sivachenko, 'Corporate Victims of "Victimless Crime": How the FCPA's Statutory Ambiguity, Coupled with Strict Liability, Hurts Businesses and Discourages Compliance'(2013) 54 (1) Boston College Law Review 393, 431

²⁵²Susan Rose-Ackerman, 'Governance and Corruption' in Bjørn Lomborg, (ed.) *Global Crises, Global Solutions* (Cambridge, Cambridge University Press, 2004) 301-362

²⁵³ Brent T. White, 'Putting Aside the Rule of Law Myth: Corruption and the Case for Juries in Emerging Democracies' (2010) 43 Cornell International Law Journal 307, 363

²⁵⁴ BA 2010 s7; 15 U.S.C. § 78dd-1(a): Issuers include (i) companies that have securities registered on a national exchange or listed on the NASDAQ or (ii) that are required to file reports under section 15(d) of the Exchange Act 15 U.S.C. § 78m.; SEC and DoJ, *Resource Guide to the U.S. Foreign Corrupt Practices Act* (14 November 2012)

<<http://www.justice.gov/criminal/fraud/fcpa/guidance/>> and <<http://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf>> §10: The Guide explains when a company is an "issuer" for purposes of the FCPA: the company is listed on a national securities exchange in the United States (either stock or American Depositary Receipts); or the company's stock trades in the over-the-counter market in the United States and the company is required to file SEC reports.

²⁵⁵ Mike Koehler, 'The Foreign Corrupt Practices Act under the Microscope' (2012) 15 (1) *University of Pennsylvania Journal of Business Law*, 63 at 55

²⁵⁶ SEC and DoJ, *A Resource Guide to the FCPA U.S. Foreign Corrupt Practices Act* (14 November 2012) 42-43

in systemic bribery in China,²⁵⁷ it will have more difficulty in proving that it had sufficient controls to prevent corruption. It appears that GSK has knowingly and wilfully failed to implement anti-bribery compliance measures and reaped financial gains from prohibited activities.²⁵⁸ For its lack of due diligence, GSK could be held liable for failure to oversee its subsidiary.²⁵⁹

8 Make Global Compliance Programmes Compatible in China

8.1 Challenges Arising from Jurisdictional Gaps

In the new era of growing international enforcement, many MNCs have been involved in long-running FCPA investigations covering multiple locations around the world.²⁶⁰ The increased cooperation between foreign governments will further expose companies to potential liability in multiple jurisdictions.²⁶¹ It is never enough to emphasise the significance of implementing adequate and effective compliance programmes. Despite the Bribery Act 2010 and FCPA's extraterritorial reach, the anti-bribery laws may not put Anglo-American companies at a disadvantage.²⁶² Instead, the tough anti-bribery laws may help them compete in China. The Western firms would gain a reputation for not paying bribes, which ultimately reduce costs for all concerned.²⁶³ Although an ethical company incurs significant costs to avoid the risk of possible liability, the compliance to anti-bribery laws may prevent real and lasting advances in anti-bribery,²⁶⁴ as Chinese entities are not similarly constrained. In addition, there is a great need to cultivate a dynamic and strong culture of compliance, which should encourage "ethical conduct and a commitment to compliance with the law" and help "prevent, detect, remediate, and report misconduct."²⁶⁵ Rigorous due diligence procedures should also be used to assess the adequacy of a company's compliance programme in dealing with overseas third parties as well as

²⁵⁷CCL 2011 Article 390 (2): Self-disclosure may lead to a more favourable settlement with enforcement agencies. GSK could benefit from leniency measures linked to voluntary disclosure given its full confession of bribes.

²⁵⁸ Heidi L. Hansberry, 'In Spite of Its Good Intentions, the Dodd-Frank Act Has Created an FCPA Monster' (2012) 102 (1) *Journal of Criminal Law and Criminology* 195, 226

²⁵⁹ *SEC v Magyar Telekom plc and Deutsche Telekom, AG*, (U.S. District Court South District of New York, 20 December 2011) <<http://www.sec.gov/litigation/complaints/2011/comp22213-co.pdf>>

²⁶⁰ Drury D. Stevenson and Nicholas J. Wagoner, 'FCPA Sanctions: Too Big to Debar?' (2011) 80 (2) *Fordham Law Review* 775, 820

²⁶¹ Rashna Bhojwani, 'Deterring Global Bribery: Where Public and Private Enforcement Collide' (2012) 112 *Columbia Law Review* 66, 111

