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Bribery Act 2010: The story so far

The admittedly limited results under the Act so far should not engender any complacency in the commercial world, warns Khawar Qureshi QC

Khawar Qureshi QC is a barrister at Serle Court. As an A panel counsel to the Crown, he represented the home secretary and the SFO on high-profile matters including the Nat West Three, Abacha, Yukos, Halliburton, and Bofors cases

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One of the major issues with regard to tackling bribery and corruption is the absence (as yet) of a clear international commitment. In 2008 the Organisation for Economic Co-operation and Development, whose Convention on Combating Bribery of Foreign Public Officials was signed up to by the UK in 1997, produced a report which remarked: 'Overall, the group is disappointed and seriously concerned with the unsatisfactory implementation of the convention by the UK.'

International criticism of the UK (largely prompted by the termination of the investigation into the Al-Yamamah arms deal between BAE Systems and the Saudi Arabian government in 2006) was the major catalyst for adoption of the Bribery Act 2010.

It would be unrealistic to assume that the absence of extensive investigations or convictions for bribery reflects a clean commercial culture, let alone to entirely blame the UK authorities for inactivity. The resources and expertise required to investigate complex crime are considerable. Evidence is often hidden under layers of corporate and trust documents and located in a jigsaw manner across multiple jurisdictions.

Indeed, the success of such investigations can depend to a very large extent upon the treaty-based mutual legal assistance process, whereby states are supposed to gather evidence on behalf of foreign authorities to assist criminal investigations and prosecutions. As a parallel track, a few states have brought civil claims with limited success before the English courts for damages against officials based on allegations of abuse of position or corruption.

The key offences set out in sections 1 to 3 relate to an advantage being sought or obtained for the improper performance of a function or activity, which is not limited to public officials.

Bribery of foreign public officials is prohibited by section 6 of the Act. A very significant provision is contained in section 7, which criminalises the failure of commercial organisations to prevent bribery, but, very importantly in terms of the reality of bribe paying, provides a defence if 'adequate procedures designed to prevent persons associated [with the entity] from undertaking such conduct' are in place. Guidance has been published by the Ministry of Justice and the Serious Fraud Office on how the Act should be read and will be applied.

In terms of convictions under the Act, the first successful conviction in November 2011 concerned a court clerk who took a bribe to alter driving offence records and was sentenced to six years' imprisonment. Since then, the most significant result was in November 2014 when Gary West, who took bribes of around $2.2m, and Stuart Stone were convicted under sections 1 and 2 of the Act in respect of a sham investment fund targeting pensioners and sent to prison for four years for these offences.

The SFO encourages 'self–reporting', which is likely to be the main route for corruption and bribery to be the subject of SFO engagement. Where wrongdoing is found, the SFO may offer deferred prosecution agreements (DPAs), the first of which was entered into in November 2015 with Standard Bank Plc in respect of a section 7 investigation which entailed, among other things, disgorgement of a profit of $8.4m, a fine of $16m, and compensation to the government of Tanzania in the sum of $7m. In addition, the terms of the DPA included independent review of internal anti-bribery controls. Another section 7 investigation led to a DPA being entered into in July 2016 by an unnamed SME.

Media reports in August 2016 indicate that the SFO is investigating Airbus business dealings concerning the involvement of 'third-party consultants' in alleged 'irregularities' related to fraud, bribery, and corruption.

The admittedly limited results under the 2010 Act should not engender any complacency in the commercial world, especially with regard to the use of 'consultants' as enablers for international commercial agreements. Effective internal safeguards against the facilitation of bribery and corruption are essential.