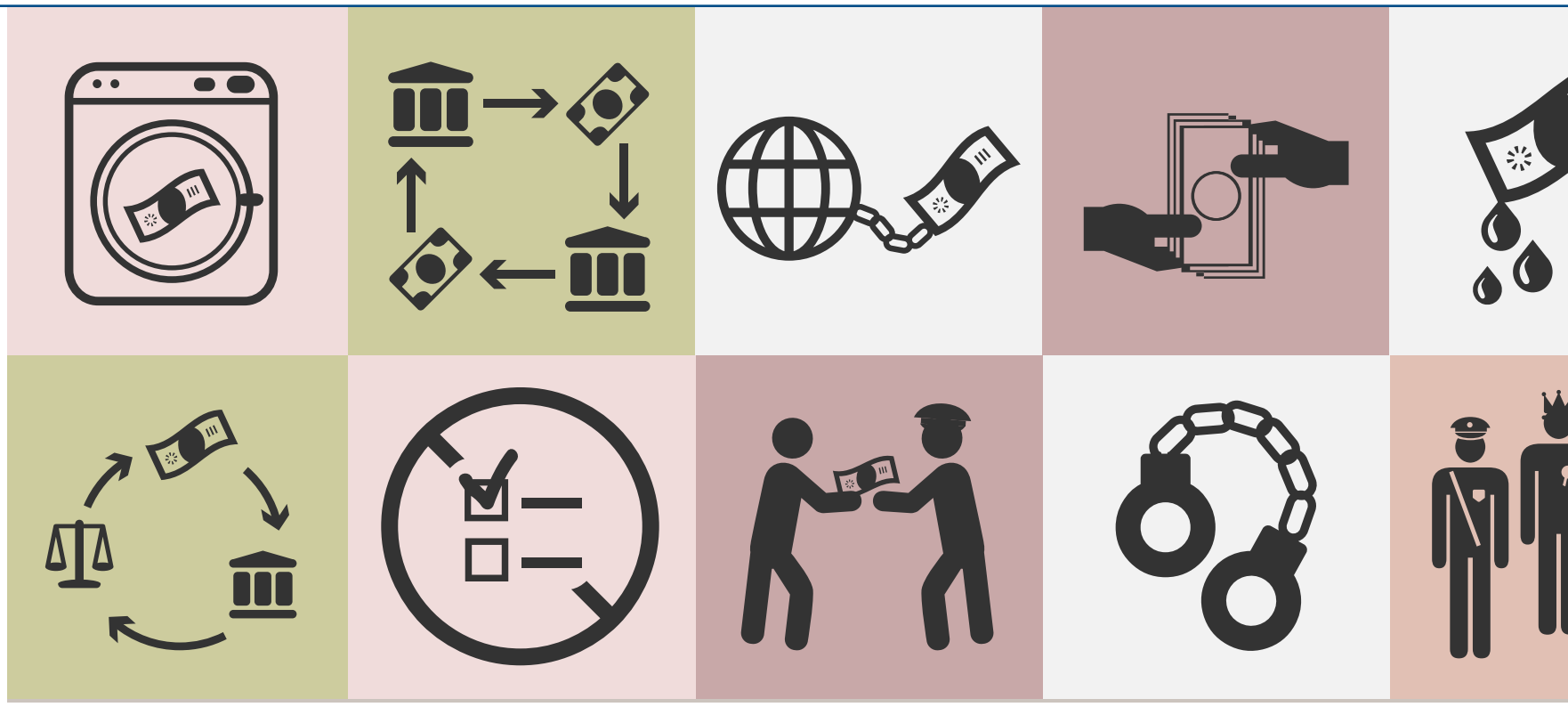

The Bribery Act, ten years on: Has it properly tackled corporate misconduct?

Marking the ten-year anniversary of the Bribery Act, senior white-collar lawyers from private practice and in-house have agreed that significant progress has been made thanks to the legislation. They also engaged in a lively debate looking ahead to identify what more needs to be done to tackle corporate malfeasance.

Legal Business, in conjunction with Paul Hastings, hosted an online event featuring an all-star cast of partners and general counsel (GCs) alike with the aim of establishing whether the Act has had the enforcement impact it originally intended.

Paul Hastings partner Jonathan Pickworth offered some opening thoughts: 'Corporate misconduct has been dealt with over the last few years by a number of deferred prosecution agreements (DPAs) but individuals in those cases are not being successfully prosecuted. As a practitioner, this makes me wonder if the section 7 offence (failure to prevent bribery) has purely become a mechanism for persuading a company to capitulate, pay some money and agree to a DPA.'

Nicola Bonucci, Paul Hastings partner and formerly the GC of the OECD (which played a key role in bringing about the Act), reminded the audience that, as early as 1999, the OECD Working Group on Bribery described the earlier anti-bribery legislation as 'not fit for purpose'. He added: 'One of the contributing factors to the lack of reform, let us be frank, is that the business community was not exactly enthusiastic about reform of the existing regime.'

Bringing an equally valuable perspective was Joanna Talbot, chief counsel for regulatory and compliance at BAE Systems. BAE Systems was subject to a well-publicised corruption probe before the Bribery Act came into force in 2011. It has now become a go-to test case on the need for strong anti-bribery processes.

