

The Bribery Act: beyond adequate?

Eoin O'Shea reflects on the significance of the House of Lords' recommendations in relation to taking bribery prevention to the next level

IN BRIEF

► The House of Lords' review of the Bribery Act 2010 makes two particularly important interventions: the first relates to interpretation of the notorious 'adequate procedures' test; the second is a strong push for government to reform 'white collar' criminal law so that vicarious liability applies to a far wider range of offences.

The Bribery Act 2010 (BA 2010) is one of the more acclaimed pieces of legislation of recent years. It has been the subject of numerous superlatives: 'the toughest anti-corruption legislation in the world', 'the gold standard' and so on. In 2018 the House of Lords constituted a Select Committee, chaired by Lord Saville, to consider its effects. After a lengthy process of taking evidence from a wide variety of interested parties, the committee issued its report on 14 March 2019 (*The Bribery Act 2010: post-legislative scrutiny*, Session 2017-19, HL Paper 303; see bit.ly/2Fd2ff3).

Maintenance & improvements

The report weighs a considerable body of external evidence, including a small contribution by the author. It's striking that the report does not challenge or even really discuss the main pillars of the legislation in any depth. The substantive definitions of bribery and the (wide) jurisdictional provisions in BA 2010 are now seen as efficient and un-controversial. It's very clear that the key distinguishing features of the Act around liability, the 'failure to prevent bribery' offence and extra-territoriality are here to stay. Any softening, for example as regards tolerance of so-called 'facilitation payments' is off the agenda as far as the

House of Lords is concerned.

The majority of the recommendations in the report are concerned either with issues around the fringes of the legislation, or improving some of the legislative and institutional infrastructure supporting enforcement. There are sensible proposals as regards amendments to government guidance, and in related areas such as deferred prosecution agreements. There is a nod to the fact that EU-wide means of cooperation on criminal justice are at risk if Brexit is not dealt with appropriately. Most of the key recommendations are summarised in the final section of the report.

Signposting the future

Two aspects of the report are particularly important as pointers to the future development of law and practice in this area. The Select Committee has ventured a little away from its strict brief and lent support to a substantial re-interpretation of the existing law as well as very significant future legislative changes.

- The first relates to the notorious problem of defining the 'adequate procedures' which might constitute a defence for corporate bodies charged with failing to prevent bribery.
- The second is about the potential

extension of corporate liability for crimes more generally.

First to the Gordian-knot of UK bribery law: the nature of 'adequate procedures'.

The 'reasonableness' of the adequate Section 7 of BA 2010 provides:

7. Failure of Commercial Organisations to Prevent Bribery

(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—
(a) to obtain or retain business for C, or
(b) to obtain or retain an advantage in the conduct of business for C.

(2) But it is a defence for C to prove that C had in place **adequate procedures designed to prevent persons associated with C from undertaking such conduct...**(emphasis added).

So, if a commercial organisation's employee or agent commits bribery in order to obtain or retain business or a business advantage for the organisation then the organisation is liable under s 7(1). But if the organisation's anti-bribery procedures are 'adequate' then it has a defence (although not to a charge under s 1 or s 6). Whether these offences could be charged will depend in each case on the difficult 'directing mind' test. But what qualifies as 'adequate'?

This is among the more difficult questions in the field of bribery law. There has been a tendency to accept the position that if any bribery can be shown to have taken place this must mean that the existing anti-bribery procedures cannot have been adequate. As some have argued on previous occasions, this equates 'adequate' with 'perfect' and cannot be right as a matter of law (see O'Shea *The Bribery Act 2010, A Practical Guide*, LexisNexis 2011).

The operation of deferred prosecution agreements (DPAs), pursuant to the Crime and Courts Act 2013, Schedule 17, means that the issue is not being properly examined by the courts. In DPA cases, by the time this issue reaches court the defendants are likely to have already conceded that they lack adequate procedures and the court will not make a definitive ruling on it. In the judgment approving the DPA in *Standard Bank*, the court remarked: 'Although there were bribery prevention measures in place, these measures did not prevent the suggested predicate offence.' (*Serious Fraud Office v Standard Bank plc (now known as ICBC Standard Bank plc)* [2015] Lexis Citation 567). This comment, which might, uncharitably, be seen as begging the question, was almost certainly not

intended as an evaluation of the ‘adequate procedures’ issue. The court is unlikely to have had detailed argument on this point, something which is a weakness of the DPA system.

In the one case where the adequacy of procedures was formally in issue—*R v Skansen Interiors Limited*, unreported—it seems as though the court did not consider the issue worthy of detailed analysis and the defendant, which was a company in administration, did not appeal. The defendant company, which had about 30 employees and operated exclusively domestically, lacked specific written anti-bribery procedures but attempted to rely on more general instructions and controls. It was dormant with no assets at the time of trial. The fact that it was prosecuted at all is highly controversial, not least because the only sentence available was an unconditional discharge. The judge’s summing-up to the jury went no further than the statement that the terms in question were to be given their ‘everyday meaning’. That case can properly be regarded as untypical.