²⁶² Lauren Giudice, 'Regulating Corruption: Analyzing Uncertainty in Current Foreign Corrupt Practices Act Enforcement' (2011) 91(1) *Boston University Law Review* 347, 378

²⁶³ Bob Davies, 'When the Anti-Corruption Official Comes Calling' *The Wall Street Journal* (8 February 2012)

²⁶⁴ SEC and DoJ, *A Resource Guide to the FCPA U.S. Foreign Corrupt Practices Act* (14 November 2012)

²⁶⁵ SEC and DoJ, *A Resource Guide to the FCPA U.S. Foreign Corrupt Practices Act* (14 November 2012) 56

its subsidiaries.²⁶⁶ It remains questionable how GSK has localised its global anti-bribery compliance programmes in China.

Given the extent of GSK's systemic and egregious malpractices, China and the U.K. would seem to have a greater and more direct interest in the conduct at issue compared to the U.S. Accusations by the Chinese Ministry of Public Security (MPS), the American DoJ and SEC could, if proven, put GSK at risk of prosecution by U.K. authorities under the Bribery Act 2010 at home, despite its incorporation and the bribes that have taken place in China. The UK, U.S. and China are parties and are subject to the United Nations Convention against Corruption (UNCC),²⁶⁷ which, among other things, stipulates legal and investigative cooperation in combating bribery. The start of the first such parallel investigation indicates that China may be embarking on a more active and cooperative path.²⁶⁸ Most MNC's holdings and business are under the jurisdiction of the FCPA, the Bribery Act, and China's anti-corruption laws.²⁶⁹ The FCPA only prosecutes against the bribery of foreign officials, although the definition of 'foreign official' remains very vague,²⁷⁰ but under Chinese and British laws, an MNC's senior executives could also be charged for accepting bribes.²⁷¹ It should be noted that a corporate compliance policy which has satisfied the FCPA may not be sufficient for compliance with the U.K. adequate procedures guidance published by the SFO.²⁷² It is likely that the GSK case will set a precedent for the future interplay of multinational anti-corruption law.²⁷³ It remains to be seen whether China enforcement agencies will draw on the wealth of bribery evidence and admissions generated in most DoJ, SEC and SFO enforcement actions, or *vice versa*, and whether GSK marks the establishment of a cross-border anti-corruption cooperation, which may render it possible to exchange bribery evidence between the enforcement agencies. It is worth

²⁶⁶ Eugene R. Erbstoesser, John H. Sturc and John W.F. Chesley, 'The FCPA and analogous foreign anti-bribery laws—overview, recent developments, and acquisition due diligence' (2007) 2 (4) *Capital Markets Law Journal* 381, 403

²⁶⁷ UNODC, 'United Nations Convention against Corruption' <<http://www.unodc.org/unodc/en/treaties/CAC>>: China ratified the United Nations Convention against Corruption (UNCC) on October 27 in 2005 and came into force on 14 December 2005

²⁶⁸ Henry Chen, 'Pharma bribe probe points to China parallel prosecutions' *FCPA Professor Blog* (11 July 2013)

²⁶⁹ Emily Flitter and Ben Hirschler, 'Exclusive: U.S. Prosecutors Add China Bribe Allegations to GSK Probe' *Reuters* (6 September 2013)

²⁷⁰ SEC and DoJ, *A Resource Guide to the FCPA U.S. Foreign Corrupt Practices Act* (14 November 2012) 19-21; Joel M Cohen, Michael Holland and Adam Wolf, 'Under the FCPA, Who Is a Foreign Official Anyway?' (2008) 63 (4) *The Business Lawyer* 1243, 1274

²⁷¹ BA 2010 s1; SEC and DoJ, *A Resource Guide to the FCPA U.S. Foreign Corrupt Practices Act* (14 November 2012) 8; CCL Article 385

²⁷² Serious Fraud Office (SFO), 'Revised Policies' (9 October 2012)

<<http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2012/revised-policies.aspx>>

²⁷³ Daniel Chow, 'The Interplay between China's Anti-Bribery Laws and the Foreign Corrupt Practices Act' (2012) 73 (5) *Ohio State Law Journal* 1015, 1037; Andrew B. Spalding, 'Four Uncharted Corners of Anti-Corruption Law: in Search of Remedies to the Sanctioning Effect' (2012) 2 *Wisconsin Law Review* 661, 688

looking into an intriguing question as to whether the multiple enforcement agencies will at some point develop coordinated enforcement program and share information about their respective investigations.²⁷⁴