She said: 'As a pre-cursor to the Act, we were taking our own steps to address what needed to be done to ensure a large and responsible company was acting responsibly. We commissioned a report by Lord Woolf to look at the way our company, the defence industry and global companies generally should structure themselves to ensure they act ethically. That report, published in 2008, contained 23 recommendations which we agreed to implement before seeing them. While not a pre-cursor to legislation, it did give a good roadmap for what adequate procedures look like.'

Talbot contended that the report was comprehensive enough that it acted as a robust roadmap for other companies to follow prior to the Act's implementation.

Following from this discussion, the in-house leaders offered their perspectives on whether the Act had provided a suitable template for ensuring good corporate behaviour in their businesses. Alex Parker, assistant GC of GlaxoSmithKline, said: 'It's a very helpful hook on which to hang legal advice. It's a commendably clear and short piece of legislation and it's relatively simple to explain the main concepts and how they relate to how the business should conduct itself. On a day-to-day practical level, being able to sell the importance of compliance is particularly important. It's a very powerful tool for in-house lawyers.'

Richard Price, GC of Anglo American, agreed with Parker's sentiment: 'I do think the Act provides a reasonably clear framework, particularly around adequate procedures. The government has the balance just about right in terms of setting out its expectations without being too prescriptive. It treats companies like adults to provide fit-for-purpose compliance programmes.'

The discussion then turned to the crucial topic of whether the Act had successfully influenced corporate behaviour. Gonzalo Guzman, global GC for anti-corruption at Unilever, offered: 'While some sectors like pharma already had healthcare compliance for companies to follow, for many companies in unregulated sectors the Act really brought those narratives around risk assessments to the table. It also gave some teeth to policies that were already there.'

Talbot also pointed out that alongside the Act, society's expectations of corporate behaviour

has changed over the years and employees want to work for a company that acts with integrity. Price added that the 'anti-bribery posture' becomes a competitive advantage for companies, with rewards to be found in the expectations of employees and customers alike.

Parker was quick to comment that ten years is still a relatively short time for the Act to have had the widespread impact on corporate culture that may be desired. Pickworth commented that nothing had put anti-bribery and corruption compliance on the boardroom agenda in the way that the Act had done.

Turning attention to meaningful ways of improving the Act, Talbot addressed the contention that British companies are at a disadvantage when trying to do business in jurisdictions without a Bribery Act equivalent: 'There's a brand that comes with selling British – high technology, robust production, and trust and openness can be added to that suite and become a competitive advantage. But it can mean that British companies simply cannot trade in certain jurisdictions. The British government, having set those standards, can provide more support to companies wanting to trade there – particularly smaller and medium-sized enterprises.'

Pickworth built upon this line of thinking, arguing that the Act was never designed to put British companies at a competitive disadvantage in certain jurisdictions. 'I've had a number of clients over the years who have encountered those requests you get in more difficult jurisdictions for repeated payments, or sometimes worse, and they go to their local embassies for assistance and they're just not getting it. They don't get any help but still find themselves under investigation by the UK authorities.'

Bonucci added that there were important countries such as India, who still do not have a foreign bribery offence written into law, and asserted that this constituted a genuine disadvantage to UK companies.

The elephant in the room until this point was the historical conduct of the Serious Fraud Office (SFO), the agency tasked with enforcing the Act to secure convictions. At the time of the discussion, the SFO had just suffered a number of high-profile setbacks, including the fruitless ending of its three-year probe into British American Tobacco.

Pickworth recognised that the SFO had secured significant successes over the last ten years, with valuable deferred prosecution agreements (DPAs) secured against the likes of Rolls-Royce and others . But he questioned if this was enough: 'What concerns me is: is the SFO's focus really on raising cash, and has it lost sight of its purpose to investigate and prosecute fraud? Is it now just a money-gathering organisation? We asked the SFO to join us today but I'm not sure they like answering these questions.'

He added, 'When I look at their case load at the moment, I question whether they pick the right ones, or many at all! There's also a big question mark as to how they are scoping their investigations. Are these such sprawling and unmanageable matters that they leave the SFO with no option but to enter into a DPA with the company?'

As for the legacy of DPAs, Pickworth noted that the mechanism was still in its infancy. 'We've had DPAs for seven years, and I think we have had nine DPAs in total, of which six were bribery related. They're not exactly selling like hot cakes. When I look across at France, it feels to me that they are having more success.'

Talbot offered an in-house perspective on whether DPAs constituted enough of a deterrent to address corporate misconduct, by pointing to the judgments and statement of facts produced by these plea deals. She said: 'From an in-house perspective, training by using those cases as examples of things that can go wrong and the consequences of them, has a massive impact. It is an incredibly powerful way of showing how bad ethical decisions can impact on a company. While there may be criticisms, those judgements are incredibly helpful.'

She added that more guidance on what constitutes 'adequate procedures' would however be helpful. Parker and Price however contended that more specific guidance may actually be detrimental when trying to create fit-for-purpose compliance programmes internally.

As a conclusion, the panel considered the overall legacy of the Bribery Act ten years on from its inception. Talbot mentioned the House of Lords post-legislative review of the Bribery Act, where the Act was unanimously praised. She said: 'It's a measure of its success that the model it uses is being adopted elsewhere, such as Australia and Malaysia.' Pickworth concluded: 'No-one can disagree that the old legislation was fragmented and messy, this is a massive improvement and the compliance impact is there for all to see. It's got anti-bribery compliance on the boardroom agenda. Most importantly, the political will seems to be there in the UK to investigate and prosecute bribery cases.'

A full recording of the discussion can be found on *The Legal 500* website.

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