Thankfully, the Select Committee approached this topic in a principled way. The discussion at paras 196–211 of the report is worth reading in full. Where it comes to, while recognising that the issue in a specific case is ultimately for the court, is the view that the best interpretation of ‘adequate’ is now ‘reasonable in all the circumstances’.

This formulation builds on the wording in the Criminal Finances Act 2017 as regards the offence of facilitating tax-evasion (sections 45, 46). In that Act, which mirrors the section 7 offence of failing to prevent subject to a due-diligence offence, a ‘reasonable’ rather than an ‘adequate’ standard was used.

The committee also considered testimony from various witnesses, including the judge who has recently overseen the major bribery cases disposed of by DPAs, Sir Brian Leveson P. Sir Brian agreed with the proposition of the committee chairman that “‘adequate’ would be construed by a judge as meaning, in effect, reasonable in all the circumstances’.

The report is clearly supportive of this view. Exhibiting considerable faith in the power of ‘guidance’, it recommends that the existing statutory guidance is amended to reflect the ‘reasonableness’ standard.

Which circumstances?

Of course, a ‘reasonable in all the circumstances’ standard leads to further questions. What might the relevant circumstances be? Whose perspective is the correct one when considering reasonableness?

In general, a standard of ‘reasonableness’ is objective, ie it does not depend on the

particular point of view or subjective understanding of the defendant. It relates in some way to a standard of generally-accepted good practice.

The issue comes back to the problem underlying all ‘due diligence’-based cases, whether in a civil, regulatory or criminal context: How much diligence, or scrutiny, or vigilance, will be enough? In approaching such questions courts are really making decisions about the most appropriate allocation of resources.

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Adherents of the law and economics school of jurisprudence might see this as an illustration of how the law of torts and the criminal law are becoming more closely aligned. We will avoid these deep waters but just note that the practical consequences of exploring a test of ‘reasonableness’ in a criminal court. The jury may well need to make an assessment of the expected costs and benefits of particular measures which were available to the corporate defendant at the relevant time. Expert evidence may well be necessary, and the work of in-house legal, compliance, finance and other staff charged with appropriate risk-management measures will be even more under the spotlight than in the past. They and their employers will want to ensure that their conduct can be justified now and in the future.

Substance or form?

A final note of caution here: there is a tendency among corporate lawyers to think of a written procedure and an actual procedure as the same thing. But in cases where bribery is found, despite written procedures designed to prevent it, the prosecution can be expected to continue to argue that a procedure which looks ‘reasonable’ on paper but is in fact not operated properly, or at all, cannot reach the ‘adequate’ standard. It will be very difficult for a defendant company to argue the contrary, especially if clear cases of default

have been ignored or covered-up. A criminal court will be focused on the substance of actual practices rather than the form of any particular document.

New law? Reforming corporate criminal liability

It is a tribute to the success of BA 2010 that, although it is outside their specific remit, Select Committee sees the ‘failure to prevent’ offence as a model for further legislation.

As mentioned above, the model has already been reproduced as regards facilitation of tax-evasion offences (as in the Criminal Finances Act 2017, ss 45(2) and 46(3)). It is being championed by the SFO and others as something of a panacea as regards the (perceived) low rate of prosecution of corporate entities for financial crimes more generally.

The basic idea seems to be that a ‘failure to prevent’ offence could be introduced to cover other offences such as fraud, money-laundering or false-accounting. It would be subject to the same sort of due-diligence-based ‘procedures’ defence as s 7 of BA 2010, albeit modified to the ‘reasonable in all the circumstances’ standard.

This idea is controversial in part because it circumvents the existing law as regards corporate liability where the prosecution must prove that a person who effectively stood in the shoes of the company, as its ‘directing mind and will’, had the necessary mental state (knowledge, intent, recklessness or similar). It cuts across an old, although perhaps now un-fashionable idea, that liability for serious crimes (unlike torts) should involve an element of voluntariness. In any event, such a change would certainly expand the potential for criminal convictions against corporate bodies enormously—an objective which the SFO and others are quite open about.

The report discusses these issues at paras 227–232. The conclusion firmly expresses the committee’s ‘hope the Government will delay no more in analysing the evidence it received two years ago and in reaching a conclusion on whether to extend the “failure to prevent” offence to other economic crimes’. Hint taken, one may think.

A great deal more will be written about widening the scope of the criminal law as specific proposals take shape. There is no doubt that, although practical problems will inevitably arise, the legislative direction of travel seems to be in favour of vicarious liability. We can expect these views to be highlighted and followed up with vigour by the SFO and other agencies. **NLJ**