THE UK BRIBERY ACT 2010

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Introduction

The need to reform the UK's bribery law was crystal clear when the UK signed the OECD Anti-bribery Convention on December 17, 1997. Prior to the passing of the UK Bribery Act 2010 ('the 2010 Act'), the UK Parliament had not reformed the substantive law of bribery in any significant way for over 100 years. The old law was embedded in different statutes, the relationship between which was unclear, and it employed antiquated language. Even more seriously, bearing in mind the UK's new international commitments under the Convention, the pre-2010 law did not apply when a UK person engaged in bribery outside England and Wales. This was a glaring omission cruelly exposed by the inability of the law to deter and punish effectively in the notorious BAE Systems bribery saga. A rushed reform did something to correct this particular anomaly in 2001, but the extension of the old law was not properly thought through. For example, non-nationals (even if habitually resident in the UK) and overseas companies doing business in the UK were not covered. That was a significant omission, in that whilst foreign-owned companies with a UK presence constitute only about 1% of the total number of businesses, they account for over 13% of UK corporate assets. Small wonder, then, that the OECD was highly critical of the state of English law, in its report on UK compliance (OECD, 2005). There had only ever been a small number of prosecutions annually in the UK (and only one prosecution and conviction in 2005), and few prosecutions – if any – against companies.

Consequently, in 2007, the Law Commission for England and Wales was asked to produce a report on the way forward, having consulted widely (Law Commission, 2007). The challenge facing reformers was two-fold. First, there was the need to ensure that the law provided a clear and sufficient deterrent to active bribery taking place anywhere in the world, when the bribery had a sufficiently substantial connection to the UK. Secondly, there was a need to ensure that any proposed reform inspired the confidence of UK-based businesses that the costs and other challenges of compliance would not be so high or uncertain as to make avoidance of the law's obligations the (covertly) preferred business strategy. In the following analysis, we concentrate on how this two-fold challenge was addressed, although the 2010 Act contains other notable and controversial reforms. Two examples are the abolition of the distinction between public and private sector bribery, and the inclusion within the 'bribery' offence of what in other jurisdictions might be regarded as more minor violations of illegal gratuity statutes.

The offence of 'failing to prevent' bribery

Section 6 of the 2010 Act makes it an offence to bribe a foreign public official, with the intention of obtaining or retaining (an advantage in) business. This is the principal wrong at the heart of the OECD anti-bribery convention. However, a key aim of national bribery legislation, from an OECD anti-bribery Convention perspective, must be the deterrence and punishment of *corporate* bribery of foreign public officials. Accordingly, it is section 7 of the 2010 Act that is rightly regarded as the centrepiece of the 2010 legislation. Section 7 of the 2010 Act creates the following offence:

> (1) A relevant commercial organisation ("C") is guilty of an offence under this section if a person ("A") associated with C bribes another person intending—
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> (a) to obtain or retain business for C, or
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> (b) to obtain or retain an advantage in the conduct of business for C.

Subject to a key defence (discussed below), section 7 thus imposes a form of strict liability on a commercial organisation, when bribery– whether or not involving a foreign public official - is committed by someone 'associated' with it, in order to obtain or retain a business advantage for that organisation. In domestic terms, section 7 marked a radical departure from the traditional approach of UK law towards the liability of commercial organisations for major financial crimes. Historically, it had long been possible under UK law to indict companies for (say) bribery, fraud, or false accounting. However, conviction hinged on showing that the offence was committed by someone representing the 'directing mind and will' of the company: someone at the highest level of the company. Suppose, for example, that the offence was committed only by a senior employee, or by a subsidiary company. Then, the (main) company could not be convicted, even if there was an obvious risk that the relevant offence might be committed by the employee or subsidiary, because the company lacked, and perhaps cared nothing about developing, procedures – or a culture – to prevent that happening. Consequently, a classic example where the law lacked teeth was when sums of money were paid – often through subsidiaries intentionally established in countries where corporate governance is weak –to foreign 'advisors,' whose role would in practice be to use some of this money to bribe officials to award contracts to the company.

Section 7 sought to put an end to *de facto* corporate immunity from prosecution in most (if not all) such circumstances, by exposing the company to liability for failing to prevent bribery committed on its behalf, whether the company knew of the bribery or not. Crucially, though, the section 7 offence of failing to prevent bribery contains an important defence. Subsection (2) provides that, 'it is a defence for C [the commercial organisation] to prove that C had in place *adequate procedures* designed to prevent persons associated with C from undertaking such conduct' (my emphasis). The 'adequate procedures' defence is, in ethical terms, designed to mitigate what might otherwise be the harshness of strict criminal liability imposed by section 7. For example, the Maersk Line shipping company has 708 ships serving 374 ports in 116 countries. Would it have been right that the company had no answer to a charge under section 7, respecting each and every occasion on which a Maersk ship's captain gave a harbour master (say) a bottle of whisky to ensure that the ship did not 'unaccountably' lose its place in the queue for unloading? To be sure, companies should not condone such 'small bribe' practices, and can be expected to move towards stamping them out over time; but what the latter point illustrates is the need to encourage companies to develop clear and ethical policies and procedures for dealing with such situations. The 'adequate procedures' defence is meant to shield companies that have taken such steps from criminal liability, and avoid the perverse incentive to cover up wrongdoing that unmitigated strict or vicarious criminal liability involves. That said, the 2010 Act has been criticised for its failure to make clear what principles – and not just procedures – should govern the offering of corporate hospitality. The official Guidance indicates that it is not the aim of the 2010 Act to penalise, 'reasonable and proportionate hospitality and promotional or other similar business expenditure', if that is simply intended to, 'improve the image of a commercial organisation' (Ministry of Justice, 2010, para 26-32). Is it, though, ever appropriate for a company – say - to entertain a civil servant or minister? The lack of more specific Government guidance on this difficult issue may make it tempting for companies simply to carry on as they did before 2010.