8.2 Risk-Based Due Diligence on Overseas Third Parties and Subsidiaries

8.2.1 *Keep Abreast of China's National Prioritised Objective in a Political & Judicial Context*

Operating in China generally entails the use of local partners and agents, whose dealings with the government officials are typically not in the foreign investor's hand but lie within the Chinese partners.²⁷⁵ In the increasingly complicated environment, the majority of prosecutions and enforcement actions involve corrupt payment made indirectly through intermediaries.²⁷⁶ Due diligence efforts should be conducted on a regular basis, which may help detect and deter the third parties' misconduct.²⁷⁷ GSK illustrates the importance of recognising red flags associated with third-party intermediaries and embracing more sophisticated compliance mechanisms.²⁷⁸

The allegations against GSK came at a time when regulators were reviewing the prices and production costs of major Chinese and global drug companies in what appeared to have been an effort to lower drug prices.²⁷⁹ Such a kind of approach is normally politically-driven, at least, implicitly. This holds particularly true in China's health-care sector that is mired in systemic and pervasive corruption,²⁸⁰ which is deemed as a major impediment to government health-care reform initiatives. The Chinese healthcare reform is accompanied by a shifting regulatory regime as new laws and decrees take effect against bribery.²⁸¹ The growing drug costs appear to have provided the Chinese government with the motivation to widen the probe into the

²⁷⁴ Jon Jordan, 'The Need for a Comprehensive International Foreign Bribery Compliance Program, Covering A to Z, in an Expanding Global Anti-Bribery Environment' (2012) 117 (1) *Penn State Law Review* 89, 137

²⁷⁵ Patrick Norton, 'The Foreign Corrupt Practices Act: a Minefield for US Companies in China' *China Law & Practice* (November 2004)

²⁷⁶ Lucinda A. Low, Thomas K. Sprange and Milos Barutciski, 'Global Anti-corruption Standard and Enforcement: Implications for Energy Companies' (2010) 3 (2) *Journal of World Energy law and Business* 166, 213

²⁷⁷ SEC and DoJ, *A Resource Guide to the FCPA U.S. Foreign Corrupt Practices Act* (14 November 2012) 60, 62; Rashna Bhojwani, 'Deterring Global Bribery: Where Public and Private Enforcement Collide' (2012) 112 *Columbia Law Review* 66, 111

²⁷⁸ Brian P. Loughman and Richard A. Sibery, *Bribery and Corruption: Navigating the Global Risks* (John Wiley & Sons, 2011) 69

²⁷⁹ Natasha Khan, 'China Probes 60 Drug-makers in Effort to Curb Drug Prices' *Bloomberg* (5 July 2013)

²⁸⁰ Daniel Chow, 'China under the Foreign Corrupt Practices Act' (2012) 2 *Wisconsin Law Review* 573, 607

²⁸¹ Benjamin Shobert and Damjan DeNoble, 'Compliance after China's Healthcare Bribery Scandals' *China Business Review* (10 October 2013)

activities of multinational pharmaceutical giants.²⁸² The case of GSK indicates that the drug giant lacks proper sensitivity in China's current political and judicial context and ignores the policy and economic repercussions of anti-bribery regulations.²⁸³ Apparently, China is currently prioritising the issue of addressing the problems relating to the disproportionately high prices of pharmaceutical products as well as infant milk with world-known brands. Unfortunately, GSK has failed to respond properly to this national campaign targeting relevant foreign MNCs. The accusation against GSK reflects, again, the long-standing issues of serious deficiencies of multinationals' strategies of localisation.²⁸⁴

8.2.2 Cultivate A Culture of Compliance

An MNC is expected to comply with applicable laws and regulations of each jurisdiction where it operates and promote a culture of high ethical standards in addition to legal compliance.²⁸⁵ It is essential for MNCs to take active steps to maintain a strong compliance culture, which will maximise the chances of addressing problems internally and solving them before they become serious.²⁸⁶ It must be ensured that a company has the proper "tone at the top," including a compliance and ethics program that is tailored to the company's risks, applied in good faith, and effective.²⁸⁷ A proper "tone at the top" should include unambiguous communication from senior management about the compliance requirements that is "scrupulously followed" and disseminated throughout the organisation.²⁸⁸ The *Guide* specifically obligates senior management to set a strong, ethical culture, "inspire" their colleagues to adhere to that culture, and articulate the procedures and standards that underpins that culture.²⁸⁹ Such a culture should encourage "ethical conduct and a commitment to compliance with the law" and help "prevent, detect, remediate, and report misconduct."²⁹⁰ However, the as discovered relating to

