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The Bribery Act – 10-Year Anniversary: The Road to the Bribery Act

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The Bribery Act 2010 ("the Act") came into force on 1 July 2011. The preamble to the Bribery Act explains that *'the purpose of the Act is to reform the criminal law of bribery to provide for a new consolidated scheme of bribery offences to cover bribery both in the United Kingdom and abroad'*. Today, there is a general consensus that the Act was long overdue, but the road to the Act was not an easy one.

The Act's tenth anniversary is a convenient moment to remind ourselves of its history and to examine whether the Act has lived up to its expectations. This is the first in a series of three articles to mark a decade of the Bribery Act.

Before the Act, the U.K.'s anti-bribery laws were fragmented and unclear. The law comprised piecemeal legislation dating back to 1889 and the common law. Why was it so unsatisfactory and what led to the Bribery Act?

The OECD Anti-Bribery Convention

Bribery is not the cost of doing business—it undermines trust, distorts the marketplace, and perpetuates inequalities. The preamble to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("the Convention") reminds us that "*bribery is a widespread phenomenon in international business transactions, including trade and investment, which raises serious moral and political concerns, undermines good governance and economic development, and distorts international competitive conditions*". The underlying concerns apply to all forms of bribery. The U.K. signed the Convention in 1997. Signatories to the Convention committed to criminalise the payment of bribes to foreign public officials and considered that no legislative changes were necessary to comply with the Convention. It would be another 14 years before the Act came into force.

In 1999, the U.K.'s legislative and common law provisions were reviewed under a process of monitoring carried out by the OECD Working Group on Bribery in International Business. The conclusion was that, "*[o]n the basis of the ample information provided, the Working Group is … not in a position to determine that the UK laws are in compliance with the standards under the Convention*". It urged the United Kingdom "*to enact appropriate legislation and to do so as a matter of priority*", and stated its intention "*to re-examine the UK in Phase 1 as soon as this legislation is enacted*". The U.K. was the subject of sharp criticism for its outdated, unclear and confusing anti-bribery legislation. In the numerous reports that followed, the OECD repeatedly lamented the U.K.'s patchwork anti-bribery laws, and urged it to remedy the shortcomings and modernise it as quickly as possible.

Put simply, the pre-Bribery Act position was not in line with the U.K.'s international obligations under the Convention and new legislation was needed. Attempts by the U.K. to meet its international obligations were attempted, for example, through the Anti-Terrorism, Crime and Security Act 2001; however, although the position improved, the law still relied on '*archaic language and formulations'*, and the meaning of certain key concepts, such as the nature of the benefit which constitutes a bribe, differed at common law and by statute. The OECD remarked that, '*[b]ecause of the continued proliferation of definitions and terminology, it is left to the prosecution, and ultimately to the judge or jury to establish what the law actually means'*.

In a statement issued in October 2008[1], the impatience of the OECD was apparent. It criticised the U.K. for failing to update its anti-bribery laws, despite signing the Anti-Bribery Convention 10 years earlier. It expressed the view that the law in force at the time made it '*very difficult for prosecutors to bring an effective case against a company for alleged bribery offences. [The U.K.] had yet to successfully prosecute any bribery case against a company'*. The OECD warned that the uncertainty of the U.K.'s legislative framework may trigger a need for increased due diligence over U.K. companies by their commercial partners or multilateral development banks, with the implication being that U.K. companies would be at a competitive disadvantage in international trade. The OECD recommended, among other things, that the U.K. should establish effective corporate liability for bribery as a matter of high priority, and should strengthen the independence of the Serious Fraud Office (the "SFO"). The concern over the SFO's independence arose out of the U.K. government's apparent involvement in a 2007 decision to abandon the high-profile BAE Systems/Al Yamamah corruption investigation, for alleged reasons of national and international security.

The Law Commission

When the Act came into force in July 2011, it implemented the recommendations of the Law Commission, made in its final report on bribery, published in November 2008 (the "2008 Report"). The Commission took the view that the adoption of the proposals would make the U.K. compliant with the Convention. The recommendations included:

- Repealing the common law offence of bribery and the whole of the 1889, 1906, and 1916 Acts;
- Replacing existing law with two general offences of bribery (now the offences under sections 1 and 2 of the Act);
- A new distinct offence of bribing a foreign public official (now section 6 of the Act; and
- A new corporate offence of negligently failing to prevent bribery (now section 7 of the Act).

The Law Commission's proposals sought to '*make the law of bribery simpler and more appropriate to modern* times'.

Lord Woolf had chaired an independent committee appointed by BAE Systems plc after it had been investigated by the SFO for alleged bribery and corruption. In May 2008, the Woolf Committee published its report on BAE System Plc's ethical policies and processes. Amongst other things, the Woolf Committee was required to identify the high ethical standards to which a global company should adhere and what action a company should take to achieve such standards. The Woolf Report made a number of recommendations that provided a framework that could be applied to companies generally. Upon publication of the Law Commission's 2008 Report, Lord Woolf observed that its recommendations would '*result in a much needed improvement to our law and would redress the criticisms that have been made of our existing law by commentators from home or abroad. The new law should be much easier to enforce and while requiring higher standards of conduct are still perfectly fair*'.