In theoretical terms, the section 7 'failure to prevent' offence can be regarded as a mixture of criminal law offence, and quasi-regulatory defence. The 'adequate procedures' defence is quasi-regulatory, in that companies are incentivised, without legal obligation, to adopt procedures to ensure bribery is not committed on their behalf. The incentives come, in part, through the enhanced likelihood that the prosecution services will not take a company with good working anti-bribery procedures through the criminal courts, and in part from the practical desirability of being seen to conform to 'benchmarking' provided by central government itself. In 2010, the UK government issued guidance on adequate procedures, based on six anti-bribery principles: proportionate procedures, top-level commitment, risk assessment, due diligence, communication, monitoring and review (Ministry of Justice, 2010). The principles are designed to be flexible so that, for example, whilst periodic verbal instructions and reminders might be all that is necessary for a firm with four employees working in a low-risk industry, nothing short of a dedicated cadre of (powerful) compliance officers overseen at Board level – coupled with regular training and spot-checks for all employees – might be required for a larger firm trading in a high-risk country.

The response to the 2010 legislation has been broadly favourable. In their Phase 4 Report, OECD representatives noted that section 7 was regarded by the private sector as providing, 'a very effective incentive for legal persons to adopt adequate corporate compliance measures and internal controls'. (OECD, 2017, para 199). In its review of the working of the 2010 Act, the House of Lords took the view that, 'section 7 deals more than adequately with the question of corporate responsibility for offences committed by the servants or agents of companies'

(House of Lords, 2019, para 108). Section 7 has now been used as a model for the offence of failing to prevent to facilitation of tax evasion (Criminal Finances Act 2017). Yet, how should success be measured? If the measure is the number of convictions for bribery that could not have been obtained under the previous law, then the legislation has not been conspicuously successful, even if one allows for the need for offending to have taken place post-implementation. There have only been two convictions under section 7 in a decade. However, section 7 has primarily been used as a way to coerce companies into entering into Deferred Prosecution Agreements ('DPAs'), a process make possible in English law by the Crime and Courts Act 2013. Some two-thirds of all 12 DPAs agreed to date have concerned section 7 allegations, with settlements bringing in £2 billion in financial penalties to date.

A DPA is an agreement between a prosecutor, such as the SFO and a corporate, which is the subject of a criminal investigation, and could be prosecuted, to suspend or 'defer' a prosecution for a set period of time, on the condition that the corporate complies with certain terms and conditions. The agreement is overseen by a judge who must be satisfied by the prosecuting authority of one of two things: either that there is already sufficient evidence to provide a realistic prospect of conviction (the 'full Code Test' in the Code for Crown Prosecutors); or, that there is a reasonable suspicion that the company has committed an offence, and there are reasonable grounds for believing that a continued investigation would, within a reasonable period of time, provide further admissible evidence capable of meeting the full Code Test. It must also be in the public interest to enter into a DPA, rather than to prosecute the corporate. Furthermore, the terms of such an agreement must be fair, reasonable and proportionate. Judicial supervision of these issues is meant to provide some assurance that prosecutors are not, in agreeing DPAs, simply giving way in the face of corporate pressure or, on the other hand, coercing companies into an inappropriate surrender of their rights.

In negotiating a DPA, a corporate can agree to a wide range of terms. These could include paying a financial penalty or any other costs, or paying reparation to an affected jurisdiction, as well as co-operating with any potential prosecution of individuals. For example, Airbus agreed to pay a fine and costs amounting to €911m in the UK and €3.6bn in total as part of the world's largest resolution, which included settlements with authorities in France and the United States. Compliance with the terms of a DPA is crucial, as a failure to adhere to any of the conditions may result in the prosecution recommencing against the corporate. Thus, part of the agreement will include arrangements for monitoring compliance with the conditions outlined in the DPA. For example, Güralp Systems Ltd was required to provide reports to the SFO containing an annual compliance risk assessment. Accordingly, it could be argued that enforcement agencies such as the SFO are beginning to adopt a quasi-regulatory role, a role that overlaps with the that of specialist financial regulators such as the Financial Conduct Authority. However, the burden on the SFO, as a criminal prosecutor, is to show that the way in which it conducts the DPA process means that the process will not come to be shrugged off by companies as just an unfortunate cost that may sometimes have to be incurred when pursuing lucrative business opportunities.

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