²⁸² José P. Sierra, 'Enemy at the Gates: Bribery Charges in China Getting Worse For GSK' (10 July 2013)

<http://pharmarisc.com/2013/07/enemy-at-the-gates-bribery-charges-in-china-getting-worse-for-gsk/>

²⁸³ U Myint, 'Corruption: Causes, Consequences and Cures' (2000) 7 (2) *Asia-Pacific Development Journal* 33, 58

²⁸⁴ Seung Ho Park and Wilfried R. Vanhonacker, 'The Challenge for Multinational Corporations in China: Think Local, Act Global' *MIT Sloan Management Review* (1 July 2007)

²⁸⁵ Keith M. Korenchuk and Samuel M. Witten, 'Emerging Global Standard for Effective Anti-Corruption Compliance: Meeting the Expectations of Governments Worldwide' *Bloomberg BNA's Corporate Accountability Report; Bloomberg BNA's World Securities Law Report* (18 January 2013)

²⁸⁶ Wayne M. Carlin, 'White Collar and Regulatory Enforcement: Emerging Trends and What to Expect in 2013' *The Harvard Law School Forum on Corporate Governance and Financial Regulation* (30 January 2013)

<http://blogs.law.harvard.edu/corpgov/2013/01/30/white-collar-and-regulatory-enforcement-emerging-trends/>

²⁸⁷ Keith M. Korenchuk, Marcus A. Asner and Samuel M. Witten, 'Responding to Anti-Corruption Compliance Challenges in China: The Way Forward in Light of the Ongoing Investigations in the Pharmaceutical Industry' *Pharmaceutical Compliance Monitor* (26 September 2013)

²⁸⁸ SEC and DoJ, *A Resource Guide to the FCPA U.S. Foreign Corrupt Practices Act* (14 November 2012) 57

²⁸⁹ SEC and DoJ, *A Resource Guide to the FCPA U.S. Foreign Corrupt Practices Act* (14 November 2012) 57

the bribery prosecution of the Ministry of Public Security concern may be raised that a culture of compliance may not be as strongly embedded in GSK, or, at least, such a culture is not perceived as strongly embedded.²⁹¹

8.2.3 *Corrupt Payment by Intermediaries of Subsidiaries: Parental-Subsidiary Liabilities*

With regard to parent-subsidiary liability, a subsidiary's actions are imputed to the parent if an agency relationship exists.²⁹² A long-standing issue always turns on whether the officers and agents of the parent had control over the actions of the subsidiary.²⁹³ There is an increased trend that parent companies will be held responsible for the actions of local employees and partners.²⁹⁴ Foreign subsidiaries are a frequent source of concern for companies subject to the FCPA, although it remains to be clarified about the issues of liability for minority-owned entities in which a parent may have a substantial stake, but no ostensible control.²⁹⁵ An increasingly common issue concerns the appropriate degree of oversight that a parent issuer is required to exercise over a minority-owned subsidiary.²⁹⁶ Enforcement agencies may consider the formal relationship between the two entities as well as the "practical realities of how the parent and subsidiary actually interact."²⁹⁷ Despite the seminal doctrine of the separate legal entity and piercing the corporate veil,²⁹⁸ parent companies are likely to be held responsible for the actions of local employees, which underscores the importance of due diligence on

²⁹⁰ SEC and DoJ, *A Resource Guide to the FCPA U.S. Foreign Corrupt Practices Act* (14 November 2012) 56

²⁹¹ Glenn Engelmann, John Kocoras et al., 'Observation on a Milestone Bribery Investigation and Increased Security of Foreign Companies in China' <<http://www.mwechinalaw.com/news/2013/cla0713b.htm>>

²⁹² Justin F. Marceau, 'A Little Less Conversation, A Little More Action: Evaluating and Forecasting the Trend of More Frequent and Severe Prosecutions under the Foreign Corrupt Practices Act' (2007) 12 (2) *Fordham Journal of Corporate & Financial Law* 285, 310