The 2008 Report was not the first on corruption. The Law Commission had published an earlier report in 1998 on 'Legislating the Criminal Code: Corruption' ("the 1998 Report"), which made recommendations for the reform of the criminal law on corruption. Unsurprisingly, the U.K. law on corruption was subject to the same criticisms; in short, it was neither comprehensive, clear nor consistent. The Law Commission recommended a modern statute. What was not then in the sights of the Law Commission was a corporate offence of failing to prevent bribery. A draft Corruption Bill followed the 1998 Report, but it was not passed as there was no consensus on a clear way forward. The Draft Bill was heavily criticised by the Joint Committee in its pre-legislative scrutiny. For example, there was debate about the breadth of the concept of 'agent/principal'. Momentum was lost.

In 2005, the Government published a consultation paper and, in March 2007, asked the Law Commission to look at the findings of the Government's consultation paper and to consider further options for reform. In October 2007, the Law Commission published its consultation paper in which the issue of corporate liability was addressed. At that time, a wider review of corporate liability was under discussion but the 2007 consultation paper touched upon the subject as it considered that the current law may not adequately meet the U.K.'s international obligations in relation to bribery—such obligations arose under various conventions including not only the OECD Convention, but also the UN Convention against Corruption and the Council of Europe's Criminal Law Convention on Corruption. The consultees were invited to respond to a number of options to cover corporate liability for bribery, including a corporate offence of negligent supervision, unless adequate systems were in place to prevent it—the forerunner for what then became section 7 of the Bribery Act. The majority of consultees favoured deferring the issue of introducing a failure to prevent type corporate offence for the anticipated wider review of corporate criminal liability. The Law Commission disagreed and recommended what then became the section 7 offence of failure to prevent bribery. The Commission was heavily influenced by the findings of the Woolf Committee Report. In particular, it adopted the suggestion that a "*company should develop formal processes to ensure business decisions are only taken following an explicit consideration of ethical and reputational risks*", and that, where such decisions are made, they should be made at the appropriate level and include ratification by the Board. The Board itself should be proactive in ensuring the high standards are applied to all the company's activities. The Law Commission went further, stating that the role of the Board in ensuring high standards of ethical business conduct should not be purely aspirational: "*Incentives to adopt good practices must be underpinned by legal duties that, if breached, may lead to legal action to punish and deter bad practice*".

A review into corporate criminal liability was on the cards at the time of the consultation paper in 2007. However, it was as recently as November 2020 when the Law Commission was asked to examine the issue, and today, in June 2021, the review is only in its consultation stage.

What is not in doubt is that the current view is that the Bribery Act has been a success—an iconic piece of legislation. The House of Lords Select Committee, in its post-legislative scrutiny of the Act, described it as "*an excellent piece of legislation which creates offences which are clear and all-embracing*", and the section 7 corporate offence was viewed as particularly effective. The Select Committee was went so far as to call it "*an example to other countries, especially developing countries, of what is needed to deter bribery*".

Efforts to derail the Bill

Despite the high-praise the Act has received, it is important to remember that it was only enacted during 'wash up'. In this case, this was the short period of a few days between the general election being announced and the dissolution of Parliament in April 2010. Any 'unfinished business' is lost on dissolution if not hurried through Parliament. This requires agreement between the government and the opposition.

Comments made by the Secretary General of the OECD may have prompted the Bill's inclusion in the 2010 wash up. He expressed his disappointment and concern at the prospect of further obstruction of the Act and warned that British companies may be blacklisted if they remained under-regulated. The OECD's irritation with the U.K.'s perceived dilatoriness was palpable.

As recently recalled by Robert Barrington, Head of Transparency International U.K. at the time, the obstruction included the opposition of the Confederation of British Industry ("CBI") to the Bill, which it described as 'not fit for purpose'. The claim was that the legislation lacked clarity and could damage British trade. CBI lobbying efforts led to filibustering by some Conservative MPs, despite the Bill previously having cross-party support. The Bill nonetheless was passed and the efforts to obstruct it were fruitless.

The Guidance

On 30 March 2011, almost a year after the Act received royal assent on 8 April 2010, the government published its statutory guidance (the Guidance"). The three-month delay between its publication and the coming into force on 1 July 2011 was expressly intended to allow businesses to familiarise themselves with its contents and may also have occurred in order to allow for consideration of concerns raised by lobbying groups, particularly in relation to the concept of 'adequate procedures'.

The Guidance identified the now well-known six key principles that should inform any business seeking to prevent bribery committed on its behalf. It is not legally binding, but is a factor taken into account by a prosecutor when reviewing cases and when considering whether the procedures put in place by a business are adequate to prevent persons performing services for or on their behalf from bribing. On the same day the Guidance was issued, the SFO and the Crown Prosecution Service issued its joint guidance for prosecutors, which set out the approach to be taken to prosecutions under the Act.

In a parliamentary statement, the then Secretary of State for Justice stated that the implementation of the Act "*will ensure that the United Kingdom is at the forefront of the battle against bribery, allowing the country to tackle corruption without being burdensome to legitimate business*". In the next article, we will look at whether this has proven to be the case, and whether describing the Act as "an excellent piece of legislation" is well-deserved.

While not a perfect piece of legislation, it is widely seen as a significant improvement on the U.K.'s previous anti-bribery laws. In part two, we will examine how the Act is being used, the close nexus between the Act, deferred prosecution agreements ("DPAs"), and the SFO. We will also consider how the subsequent introduction of DPAs appears to have changed the landscape and quietly shifted the priorities of the SFO—perhaps at the expense of other worthy considerations.

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[1] OECD Group demands rapid U.K. action to enact adequate anti-bribery laws - OECD

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