²⁹³ Travis Robert-Ritter, 'Using Second Circuit Precedent to Fundamentally Change Multinational Corporations' Global Foreign Corrupt Practices Act Internal Investigations' (2012) 8 *International Law & Management Review* 89, 110

²⁹⁴ SEC and DoJ, *A Resource Guide to the FCPA U.S. Foreign Corrupt Practices Act* (14 November 2012) 27; H. Lowell Brown, 'The Foreign Corrupt Practices Act Redux: The Anti-Bribery Provisions of the Foreign' Corrupt Practices Act' (1994) 12 (2) *Berkeley Journal of International Law* 260, 290

²⁹⁵ SEC and DoJ, *A Resource Guide to the FCPA U.S. Foreign Corrupt Practices Act* (14 November 2012) 27-28;

²⁹⁶ David M. Zornow, Charles F. Walker et al., 'The United States Foreign Corrupt Practices Act: SEC and DOJ Enforcement Trends' (22 April 2013)

<http://www.law.yale.edu/documents/pdf/cbl/Skadden_FCPA_SEC_and_DOJ_Enforcement_Trends.pdf>; Stuart H. Deming, 'The Potent and Broad-Ranging Implications of the Accounting and Record-Keeping Provisions of the Foreign Corrupt Practices Act' (2006) 96 (2) *Journal of Criminal Law and Criminology* 465, 502

²⁹⁷ SEC and DoJ, *A Resource Guide to the FCPA U.S. Foreign Corrupt Practices Act* (14 November 2012) 27

²⁹⁸ Kayla Feld, 'Controlling the Prosecution of Bribery: Applying Corporate Law Principles to Define a "Foreign Official" in the Foreign Corrupt Practices Act' (2013) 88 (1) *Washington Law Review* 245, 280

prospective third parties.²⁹⁹ In China's more increasingly complicated business environment, foreign MNCs must strengthen their efforts in due diligence and transparency to ensure that ethics at the corporate level are translated to ground floor business practices.³⁰⁰

8.2.4 Localise GSK's Global Compliance Programmes

Global compliance measures superimposed on China's unique business environment are not enough.³⁰¹ Foreign MNCs should truly localise their global compliance programmes to specifically address their local operations in China. Thus, having a robust home compliance programme makes limited sense, unless it is effectively compatible in China's social and legal settings.³⁰² GSK should always be aware of the degree of risk attributed to particular locations, like China, where an agent may present bigger risks for GSK than the same type of agent in another country.³⁰³ A truly effective compliance program for China needs to be one that identifies and addresses the issues arising out of local business and legal culture.³⁰⁴ Such efforts are helpful in minimising risk and potential consequences, including reputational damage. MNCs operating in China should understand the potential consequences of alleged violations of the Chinese anti-bribery laws, regularly assess their risk profile, and highlight hallmarks of adequate compliance programmes to account for local variations in enforcement standards.³⁰⁵ An effective compliance programme "constantly evolves" to reflect the changes to the company's business over time, including changes to the environment in which the company operates, the nature of its customers and the laws that govern the company's actions.³⁰⁶

²⁹⁹ Jennifer Quartana Guethoff, Marie-Josée Bérubé, et al., 'Good Practice Guidelines on Conducting Third-Party Due Diligence' (Geneva, Switzerland, World Economic Forum, 2013)

http://www3.weforum.org/docs/WEF_PACI_ConductingThirdPartyDueDiligence_Guidelines_2013.pdf

³⁰⁰ Ron Cai, Jeffrey B. Coopersmith and Elizabeth Chen, 'Chinese Probe Into GSK—Media Reports and Legal Analysis' (29 July 2013)

<http://www.dwt.com/Chinese-Probe-Into-GSK-Media-Reports-and-Legal-Analysis-07-29-2013/>

³⁰¹ SEC and DoJ, A Resource Guide to the FCPA U.S. Foreign Corrupt Practices Act (14 November 2012) 63

³⁰² David Kennedy and Dan Danielsen, "Busting Bribery: Sustaining the Global Momentum of the Foreign Corrupt Practices Act (New York, Open Society Foundations, 2011) ; F. Joseph Warin, Michael S. Diamant and Veronica S. Root, 'Somebody's Watching Me: FCPA Monitorships and How They Can Work Better' (2011) 13 (2) *University of Pennsylvania Journal of Business Law* 321, 381

³⁰³ Wendy Wysong, 'Third-Party Intermediaries in China: Mitigating A Necessary Risk' Corporate Compliance Insights (29 August 2011)

³⁰⁴ Glenn Engelmann and John Kocoras, 'Observations on a Milestone Bribery Investigation and Increased Scrutiny of Foreign Companies in China' McDermott Will & Emery China Law Alert (26 July 2013)

³⁰⁵ SEC and DoJ, A Resource Guide to the FCPA U.S. Foreign Corrupt Practices Act (14 November 2012) 8, 52, 57

³⁰⁶ SEC and DoJ, A Resource Guide to the FCPA U.S. Foreign Corrupt Practices Act (14 November 2012) 61-62

Most significantly, GSK should consider undertaking more due diligence to ensure that existing compliance programs are properly implemented in China.³⁰⁷ It is paramount to have a robust compliance program covering all critical functions, including sales and marketing personnel as well as legal compliance.³⁰⁸ Sales in the UK through legal and compliant channels may warrant less scrutiny from a compliance program than GSK's deals in China, by way of engaging those high-risk Chinese third party sales agents.³⁰⁹ The risk-based compliance approach is only effective if the company in question is realistic about the locale in which it is dealing.³¹⁰ GSK should have devoted more resources, like increasing its budgets, to ensuring compliance with the anti-bribery laws and regularly assess risks and to review and update their policies to reflect evolving best practices.³¹¹

8.2.5 Overseas Third Parties: Identify "Red Flags"

"Red Flags" are simply warning signs that a violation may have occurred or may be about to occur.³¹² Since third parties are commonly used to conceal the payment of bribes to foreign officials,³¹³ the requisite level of scrutiny of a prospective third party depends on the "red flags" identified through the due diligence process.³¹⁴ Both the FCPA and Bribery Act 2010 impose liabilities on companies for payments made by any third parties acting on its behalf, even if the company was not aware of the third party's conduct.³¹⁵ It is indispensable to have periodical, thorough due diligence reviews of third-party business partners, including but not limited to: agents, distributors, consultants and travel agents. Mere negligence is insufficient to impose

³⁰⁷ Philip Urofsky, Hee Won Moon and Jennifer Rimm, 'How Should We Measure the Effectiveness of the Foreign Corrupt Practices Act? Don't Break What Isn't Broken-The Fallacies of Reform' (2012) 73 (5) Ohio State Law Journal 1145, 1179

³⁰⁸ Dezan Shira, 'China's Criminal Law Tackles Bribery of Foreign Officials' Caijing (5 August 2013)

³⁰⁹ 'FCPA: Increased Enforcement in China Could Result in Large Fines in US and UK' Policy & Medicine (16 August 2013) <<http://www.policymed.com/fcpa>>

³¹⁰ Rodriguez, Peter, Klaus Uhlenbruck and Lorraine Eden, 'How Corrupt Governments Matter: Strategies of Multinationals Under Corrupt Regimes' (2005) 30 (2) Academy of Management Review 383, 396

³¹¹ United Nations Office on Drugs and Crime, 'The United Nations Convention against Corruption: A Strategy for Safeguarding against Corruption in Major Public Events' (New York, United Nations, September 2013) <http://www.unodc.org/documents/corruption/Publications/2013/13-84527_Ebook.pdf>

³¹² Charles Kenny and Maria Musatova, "Red Flags of Corruption" in World Bank Projects: An Analysis of Infrastructure Contracts' (The World Bank Sustainable Development Department Finance, Economics and Urban Division, March 2010) <<http://elibrary.worldbank.org/doi/pdf/10.1596/1813-9450-5243>>

³¹³ Emily N. Strauss, 'Easing Out' the FCPA Facilitation Payment Exception' (2013) 93 (1) Boston University Law Review 235, 273

³¹⁴ OECD, *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas* (2nd Ed., 2012) <<http://www.oecd.org/daf/inv/mne/GuidanceEdition2.pdf>>

³¹⁵ Margaret Ryznar and Samer Korkor, 'Anti-Bribery Legislation in the United States and United Kingdom: A Comparative Analysis of Scope and Sentencing' (2011) 76 (2) Missouri Law Review 415, 453

liability under the statute's third-party payment provision.³¹⁶ However, proof of conscious avoidance, wilful blindness, and deliberate ignorance are sufficient to satisfy the third-party payment provision's knowledge requirement.³¹⁷ There should be policies and procedures relating to the risks associated with third parties, including the capacity for on-going monitoring and the ability to address any “red flags” that may surface during the course of the third party relationship.³¹⁸

Individual companies have different compliance needs and there is no “one-size-fits-all” formula to an effective model, but a “common-sense and pragmatic approach to evaluating compliance programs.”³¹⁹ This leaves it to the company to determine what reasonable internal controls are. An effective compliance program is one that is appropriately tailored to meet the needs of the company. The adequacy of a company's compliance “staffing and resources” depends on the “size, structure, and risk profile of the business.”³²⁰ GSK’s compliance programme must be tailored to the size and nature of the business and the particular risks associated with its global location. GSK should have evaluated what type of compliance programme would fit it best.

Due to the failure to conduct due diligence on the agent responsible for the bribes, GSK must identify high-risk activities while concentrating compliance efforts on mitigating potential violations of law.³²¹ Emphasising a risk-based approach, GSK may need to tailor its programme to take into account its size, product and sensitivity with a particular regard to high-risk areas with “red flags”.³²² When the “red flags” were raised, GSK had an affirmative duty to investigate the suspicious circumstances and took steps to determine whether the anti-bribery laws have been violated. If red flags cannot be justified, GSK may run the risk of having had knowledge that would make the bribery a violation of anti-bribery laws.³²³ A mere declaration of its innocence would not insulate it from liability. In the wake of the US and Chinese

³¹⁶ Jer Monson, ‘Bribery Boom or Bust: A Practitioner’s Primer for Differentiating Between Bribes and Legitimate Exceptions in the Foreign Corrupt Practices Act’ (2012) 5 (2) *Journal of Business, Entrepreneurship and the Law* 403, 426

³¹⁷ *United States v. Kozeny* 582 F. Supp. 2d 535 (S.D.N.Y. 2008)

³¹⁸ SEC and DoJ, *A Resource Guide to the FCPA U.S. Foreign Corrupt Practices Act* (14 November 2012) 60-61

³¹⁹ SEC and DoJ, *A Resource Guide to the FCPA U.S. Foreign Corrupt Practices Act* (14 November 2012) 56

³²⁰ SEC and DoJ, *A Resource Guide to the FCPA U.S. Foreign Corrupt Practices Act* (14 November 2012) 58

³²¹ Dean Giampietro, ‘FCPA and UK Bribery Act Updates: Whistleblower Effects’ *Whistleblower Security* (13 June 2013)

³²² Robert C. Blume and J. Taylor McConkie, ‘Navigating the Foreign Corrupt Practices Act: The Increasing Cost of Overseas Bribery’ (2007) 36 *The Colorado Lawyer* 91

³²³ Emily Flitter and Ben Hirschler, ‘Exclusive: U.S. Prosecutors Add China Bribe Allegations to GSK Probe’ *Reuters* (6 September 2013)

governments' increasingly rigorous stance on enforcement, foreign multinationals should act with more caution in dealing with their foreign agents and business partners.³²⁴

9 Conclusion

The recent enforcement of Chinese anti-bribery laws against GSK highlights the compliance challenges faced by foreign companies operating in China and the importance of the maintenance of high legal and ethical standards. Critical to a compliance programme is making integrity and ethics a part of the overall evaluation process, which provides incentives for compliance. GSK represents China's highest profile bribery investigation of a foreign company since the new bribery rules came into effect in 2013, reflecting broad concerns about the challenges of doing business in China. As a milestone for Chinese agencies to impose far more rigorous enforcement of analogous anti-bribery laws, it is advisable that MNCs should not underestimate the implications of China's willingness to subject foreign companies to bribery prosecutions.

GSK sends a strong message of deterrence to domestic and foreign actors, and improves China's overall anti-corruption standing in the world. GSK has a particular far-reaching impact on the pharmaceutical firms, which are expected to re-examine their internal controls and be more legally compliant. It is also imperative that foreign MNCs implement robust anti-bribery compliance programmes which are well-designed and tailored to the companies' specific high-risk areas. More meaningfully, the first parallel GSK case may set a precedent for the future interplay of multinational anti-bribery law. Given that the Bribery Act 2010 and China's laws are relatively untested, the landmark case serves an instrumental role in demonstrating how the transnational criminal codes apply to real world issues. In the increasingly complicated environment of multinationals and their foreign subsidiaries, MNCs must strengthen efforts in due diligence to ensure that ethics at the global corporate level are translated to ground floor business practices.

³²⁴ OECD, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and Related Documents (2011)

<http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf>