The U.K. Bribery Act: "The Caffeinated Younger Sibling of the FCPA"*

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TABLE OF CONTENTS

I. INTRODUCTION

This Article will deal with the recent history of bribery law in the United Kingdom,[1] and introduce and consider the effects of the Bribery Act 2010, specifically so far as concerns prosecution practice. It will show that the history of the first decade of the twenty-first century was one in which the United Kingdom finally and reluctantly gave up the idea that the essence of bribery is that it is an offence of disloyalty and embraced the idea that bribery undermines the proper operation of markets. This was not a smooth path from acceptance at an intellectual level that the offence is part of competition law to the formulation of an offence giving this realisation effect. Rather it was a messy, chaotic, and highly politicised sequence of events which, it is suggested, is far more typical of criminal lawmaking. Far from the achievement of an objective by the conscious agency of one or a group of individuals, the law reform process took at least one wrong turn and was delayed for several years by political happenstance.[2] It was not put back on the right track by the power of

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* Joe Palazzolo, *Law Blog Job of Week: SFO Director*, WALL ST. J.L. BLOG (Oct. 25, 2011, 1:15 PM), http://blogs.wsj.com/law/2011/10/25/law-blog-job-of-week-sfo-director/.

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[1] I will use the expression United Kingdom (U.K.). Strictly speaking, this Article will deal only with the position in England and Wales.

[2] *See* FRAUD TRIALS COMM., FRAUD TRIALS COMMITTEE REPORT 5 (1986).

rational argument but by the force of international obligations, which, although only enshrined in unjusticiable "soft law" proved sufficient to compel action.

Having dealt with the history, the Article will turn to two distinct contemporary issues in bribery law, both of which connect the United Kingdom with the United States. The first is the introduction of the corporate offence of failing to prevent an employee from bribing someone, with its concomitant defence of "adequate [corporate governance] procedures."[3] In the increasingly globalised corporate governance environment, the effect of the introduction of the defence will be evident, not so much in the number of prosecutions under Section 7, but in the corporate governance régimes of the corporations to which it applies. The shift of enforcement responsibility away from the reactive model relying on police prosecutors and criminal courts to secure change, towards a more proactive model enlisting the corporations themselves to make the change will be driven partly, no doubt, by economic considerations but also partly by a different model of criminal law enforcement which relies more upon the actions of involved third parties.

The second issue of contemporary significance is as to agreements with defendants. Criminal justice in England and Wales has, for many years, operated on the expressed basis, save in narrow and clearly delineated circumstances, that the disposition of criminal court ought not to be governed by the agreement of the parties.[4] The history of the last twenty-five years has been one in which it has proved very difficult to secure convictions in economic crime trials.[5] Prosecutors have been put under pressure to produce results and have proved vulnerable to the vagaries of criminal litigation.[6] There has consequently been pressure, particularly as a result of policies adopted by the most recently retired Director of the Serious Fraud Office (SFO), to engage more in bargaining with accused persons and corporations.[7] To move towards bargains an additional layer is provided by the international dimension. The Organisation for Economic Co-operation and Development (OECD) Convention deals with bribery across jurisdictions, and investigations are frequently not limited to the jurisdiction in or to which the bribe is paid.[8] Investigation across jurisdictions requires collaboration between national

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[3] Bribery Act 2010, c. 23, § 7(2) (U.K.).

[4] FRAUD TRIALS COMM., *supra* note 2, at 5.

[5] *See* FRAUD TRIALS COMM., *supra* note 2.

[6] *Cf.* Jane Croft & Caroline Binham, *'Plea Bargain' Doubts Hit SFO Drive*, FIN. TIMES, Aug. 8, 2011, at 8 (explaining that judicial resistance to reduced sentences for whistleblowers creates a significant barrier for prosecutors seeking information).

[7] *E.g.*, *id.*

[8] *See generally, e.g.*, R v. BAE Systems PLC, [2010] EW Misc (Crown) 16, *available at* http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/r-v-bae-sentencing-remarks.pdf; R v. Innospec Ltd., [2010] EW Misc (Crown) 7, *available at* http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/sentencing-remarks-thomas-lj-innospec.pdf.

prosecuting authorities. Where prosecutors from one jurisdiction are used to making agreements and the others not, this can give rise to difficulties, as were witnessed in the cases on *Innospec* and *BAE Systems*, in which the Serious Fraud Office had to work with the Department of Justice, and where their efforts were not fully appreciated by the judges of England and Wales.[9]

II. RECENT HISTORY

Until the late 1990s U.K. bribery law was a neglected backwater. It was made up of common law offences[10] and groups of specific[11] or more general[12] statutory offences. There were few prosecutions (fewer than ten per year) and easily available charging alternatives,[13] so there was little pressure for change. In general, for the most frequently charged statutory offences, the test the prosecution had to satisfy was that the bribe had been given or received "corruptly."[14] Although there were different possible meanings, usually defined negatively ("[C]orruptly" we were told, is not the same as "dishonestly."[15]), this

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[9] *BAE Systems*, [2010] EW Misc (Crown) 16 at [5]; *Innospec*, [2010] EW Misc (Crown) 7 at [27], [43].

[10] For example, bribery, *see* LAW COMM'N, REFORMING BRIBERY, 2008, H.C. 928, paras. 2.4–2.8 (U.K.), *available at* http://lawcommission.justice.gov.uk/docs/cp185_Reforming_Bribery_report.pdf (enticing a public officer to act contrary to his/her duty, or to carry out his/her duty in a biased way); blackmail, *see* Theft Act 1968, c. 60, § 21 (Eng. & Wales), *available at* http://www.legislation.gov.uk/ukpga/1968/60/pdfs/ukpga_19680060_en.pdf (until 1968, called extortion *ex virtute officii*); misfeasance in public office, *see Misconduct in Public Office*, LAW COMMISSION, http://lawcommission.justice.gov.uk/areas/misconduct.htm; conspiracy to defraud and embracery, *see* Bribery Act 2010, c. 23, § 17(1)(a) (U.K.) (bribing jurors, which was formally abolished by the Bribery Act 2010).

[11] *See, e.g.*, Sale of Offices Act 1551, 5 & 6 Edw. 6, c. 16 (Eng. & Wales), *available at* http://www.legislation.gov.uk/aep/Edw6/5-6/16 (Justices of the Peace); Sale of Offices Act 1809, 49 Geo. 3, c. 126 (U.K.), *available at* http://www.legislation.gov.uk/ukpga/1809/126/pdfs/ukpga_18090126_en.pdf (general provision, the trigger being military commissions); Representation of the People Act 1983, c. 2, § 113 (U.K.), *available at* http://www.legislation.gov.uk/ukpga/1983/2/pdfs/ukpga_19830002_en.pdf (voters); Honours (Prevention of Abuses) Act 1925, 15 & 16 Geo. 5, c. 72 (U.K.), *available at* http://www.legislation.gov.uk/ukpga/1925/72/pdfs/ukpga_19250072_en.pdf (peerages and other honours, in light of Lloyd George's activities). These offences also include those against administration of justice (bribing jurors, etc.).

[12] Public Bodies Corrupt Practices Act 1889, 52 & 53 Vict., c. 69 (U.K.), *available at* http://www.legislation.gov.uk/ukpga/1889/69/pdfs/ukpga_18890069_en.pdf; Prevention of Corruption Act 1906, 6 Edw. 7, c. 34 (U.K.), *available at* http://www.legislation.gov.uk/ukpga/1906/34/pdfs/ukpga_19060034_en.pdf; Prevention of Corruption Act 1916, 6 & 7 Geo. 5, c. 64 (U.K.), *available at* http://www.legislation.gov.uk/ukpga/1916/64/pdfs/ukpga_19160064_en.pdf.

[13] Most cases of bribery were also conspiracies to defraud.

[14] Public Bodies Corrupt Practices Act 1889, 52 & 53 Vict., c. 69, § 1, *available at* http://www.legislation.gov.uk/ukpga/1889/69/pdfs/ukpga_18890069_en.pdf.

[15] Cooper v. Slade, (1858) 10 Eng. Rep. 1488 (H.L.) 1499 (appeal taken from Eng.).

was a word juries were assumed to understand.[16] When the statutory bribery offence was charged, the "presumption of corruption" operated to place on a public-sector recipient of largesse the burden of proving that it was not given or taken corruptly.[17] In the substantive and procedural English law of bribery, far more significant developments have taken place in the last five years than all its previous history. The changes we have seen have been driven by developments worldwide, starting with the Foreign Corrupt Practices Act (FCPA).

Globalisation, including liberalisation of markets and greater ease of communication, has made all the difference. It is not the ethical approach of the Carter administration but the demands of fair competition in global markets that have tugged bribery law out of obscurity into the mainstream of worldwide legal attention. The type of corruption that triggers this change influences the types of corruption which form the target of the law. The model for corruption under legislation outlawing bribery is the single transaction involving synchronous exchange of benefits.[18] The three main forms of corruption which have never, without more, been criminal in English law are the linked ones of nepotism, asynchronous exchanges, and unreciprocated but corrupt doing of favours.[19] This is not a trivial point. Much of the recent activity in the arena has dealt with large payments in respect of single contracts.[20] It is clear that some of the most corrupt societies are those in which the typical forms of corruption are those which are not covered by English Law. A criminal organisation does not need to bribe someone it already owns. The Transparency International Corruption Perception Index,[21] for example, needs to be assessed against this consideration. Most obviously, the requirement for a bribe (rather than just the corrupt conferment of an advantage) is both an evidential and due process limitation upon the scope of corruption law (restricting the range of cases in which proceedings might follow, and possibly limiting abuses by prosecutors) and also an ethical statement, embodying the dubious precept that corruptly to confer an advantage is acceptable if nothing is obtained in exchange. Of course it is not.

From the election of the Blair government in May 1997, a number of factors argued for the reform of U.K. bribery law. First, the existing law was old. Second, the government had come to power against a background of "sleaze" in

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[16] R v. Wellburn, (1979) 69 Crim. App. 254 at 265 (Eng. & Wales).

[17] Prevention of Corruption Act 1916, 6 & 7 Geo. 5, c. 64, § 2 (U.K.), *available at* http://www.legislation.gov.uk/ukpga/1916/64/pdfs/ukpga_19160064_en.pdf.

[18] *See supra* note 12; *see also infra* note 20 and accompanying text.

[19] This follows from the definitions of the common law offence and those in the Prevention of Corruption Acts 1889–1916. *See supra* notes 12, 14. This proposition is unaltered by the Bribery Act 2010, c. 23 (U.K.).

[20] The Al-Yamamah transaction being a prime example. *See infra* Part V.

[21] For the most recent Corruption Perception Index, see *Corruption Perceptions Index 2011*, TRANSPARENCY INT'L, http://www.transparency.org/cpi2011/results (last visited Aug. 29, 2012).

the previous administration, and, following the "cash for questions" scandal,[22] something had to be done about the position of Member of Parliament, which had been held to fall outside the categories of public official for the purposes of the common law offence and outside that of "agent" for the purposes of the statutory one.[23] Third, it was said that the law was unclear—too much turned on the jury's understanding of the word "corruptly." There were many instances, corporate entertaining and "facilitation payments" among them, where the evaluations of differing jurors might legitimately vary.[24] In addition and increasingly, the geographical locus became important to the meaning of the adverb. The question that increasingly arose was whether the jury should apply the test of what would count as having been done "corruptly" on a Clapham omnibus or on whatever form of mass passenger transit obtained where the advantage was conferred.[25] Fourth, could the "presumption of corruption" under the Prevention of Corruption Act 1916[26] sit with the presumption of innocence under Article 6(2) of the European Convention on Human Rights (ECHR) and its domestic application under the Human Rights Act 1998?[27] Fifth, there was the procedural question of prosecutorial consents. There are groups of offences the prosecution of which are thought sufficiently sensitive that they require the consent of an official, either the Attorney-General (A-G) or the Director of Public Prosecutions (DPP) (or, when the case falls under its *aegis*, the Director of the Serious Fraud Office).[28] There is not much rhyme or reason in the distinction between the list of offences where the consent is required of the politician (A-G) and those where it is for the civil servant (DPP). It is far more a

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[22] Alan Doig, *'Cash for Questions': Parliament's Response to the Offence that Dare Not Speak its Name*, 51 PARLIAMENTARY AFF. 36, 42–43, 46 (1998).

[23] A.W. Bradley, *Parliamentary Privilege and the Common Law of Corruption:* R v. Greenway and Others, 24 COMMONW. L. BULL. 1317, 1318 (1998).

[24] *Oral Evidence Taken Before the Joint Committee on the Draft Corruption Bill on Tuesday 10 June 2003*, 2002-3 PARL. (2003) (statement of Mr. Justice Silber), *available at* http://www.publications.parliament.uk/pa/jt200203/jtselect/jtcorr/uc705-vii/uc70502.htm.

[25] *Id.*

[26] That is, the rule that where the recipient was in the public sector, the burden was on the recipient to establish that the gift, etc. was not received corruptly. Prevention of Corruption Act 1916, 6 & 7 Geo. 5, c. 64, § 2 (U.K.), *available at* http://www.legislation.gov.uk/ukpga/1916/64/pdfs/ukpga_19160064_en.pdf.

[27] Convention for the Protection of Human Rights and Fundamental Freedoms art. 6, para. 2, Apr. 11, 1950, E.T.S. No. 5 [hereinafter ECHR], *available at* http://www.conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=005&CM=8&DF=09/10/2012&CL=ENG; Human Rights Act 1998, c. 2 (U.K.), *available at* http://www.legislation.gov.uk/ukpga/1998/42/data.pdf. Article 6, paragraph 2 of the ECHR states: "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law." ECHR, *supra*, at art. 6, para. 2. The extent to which this is compatible with domestic "shifted onus" provisions has been much debated. *See, e.g.*, Sheldrake v. DPP, [2004] UKHL 43, [2005] 1 A.C. 264 (appeal taken from Eng. & Wales).

[28] *Consents to Prosecute*, CROWN PROSECUTION SERVICE, http://www.cps.gov.uk/legal/a_to_c/consent_to_prosecute/ (last visited Sept. 4, 2012).

product of historical chance. The Attorney-General, however, is a party politician who holds a seat in one or another House of Parliament and answers there for the prosecution service.[29] Any decisions taken by the Attorney-General to do with prosecutions have always been said to be free of political considerations, and any suggestions to the contrary are taken to impugn the honour of the officeholder.[30] As it happens, bribery was one of the offences whose prosecution requires the consent of the Attorney-General.[31] If the offence was to be extended to Members of Parliament, whether or not compliance with the OECD Convention could be assured, then this might provide an excellent opportunity to change that rule. Sixth, when the 1916 Act was put in place, the public and private sectors were able fairly easily to be distinguished, and it was straightforward to find moral justification for the presumption of corruption in the public sector. Privatisation, regulation, and growth in outsourcing of roles previously thought of as public sector ones have made this distinction no longer easy to make or defend.[32] Finally and seventh (and this is where we get to the FCPA), there is the effect of global forces. The attitude of the U.K. government to the use of bribes overseas by U.K. business people had been very tolerant. Until 1992 at the earliest, and most probably 2000, companies were able to deduct from their profits for the purposes of taxation bribes paid overseas.[33] In 1997 the Paris Convention of the OECD changed the landscape.

Of these, only the final one, and to the extent that it was bound up in the final one, the fifth, were such as to compel action from an incoming government with a full legislative agenda.[34] Arguments about old laws always have two facets. On the one hand, the law is old, irrational, and cranky. On the other hand, because it is old, all users have a reasonably clear idea what it means; there is no need for "bedding in," and leaving things as they are is a way to save Parliamentary time. So far as concerns the European Convention and especially Article 6(2), at the time it was widely thought that there were comparatively few offences with such "reversed onus" provisions, that public sector bribery

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[29] *Statutory Duties and Powers*, CROWN PROSECUTION SERVICE, http://www.cps.gov.uk/legal/s_to_u/statutory_duties_and_powers_/ (last visited Sept. 4, 2012).

[30] *Id.*

[31] Prevention of Corruption Act 1906, 6 Edw. 7, c. 34, § 2(1) (U.K.), *available at* http://www.legislation.gov.uk/ukpga/1906/34/pdfs/ukpga_19060034_en.pdf.

[32] The use of government contracts and subsidies of bodies with independent legal personality is an example. Until the 1980s in the U.K. housing for let was either publicly owned or owned by private landlords. The advent of housing associations with links and obligations to government but formal independence blurred the boundary.

[33] It was unclear whether or not this had been achieved by the Finance Act 1992 and Finance Act 1993, or the Income and Corporation Taxes Act 1988. It was finally put beyond argument on April 1, 2002, by the Finance Act 2002, c. 23, § 68(2) (U.K.), *available at* http://www.legislation.gov.uk/ukpga/2002/23/pdfs/ukpga_20020023_en.pdf.

[34] The Blair (Labour) Government took office on May 1, 1997. JOSEPH E. THOMPSON, AMERICAN POLICY AND NORTHERN IRELAND: A SAGA OF PEACEBUILDING 194 (2001). Before that the Conservatives had held power since 1979. *See id.*

was one, and that the effect to be given to Article 6(2) of the Convention by the Human Rights Act 1998 would require legislative action.[35] As matters developed, the ECHR argument turned out not to be so serious a force for change.[36] It was eventually held that the only way to avoid incompatibility is for the offending provision[37] to be "read down"[38] in such a way that it imposes only an evidential burden on the defence. The Human Rights Act 1998, section 3, provides the necessary authority for such a reading down.[39]

III. "WE'LL ALWAYS HAVE PARIS"[40]

The origins of the Paris Convention are in the FCPA. The (U.S.) Omnibus Trade and Competitiveness Act of 1988 placed a duty upon the President to pursue international agreement amongst members of the OECD to create FCPA-type legislation applying in the countries that are not members.[41] The United States used its influence to apply the same rules to everyone. In 1998 the FCPA was strengthened by the International Anti-Bribery and Fair Competition Act of 1998.[42] At the prompting of the United States, the OECD put in place the Paris Convention on the Bribery of Foreign Public Officials, which was signed in 1997 and entered force in 1999.[43] This required the U.K. government to

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[35] *See* LAW COMM'N, LEGISLATING THE CRIMINAL CODE: CORRUPTION, 1998, H.C. 524, paras. 4.1–4.4, 4.76–4.78 (U.K.).

[36] The leading cases are *Sheldrake v. DPP*, [2004] UKHL 43, [2005] 1 A.C. 264 (appeal taken from Eng. & Wales), and *R v. Lambert*, [2001] UKHL 37, [2002] 2 A.C. 545 (appeal taken from Eng. & Wales).

[37] Prevention of Corruption Act 1916, 6 & 7 Geo. 5, c. 64, § 2 (U.K.), *available at* http://www.legislation.gov.uk/ukpga/1916/64/pdfs/ukpga_19160064_en.pdf.

[38] "Read down" is an expression in (U.K.) human rights law to indicate that the interpretative obligation imposed by the Human Rights Act 1998—to interpret existing statutes where possible in accordance with the convention—has been applied. Human Rights Act 1998, c. 42, § 3 (U.K.), *available at* http://www.legislation.gov.uk/ukpga/1998/42/data.pdf. It stems from *Lambert*, [2001] UKHL 37 at [17], [2002] 2 A.C. at 563; *see also generally* Tovey v. Ministry of Justice, [2011] EWHC (QB) 271, *available at* http://www.bailii.org/ew/cases/EWHC/QB/2011/271.html; Webster v. R, [2010] EWCA (Crim) 2819, *available at* http://www.bailii.org/ew/cases/EWCA/Crim/2010/2819.html; *Sheldrake*, [2004] UKHL 43, [2005] 1 A.C. 264.

[39] *Webster*, [2010] EWCA (Crim) 2819 at [30]–[31] (quoting Ghaidan v. Godin-Mendoza, [2004] UKHL 30, [32]–[33], [2004] 2 A.C. 557, 571–72 (appeal taken from Eng. & Wales)).

[40] CASABLANCA (Warner Bros. Pictures 1942).

[41] Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 5003, 102 Stat. 1107, 1415–25 (codified as amended in 15 U.S.C. § 78); *see also generally* Exec. Order No. 12,661, 3 C.F.R. 618 (1988).

[42] International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (codified as amended at 15 U.S.C. § 78).

[43] Indira Carr & Opi Outhwaite, *The OECD Anti-Bribery Convention Ten Years On*, 5 MANCHESTER J. OF INT'L ECON. L., no. 1, 2008 at 4–7.

instantiate legislation, and subsequently to enforce it, making it a crime for a British citizen or company to bribe a foreign public official to secure a contract.[44] Those responsible for the Convention were not principally concerned about the loyalty of employees of foreign governments. They cared about markets and whether or not their companies could compete in them on equal terms.[45]

Given the state of English law, from the time of signing the Convention, in order minimally to comply with the requirements of the Convention, the United Kingdom was therefore obliged:

(i) to extend the territorial scope of bribery law, at least so far as concerned officials; and
(ii) to deal with the role of the Attorney-General in bribery prosecutions in a manner which better respected the separation of powers. In particular, the Attorney-General had to be taken away from decisions in respect of prosecutions where there might be any "political" content; and
(iii) to observe of Article 5 of the Convention, which prohibited the making of decisions based upon the economic interest of the state party; and
(iv) to move away from the use of the supposedly vague term "corruptly" (and a jury's view of its meaning) as providing the basis for liability; and
(v) to put in place a régime that would give rise to effective, proportionate, and dissuasive sanctions not merely for individuals but also for companies, so as to satisfy Article 2 and 3 of the Convention.[46]

In order to accomplish all these tasks satisfactorily, it was necessary to deal with a range of substantive and procedural legal questions. Of the substantive issues, six were prominent. First, there is the "public/private" distinction. Since the very earliest times, the law of bribery has been informed by the sentiments that there are some jobs the holders of which should not receive anything from sources other than their employer.[47] There are others who might be allowed to benefit otherwise than from their employer.[48] Broadly speaking this division follows roughly the "public/private" boundary. The boundary has, however, become increasingly blurred since the Victorian and Edwardian legislation. It is reasonably clear that if judges, prosecutors, police officers, tax, or customs and immigration officials obtain benefits otherwise than from the employer

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[44] *See id.* at 7 (citing Organisation for Economic Co-operation and Development, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions art. 1, Dec. 17, 1997, S. TREATY DOC. NO. 105-43 cmt. [hereinafter OECD Convention]).

[45] This is what the OECD is for. *See* Carr & Outhwaite, *supra* note 43, at 4.

[46] *See generally* OECD Convention, *supra* note 44.

[47] *See* 3 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 250 (1883) (quoting 8 Rich. 2, c. 3 (1384) (Eng.)).

[48] An obvious example is those occupations that may attract gratuities.

something needs to be explained.[49] What of people working in housing associations, or even universities? This needed to be considered afresh. Second, there was the question of the mental state. English law had adopted as the test for liability the flexible term "corruptly."[50] This was a mechanism by which to allow juries to differentiate between those advantages, secured by people in the appropriate relationships acceptance of which was criminal, and those which were not. Third, if there was to be a departure from the use of "corruptly," which covered a range of issues, not simply of mental states, then those issues would have to be dealt with otherwise than by mental states. These include the difficult questions surrounding "normal business practice" and business entertaining, and the possibility of a defence of *de minimis*.[51] Fourth, the national security exception had to be addressed. One of the methods of the security services when working abroad is to bribe local officials.[52] The decision to bring the security services under a legal framework raises questions as to how this particular area of their work is dealt with. Fifth, there are local agents. Under the OECD Convention as introduced, there was a loophole for wholly owned local subsidiaries through which bribes were passed.[53] This needed to be plugged. Sixth, there was the question of "facilitation payments." It was generally perceived to be a problem under the FCPA that facilitation payments were not covered and that they should be, perhaps with an explicit and controlled prosecutorial discretion not to proceed in trivial cases.[54]

There were also two procedural issues to be dealt with. First, if Members of Parliament were to be brought within the ambit of the law, in particular taking payments to ask Parliamentary Questions or even to move motions, then, it was argued, something had to be done to deal with the relations between the courts

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[49] R v. Wellburn, (1979) 69 Crim. App. 254 at 265 (Eng. & Wales).

[50] *See* Cooper v. Slade, (1858) 10 Eng. Rep. 1488 (H.L.) 1499 (appeal taken from Eng.).

[51] *See generally* LAW COMM'N, REFORMING BRIBERY, 2008, H.C. 928 (U.K.) [hereinafter LAW COMM'N, REFORMING BRIBERY], *available at* http://lawcommission.justice.gov.uk/docs/lc313_Reforming_Bribery.pdf; LAW COMM'N, REFORMING BRIBERY: A CONSULTATION PAPER, No. 185 (2007) (U.K.) [hereinafter LAW COMM'N CONSULTATION PAPER 185], *available at* http://lawcommission.justice.gov.uk/docs/cp185_Reforming_Bribery_consultation.pdf; LAW COMM'N, LEGISLATING THE CRIMINAL CODE: CORRUPTION, 1998, H.C. 524 (U.K.) [hereinafter LAW COMM'N, CORRUPTION], *available at* http://lawcommission.justice.gov.uk/docs/lc248_Legislating_the_Criminal_Code_Corruption.pdf; LAW COMM'N, LEGISLATING THE CRIMINAL CODE: CORRUPTION: A CONSULTATION PAPER, No. 145 (1997) (U.K.), *available at* http://www.bailii.org/ew/other/EWLC/1997 /c145.pdf.

[52] *See* Jeremy Horder, *On Her Majesty's Commercial Service: Bribery, Public Officials and the UK Intelligence Services*, 74 M.L.R. 911, 911–12, 918–19 (2011).

[53] THE OECD CONVENTION ON BRIBERY: A COMMENTARY 129–36 (Mark Pieth, Lucinda A. Low & Peter J. Cullen eds., 2007).

[54] *See* Jon Jordan, *The OECD's Call for an End to "Corrosive" Facilitation Payments and the International Focus on the Facilitation Payments Exception Under the Foreign Corrupt Practices Act*, 13 U. PA. J. BUS. L. 881, 896–98 (2011).

and Parliament and the admissibility of Hansard (the Parliamentary record) in evidence.[55] There were those who asserted that some amendment would be necessary to the Parliamentary privilege provision of the Bill of Rights 1689.[56] Second, consents to prosecutions would have to be taken out of the hands of the Attorney-General.[57]

IV. THE REFORM SAGA

The then (Blair) government used the events of September 2001 to apply a sticking plaster to the law of bribery. In the legislation passed immediately upon the attacks on the United States, it amended the territorial scope of the law of bribery, supposedly to go some way towards bringing the law into compliance with the OECD Convention.[58] At the time, it also made clear that the 2001 Act was not intended to be a substitute for thoroughgoing reform.[59] There followed a series of attempts at law reform which are extraordinary in the level of attention given over a sustained period to a relatively small area of law and the range of options canvassed.[60] In 2003, following recommendations from the Law Commission, the Government introduced a draft Corruption Bill, for consideration by a Joint Parliamentary Committee.[61] The Bill was based largely

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[55] JOINT COMM. ON DRAFT CORRUPTION BILL, DRAFT CORRUPTION BILL: REPORT AND EVIDENCE, 2002-3, H.C. 705, H.L. Paper 157, paras. 107, 118 (U.K.) [hereinafter DRAFT CORRUPTION BILL], *available at* http://www.publications.parliament.uk/pa/jt200203/jtselect/jtcorr/157/157.pdf.

[56] Bill of Rights 1688, 1 W. & M. 2, c. 2 (Eng. & Wales). This was much discussed in the DRAFT CORRUPTION BILL, *supra* note 55, at paras. 101–29.

[57] DRAFT CORRUPTION BILL, *supra* note 55, at paras. 136–39.

[58] *See* Anti-terrorism, Crime and Security Act 2001, c. 24, §§ 108–10 (U.K.).

[59] 629 PARL. DEB., H.L. (5th ser.) (2001) 287–89 (U.K.).

[60] *See generally, e.g.*, HOME OFFICE, CORRUPTION: DRAFT LEGISLATION, 2003, Cm. 5777 (U.K.) [hereinafter HOME OFFICE, DRAFT CORRUPTION LEGISLATION], *available at* http://www.archive2.official-documents.co.uk/document/cm57/5777/5777.pdf; DRAFT CORRUPTION BILL, *supra* note 55; SEC'Y OF STATE FOR THE HOME DEP'T, DRAFT CORRUPTION BILL: THE GOVERNMENT REPLY TO THE REPORT FROM THE JOINT COMMITTEE ON THE DRAFT CORRUPTION BILL SESSION 2002-03 HL PAPER 157, HC 705, 2003, Cm. 6086 (U.K.) [hereinafter HOME SEC'Y, GOVERNMENT REPLY], *available at* http://www.archive2.official-documents.co.uk/document/cm60/6086/6086.pdf; HOME OFFICE, BRIBERY: REFORM OF THE PREVENTION OF CORRUPTION ACTS AND SFO POWERS IN CASES OF BRIBERY OF FOREIGN OFFICIALS: A CONSULTATION PAPER (2005) (U.K.) [hereinafter HOME OFFICE, BRIBERY CONSULTATION PAPER], *available at* http://www.nio.gov.uk/bribery_consultation_paper.pdf; LAW COMM'N CONSULTATION PAPER 185, *supra* note 51; LAW COMM'N, REFORMING BRIBERY, *supra* note 51; JOINT COMM. ON THE DRAFT BRIBERY BILL, DRAFT BRIBERY BILL: FIRST REPORT OF SESSION 2008-09, 2008-9, H.L. 115-I, H.C. 430-I (U.K.) [hereinafter DRAFT BRIBERY BILL, vol. I], *available at* http://www.publications.parliament.uk/pa/jt200809/jtselect/jtbribe/115/115i.pdf.

[61] *See generally* HOME OFFICE, DRAFT CORRUPTION LEGISLATION, *supra* note 60. The purpose of the procedure of submitting a *draft* Bill to a Parliamentary Committee for

upon the Law Commission's 1998 Report.[62] The Bill followed the previous legislation and relied upon the principal–agent nexus as providing the legal precondition to bribery.[63] This constituted the "principal" (widely understood, usually the employer) as the "victim" of bribery.[64] The view that the principal was a victim, combined with the general precept[65] that in all but the most serious offences against the person, the consent of the victim was a complete defence to a criminal charge, was the blind alley down which the law went.[66] Consequently, the Law Commission's draft Bill had included a consent defence.[67] The Joint Parliamentary Committee considering the Bill was chaired by Lord Slynn of Hadley.[68] The Draft Bill procedure is one established to enable a Parliamentary Committee to consider a range of possible solutions to a problem, rather than being constrained by the stark options of rejecting the Bill outright (at Second Reading) or making textual amendments (at Committee stage).[69]

Various aspects of the Bill were subject to scrutiny. In particular, a great deal of time was spent on the proposal to amend the Parliamentary privilege provisions of the Bill of Rights 1689, only so far as concerned the new proposed bribery offence, and the continued concentration of the law upon the principal–agent nexus.[70] As to the OECD Convention, the Committee heard evidence from Mark Pieth, the widely influential chair of the OECD working Group on Bribery.[71]

In its report, the Joint Committee gave only a qualified assent to the Bill.[72] So far as concerned the principal–agent nexus, Lord Slynn told the House of Lords that:

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scrutiny is to avoid the stark choice between opposition *tout court*, typically at Second Reading, and textual amendment, neither of which allow Parliamentarians the scope to explore alternative solutions to one proposed in a substantive Bill. *See Draft Bills*, WWW.PARLIAMENT.UK, http://www.parliament.uk/about/how/laws/draft/ (last visited Sept. 6, 2012).

[62] *See generally* LAW COMM'N, CORRUPTION, *supra* note 51.

[63] Peter Alldridge, *Reforming Bribery: Law Commission Consultation Paper 185(1) Bribery Reform and the Law Commission—Again*, 2008 Crim. L. Rev. 671, 671–89.

[64] 663 PARL. DEB., H.L. (5th ser.) (2004) 1549 (U.K.).

[65] At that time there was still a project for a Criminal Code embodying (much debated) general principles. The project was subsequently abandoned. LAW COMM'N, TENTH PROGRAMME OF LAW REFORM, 2008, H.C. 605, para. 3.3 (U.K.), *available at* http://lawcommission.justice.gov.uk/docs/lc311_10th_Programme.pdf.

[66] R v. Brown, [1994] 1 A.C. 212 (H.L.) 213 (appeal taken from Eng. & Wales) lays down some limitations that are not relevant here.

[67] HOME OFFICE, DRAFT CORRUPTION LEGISLATION, *supra* note 60, at para. 7.

[68] *See generally* DRAFT CORRUPTION BILL, *supra* note 55.

[69] *Draft Bills*, *supra* note 61.

[70] *See generally* DRAFT CORRUPTION BILL, *supra* note 55.

[71] *Id.* at 69–71, 98.

[72] 663 PARL. DEB., H.L. (5th ser.) (2004) 1549 (U.K.).

> The committee states, with conviction, that the agent/principal test is not the appropriate one. We invite the Home Secretary perhaps to step back from the Bill and to reconsider how a criminal offence can be defined which is wide enough, meeting the essentials of corruption and in language which is intelligible rather than to hold on so resolutely to the agent/principal test.[73]

The Committee's report included an annex setting out what an alternative version of the crime of bribery might look like if, instead of from the principal–agent nexus the crime had been derived, as in many cases, from notions of competition.[74] The government published a holding response.[75] It might have been possible to proceed with that Bill, but the reception was later described by Lord Goldsmith thus: "[W]hen the Bill was produced, it was heavily criticised by the Joint Committee that gave it its pre-legislative scrutiny. The Joint Committee recommended an entirely different basis for the scheme of offences, which the Government then found unworkable."[76]

In July 2004, the OECD conducted its second site visit to the United Kingdom.[77] Site visits and subsequent recommendations under the aegis of the Working Group on Bribery are the principal mechanism whereby the "soft law" obligations set out in the Convention are enforced.[78] The procedure is that the delegation from two other OECD nations—in the case of the United Kingdom, from France and Canada—takes evidence in writing and by interviewing witnesses, including police, prosecutors, legal practitioners, and academic experts.[79] At this time, the Draft Bill had only recently been "approved" by the Joint Committee.[80] The OECD delegation was keen to see legislative progress, but at that point their patience was not yet exhausted. In 2005 the Home Office published a further consultation paper, displaying rather less urgency.[81]

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[73] *Id.* at 1553.

[74] DRAFT CORRUPTION BILL, *supra* note 55, at 80–84 (including note by Peter Alldridge, specialist adviser, on locating the harm in bribery and corruption—an alternative approach).

[75] *See generally* HOME SEC'Y, GOVERNMENT REPLY, *supra* note 60.

[76] 690 PARL. DEB., H.L. (5th ser.) (2007) 962 (U.K.).

[77] ORG. FOR ECON. CO-OPERATION & DEV., UNITED KINGDOM: PHASE 2: REPORT ON THE APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 1997 RECOMMENDATION ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS, paras. 1–2 (Mar. 17, 2005) [hereinafter OECD PHASE 2], *available at* http://www.oecd.org/investment/briberyininternationalbusiness/anti-briberyconvention/34599062.pdf.

[78] *See generally* OECD Convention, *supra* note 44.

[79] THE OECD CONVENTION ON BRIBERY: A COMMENTARY 459–62 (Mark Pieth, Lucinda A. Low & Peter J. Cullen eds., 2007).

[80] *See generally* HOME SEC'Y, GOVERNMENT REPLY, *supra* note 60.

[81] *See generally* HOME OFFICE, BRIBERY CONSULTATION PAPER, *supra* note 60.

V. AL-YAMAMAH

Although the full extent of the deal has never been fully clarified, the Al-Yamamah arms deal (really a series of deals dating from the 1980s) was described as "the biggest sale ever, of anything, to anyone," "staggering both by its sheer size" and complexity.[82] There were, from the outset, allegations that the contracts were a result of bribes to members of the Saudi royal family and government officials.[83] The Serious Fraud Office was reported to be considering opening an investigation into an alleged £20 million slush fund.[84] In October 2004, the BBC's Money Programme broadcast an in-depth story, including allegations in interviews with Edward Cunningham and other former insiders, about the way BAE Systems allegedly paid bribes to Prince Turki bin Nasser and ran a secret £60 million slush fund in relation to the Al-Yamamah deal.[85] Most of the money was alleged to have been spent through a front company called Robert Lee International Limited.[86] In June 2007 the BBC's investigative programme *Panorama* alleged that BAE Systems "paid hundreds of millions of pounds to the ex-Saudi ambassador to the US, Prince Bandar bin Sultan."[87]

In late 2005, BAE refused to comply with compulsory production notices for details of its secret offshore payments to the Middle East.[88] The terms of the investigation referred to a prosecution under Part 12 of the Anti-Terrorism, Crime and Security Act 2001.[89] At the end of November 2006, when the long-

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[82] David White & Robert Mauthner, *Britain's Arms Sale of the Century*, FIN. TIMES, July 9, 1988, at 7.

[83] *See, e.g.*, David Leigh, Rob Evans & David Gow, *Fraud Office Looks Again at BAE: SFO Considers Inquiry into BAE Slush Fund Claims*, GUARDIAN (Sept. 12, 2003, 9:52 AM), http://www.guardian.co.uk/uk/2003/sep/12/freedomofinformation.saudiarabia/print.

[84] *Id.*

[85] Michael Robinson, *BBC Lifts the Lid on Secret BAE Slush Fund*, BBC NEWS (Oct. 5, 2004), http://news.bbc.co.uk/go/pr/fr/-/2/hi/business/3712770.stm.

[86] David Leigh & Rob Evans, *Arms Firm's £60M Slush Fund*, GUARDIAN (May 4, 2004, 4:34 AM), http://www.guardian.co.uk/uk/2004/may/04/politics.saudiarabia/print.

[87] *Saudi Prince 'Received Arms Cash'*, BBC NEWS (June 7, 2007), http://news.bbc.co.uk/1/hi/6728773.stm.

[88] David Leigh & Rob Evans, *Parliamentary Auditor Hampers Police Inquiry into Arms Deal*, GUARDIAN (July 25, 2006), http://www.guardian.co.uk/uk/2006/jul/25/houseofcommons.armstrade.

[89] This may not have been correct. The offences were alleged to have been committed in the 1980s. The Anti-terrorism, Crime and Security Act came into force in February 2002. Anti-terrorism, Crime and Security Act 2001 (Commencement No. 3) Order 2002, 2002, S.I. 228 (Eng., Wales, & N. Ir.), *available at* http://www.legislation.gov.uk/uksi/2002/228/pdfs/uksi_20020228_en.pdf. The jurisdictional basis would have been the common law of criminal jurisdiction. *See* R v. Smith, [2004] EWCA (Crim) 631, [47], [64]–[66], [2004] Q.B. 1418, 1431, 1437–39 (overruling R v. Manning, [1999] Q.B. 980 (Eng.)). This distinction would have been significant because the presumption of corruption, under Prevention of Corruption Act 1916, 6 & 7 Geo. 5, c. 64, § 2 (U.K.), *available at*

running investigation was threatening to go on for two more years, BAE Systems was negotiating a multi-billion pound sale of Eurofighter Typhoons to Saudi Arabia.[90] Significant numbers of jobs were at stake.[91] On December 1, 2006, the *Daily Telegraph* ran a front page headline suggesting that Saudi Arabia had given the United Kingdom ten days to suspend the Serious Fraud Office investigation into BAE/Saudi Arabian transactions, failing which it would take the deal to France.[92] This threat was played down in other quarters. Robert Wardle, head of the SFO, also stated (in a later High Court challenge) that at that time he had received a direct threat of a cessation of counterterrorist cooperation from the Saudi Arabian ambassador to the United Kingdom in the first of three meetings held to assess the seriousness of the threat.[93] Wardle was left with the clear impression that "British lives on British streets were at risk."[94]

After the matter had gone to the then Attorney-General and Prime Minister (Lord Goldsmith and Tony Blair, respectively) on December 13, 2006, the Director of the SFO wrote to the Attorney-General to inform him that the SFO was dropping the investigation and would not be looking into the Swiss bank accounts, stating that its continuation risked "real and imminent damage to the U.K.'s national and international security and would endanger the lives of U.K. citizens and service personnel."[95] Lord Goldsmith QC defended the decision to end the enquiry in a short Parliamentary statement:

> The Director of the Serious Fraud Office has decided to discontinue the investigation into the affairs of [BAE Systems PLC] as far as they relate to the Al Yamamah defence contract. This decision has been taken following representations that have been made both to the Attorney General and the Director concerning the need to safeguard national and international security. It has been necessary to balance the need to maintain the rule of law against the

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http://www.legislation.gov.uk/ukpga/1916/64/pdfs/ukpga_19160064_en.pdf, was removed by § 110 of the 2001 Act only so far as concerned prosecutions made possible by the statutorily extended jurisdiction. Anti-terrorism, Crime and Security Act 2001, c. 24, § 110 (U.K.), *available at* http://www.legislation.gov.uk/ukpga/2001/24/pdfs/ukpga_20010024_en.pdf.

[90] *Grand Salaam! Eurofighter Flies Off with Saudi Contract*, DEF. INDUSTRY DAILY (Apr. 8, 2012, 3:32 PM), http://www.defenseindustrydaily.com/the-2006-saudi-shopping-spree-eurofighter-flying-off-with-10b-saudi-contract-updated-01669/.

[91] Christopher Hope, *Halt Inquiry or We Cancel Eurofighters*, TELEGRAPH (Dec. 1, 2006, 12:01 AM), http://www.telegraph.co.uk/news/uknews/1535683/Halt-inquiry-or-we-cancel-Eurofighters.html. *See also BAE Admits Saudi Eurofighter Fear*, BBC NEWS (Nov. 28, 2006), http://news.bbc.co.uk/2/hi/business/6190998.stm.

[92] Hope, *supra* note 92.

[93] R v. Dir. of the Serious Fraud Office, [2008] EWHC (Admin) 714, [83]–[87], [2009] 1 A.C. 756, 785.

[94] R v. Dir. of the Serious Fraud Office, [2008] UKHL 60, [14], [2009] 1 A.C. 756, 835 (appeal taken from Eng. & Wales).

[95] *Dir. of the SFO*, [2008] EWHC (Admin) 714 at [36], [2009] 1 A.C. at 775.

> wider public interest. No weight has been given to commercial interests or to the national economic interest.[96]

Lord Goldsmith's principal objective in Parliament seems to have been to forestall any claim that the Government had acted in breach of Article 5 of the OECD Convention by making a decision based upon the economic interest of the United Kingdom.[97] In a contemporaneous interview with the *Financial Times*, however, he was more forthcoming and stated that the principal's consent was the major obstacle to the prosecution:

> AG. [. . .] I very carefully considered this case. I talked it through over a matter of days with the SFO investigators and their lawyers. I had independent legal advice from a senior experienced criminal QC. My judgement was that this case at the end of the day wouldn't have led to a successful prosecution.
>
> INTERVIEWER. Can I just take you back . . .
>
> AG. Let me just finish the point here. I just want to make this clear because I know the SFO have said something different. I entirely respect the SFO. They recognise they weren't going to prosecute for anything pre-2002. A lot of the stuff that's been in the newspapers and the comment has been about "this payment has been made here, that payment has been made there". People saying, "what about this invoice and that invoice?" It's all pre-2002.
>
> The SFO accepted that they wouldn't prosecute in relation to pre-2002 because that's when we changed the law. They said they would need another 18 months to investigate. They were clear that there remained, as they put it, issues to determine. My judgement was there were obstacles they would not overcome.
>
> INTERVIEWER. What were those obstacles?
>
> AG. The principal obstacle, BAE were asserting that the payments they were making had been authorised at the highest level.
>
> INTERVIEWER. The highest level of the Saudi monarchy?
>
> AG. Yes, the Saudis. I am using that in a general sense . . . [pauses] . . . Normally to produce a corruption case you normally will call somebody senior from the company to say, "good heavens, I never knew the marketing director was taking used £50 notes, or getting a free subscription to the golf club, or having his roof done", or whatever it may be. That's the first person you call. How were the SFO going to deal with that in this case? Were they going to be

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[96] 687 PARL. DEB., H.L. (5th ser.) (2006) 1711–12 (U.K.) (citing Press Release, Serious Fraud Office, BAE Systems Plc/Saudi Arabia (Dec. 14, 2006)), *available at* http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2006/bae-systems-plcsaudi-arabia.aspx).

[97] OECD Convention, *supra* note 44, at art. 5. Article 5 states:

> Investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party. They shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved.

Id.

> able to call someone from Saudi to say this wasn't authorised? That's an insuperable problem.[98]

That is, in 2007 Lord Goldsmith argued, as had the Law Commission and the 2003 Draft Bill, that the consent of the principal was a defence to a charge of bribery.[99] So far as concerned the Al-Yamamah deal, that implied that, had someone within the Saudi government (the King?) consented to Prince Bandar accepting the money, there would have been no offence. In fact, that had never been the law. When the Prevention of Corruption Acts were put in place, it had not been contemplated remotely that consent could provide a defence. Analytical wires had become crossed in the late 1990s between those who wanted a criminal code covering all crimes with general defences, including a general defence of consent of the "victim," and those who saw the principal–agent relationship as a necessary precondition to bribery and the crime of bribery as an attack on that relationship, and this provided Lord Goldsmith with a colourable justification for the decision. A subsequent attempt to secure judicial review of the decision to cease the investigation failed.[100] In 2010, BAE Systems Plc pleaded guilty in the U.S. District Court for the District of Columbia to conspiring to defraud the United States by impairing and impeding its lawful functions, to making false statements about its Foreign Corrupt Practices Act compliance program, and to violating the Arms Export Control Act (AECA) and International Traffic in Arms Regulations (ITAR).[101]

In April 2008 the OECD conducted a further site visit (the Phase 2bis examination).[102] This occurred in the wake of the Al-Yamamah decision. By

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[98] ORG. FOR ECON. CO-OPERATION & DEV., UNITED KINGDOM: PHASE 2*BIS*: REPORT ON THE APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 1997 RECOMMENDATION ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS, para. 38 (Oct. 16, 2008) [hereinafter OECD, PHASE 2*BIS*] (alteration in original) (quoting a January 2007 interview of the Attorney-General), *available at* http://www.oecd.org/investment/briberyininternationalbusiness/anti-briberyconvention/41515077.pdf.

[99] *Id.*

[100] *See* R v. Dir. of the Serious Fraud Office, [2008] UKHL 60, [83]–[87], [2009] 1 A.C. 756, 784–85 (appeal taken from Eng. & Wales), in which the House of Lords expressed strong sympathy with Wardle's position. *See also* Roman Tomasic, *The Financial Crisis and the Haphazard Pursuit of Financial Crime*, 18 J. FIN. CRIME 7, 10 (2011).

[101] Press Release, U.S. Dep't of Justice, BAE Systems PLC Pleads Guilty and Ordered to Pay $400 Million Criminal Fine (Mar. 1, 2010), *available at* http://www.justice.gov/opa/pr/2010/ March/10-crm-209.html.

[102] OECD, PHASE 2*BIS*, *supra* note 98, at 4.

this stage, the OECD had lost patience with the United Kingdom completely. The tone of the questioning was far more aggressive than in 2004, and the ensuing report was seriously condemnatory.[103] One of the matters upon which the questioning concentrated was the Attorney-General's statement made to the *Financial Times* and the question whether, as Lord Goldsmith seemed to have claimed, consent of the principal could constitute a defence to a charge of bribery in the Al-Yamamah case. The relevant part of the OECD report is as follows:

> At the on-site visit, several panellists disagreed with this view and did not see principal consent as a valid defence. As noted in the UK's submissions quoted above, the principal consent defence arises only for an offence under the 1906 Act. Offences under the common law and the 1889 Act (as amended) do not rely on the agent/principal concept and should thus be unaffected by principal consent. But regardless of the defence's status or scope in UK law, the Al-Yamamah case shows that principal consent at a minimum interferes with the investigation and prosecution of foreign bribery cases in practice.[104]

The U.K. government finally saw that something needed to be done as a matter of urgency. The Law Commission had already assembled in March 2007 a Bribery Advisory Group, and it then produced a consultation paper (which adhered to its previous position that bribery is a crime against loyalty).[105] That paper included an appendix which was a response to the position that had been outlined in the paper appended to the Report of the Slynn Committee.[106] The burden of the Commission's response was that there were many offences that covered anticompetitive behaviour and that bribery ought not to be conceived as a further one.[107] The Commission therefore recommended a version of the bribery offence that turned upon the existence, among other things, of prior legal duties (to act impartially, to act in good faith, or to be in a position of trust).[108] The obvious objection to this proposal was that some of those duties could only be found in contracts, usually contracts of employment; since the duties were set out in contracts, they could be altered or removed by contracts; and where they were altered or removed by contracts, this would have the effect of creating a defence of the consent of the principal, which would have meant in turn that the proposed legislation would not have been compliant to the

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[103] *Id.* at para. 79. ("The examining team . . . consider[s] that there is a lack of political will to achieve compliance with the Convention.").

[104] *Id.* at para. 39.

[105] LAW COMM'N CONSULTATION PAPER 185, *supra* note 51, at para. 4.5(4).

[106] *Id.* at paras. D.1–D.65 (Appendix D: The Harm of Bribery: Individual or Market-Based).

[107] *Id.* at para. 11.79.

[108] *Id.* at paras. 5.47–5.49.

Convention. This objection was made and taken.[109] The Law Commission then made substantial changes to the proposal floated in the Consultation Paper.[110] In particular, the Commission accepted (finally, but not expressly) that bribery is a crime directed against anticompetitive behaviour and replaced the idea of "duty" with one of reasonable expectation, thereby avoiding the problem, at the expense of a certain extra complication of the terms of the contract of employment.[111]

In 2009 the Government introduced a further bill, along the lines proposed by the Law Commission.[112] Probably mistakenly, it was introduced again under the Draft Bill procedure. Since by the time there was no real chance of amendments other than textual ones being suggested, it could have been introduced as a regular bill. On this occasion the principal questions arising surrounded the introduction of a specific offence to deal with the bribery of overseas public officials (Section 6) and the consequences of the offence, designed to bring companies within the scope of the Act by making companies vicariously liable for the actions of their employees in bribing, unless they can establish that they had in place appropriate procedures to prevent bribery by their employees.[113] Consent to prosecutions was now in the hands of the relevant directors (usually the Director of Public Prosecutions or the Director of the Serious Fraud Office, not the Attorney-General).[114] The Draft Bill, a far better one than the 2003 one, was endorsed in all major facets. A full bill was then introduced and was enacted in the last days of the Blair government.[115]

VI. THE BRIBERY ACT 2010[116]

The Bribery Act 2010 contains new substantive offences of active and passive bribery, defined no longer by reference to the adverb "corruptly" but by intention to affect the way in which somebody acts who is expected to act in good faith or impartially or who is in a position of trust.[117] It contains no

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[109] Alldridge, *Reforming Bribery*, *supra* note 62, at 671–89; *see also* LAW COMM'N, REFORMING BRIBERY, *supra* note 51, at para. 3.91.

[110] *See generally* LAW COMM'N, REFORMING BRIBERY, *supra* note 51.

[111] *Id.* at para. 3.88.

[112] DRAFT BRIBERY BILL, vol. I , *supra* note 60, at para. 12.

[113] *Id.*

[114] *Id.* at para. 165.

[115] Bribery Act 2010, c. 23 (U.K.).

[116] For a recent direct comparison with the FCPA, see generally Nicholas Cropp, *The Bribery Act 2010: (4) A Comparison with the Foreign Corrupt Practices Act: Nuance v Nous*, 2011 CRIM. L. REV. 122.

[117] There are full commentaries upon the Act in Issue 2 of Criminal Law Review 2011, a special issue dedicated to the new Bribery Act 2010. See also generally, in due course, Modern Bribery Law (Jeremy Horder & Peter Alldridge eds.) (Aug. 23, 2012) (unpublished manuscript) (on file with author).

explicit public/private distinction.[118] The Act put in place a specific overseas bribery offence[119] to deal with overseas officials and a further new offence committed by corporations employing persons who bribe unless they have adequate procedures in place.[120] It involves an extended jurisdiction.[121] Consent to prosecution is for the relevant director.[122] Shortly after it came into force, the Bribery Act was described in a blog as "the ballyhooed U.K. Bribery Act, the caffeinated younger sibling of the FCPA."[123]

So far as concerned the immediate general objective of compliance with the Convention, the site visit in November 2011, at which the mood was significantly improved from the 2008 site visit, led to a report, which, by giving the United Kingdom a clean bill of health, clearly regarded the United Kingdom as part of the international effort to combat international corruption.[124] Some major remaining deficiencies were emphasised. They were the resourcing of the SFO, and the difficulties and the use of confidentiality clauses in agreements—usually agreements concerning a civil recovery order.[125] Clarification was also sought on the significance of "reasonable and proportionate" hospitality and promotional expenditures and the distinction between provision of advice and self-reports.[126] So far as concerns the United Kingdom, this was an entirely satisfactory outcome. The remainder of this Article will involve an exploration of some of the "adequate procedures" defences introduced by the Act and, then, issues relating to enforcement.

VII. CORPORATE LIABILITY AND THE SECTION 7 OFFENCE

Under the OECD Convention, the U.K. government is obliged to put in place a régime on the bribery of overseas officials that gives rise to liability for

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[118] Bribery Act 2010, c. 23, §§ 1–2 (U.K.).

[119] *Id.* § 6.

[120] *Id.* § 7.

[121] *Id.* § 12.

[122] Either the Director of Public Prosecutions or the Director of the Serious Fraud Office. *Id.* § 10.

[123] Joe Palazzolo, *Law Blog Job of Week: SFO Director*, WALL ST. J.L. BLOG (Oct. 25, 2011, 1:15 PM), http://blogs.wsj.com/law/2011/10/25/law-blog-job-of-week-sfo-director/. And some of the ballyhoo has been seen in the U.S. journals. *See generally, e.g.*, F. Joseph Warin, Charles Falconer & Michael S. Diamant, *The British Are Coming!: Britain Changes Its Law on Foreign Bribery and Joins the International Fight Against Corruption*, 46 TEX. INT'L L.J. 1 (2010).

[124] ORG. FOR ECON. CO-OPERATION & DEV., PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN THE UNITED KINGDOM 5 (Mar. 16, 2012) [hereinafter OECD, PHASE 3], *available at* http://www.oecd.org/investment/briberyininternational business/anti-briberyconvention/50026751.pdf.

[125] *Id.*

[126] *Id.*

corporations, and that liability must be more than a theoretical possibility.[127] Corporations must be subject to "effective, proportionate and dissuasive criminal penalties."[128] Even after the enactment of the Bribery Act 2010, compliance with the Convention could not be assured solely by relying on the standard English law doctrine that corporations are subject to criminal liability. It would not have been plausible to argue that the existence of new bribery offences under sections 1, 2, and 6 of the Bribery Act 2010, applying, as they do, to corporations, without more, satisfies the requirement of the Convention to have in place "effective, proportionate and dissuasive noncriminal sanctions."[129] The respondeat superior doctrine does not apply in English criminal law. The alternative and much narrower "identification doctrine" makes the conviction of a company dependent upon it being able to be established by the prosecution that there was a single person, high up within the organisation, that could be convicted of the crime.[130] The effect of the identification doctrine has been that prosecutions against companies face significant and frequently insuperable obstacles.

Since 2008, three individuals (Dougall, Tobiasen, and Messent)[131] and two companies (Innospec and Mabey & Johnson)[132] have been convicted of foreign bribery. Two financial institutions (Aon and Willis) have been fined by their regulator for failure to adopt adequate corporate compliance measures to

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[127] OECD Convention, *supra* note 44, at art. 1, para. 1.

[128] *Id.* at art. 3, para. 1.

[129] *Id.* at art. 3, para. 2.

[130] *See* Tesco Supermarkets Ltd. v. Nattrass, [1972] A.C. 153 (H.L.) 174–75 (appeal taken from Eng. & Wales); *see also, e.g.*, Celia Wells, *Corporate Criminal Liability in England and Wales: Past, Present, and Future*, *in* CORPORATE CRIMINAL LIABILITY 91, 104 (Mark Pieth & Radha Ivory eds., 2011). A recent example of the application of this doctrine is *R v. St. Regis Paper Co.*, [2011] EWCA (Crim) 2527, [30], [2012] P.T.S.R. 871 [883]. The identification doctrine is the reason for the perceived necessity for the enactment of the Corporate Manslaughter and Corporate Homicide Act 2007, c. 19 (U.K.), *available at* http://www.legislation.gov.uk/ukpga/2007/19/pdfs/ukpga_20070019_en.pdf.

[131] R v. Dougall, [2010] EWCA (Crim) 1048, [26], *available at* http://www.bailii.org/ew/cases/EWCA/Crim/2010/1048.html; Rob Evans & Paul Lewis, *First Executive Convicted of Foreign Bribery Escapes Jail Term*, GUARDIAN (Sept. 26, 2008), http://www.guardian.co.uk/world/2008/sep/27/uganda.ukcrime; Press Release, Serious Fraud Office, Insurance Broker Jailed for Bribing Costa Rican Officials (Oct. 26, 2010), *available at* http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2010/insurance-broker-jailed-for-bribing-costa-rican-officials.aspx.

[132] *See generally* R v. Innospec Ltd., [2010] EW Misc (Crown) 7, *available at* http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/sentencing-remarks-thomas-lj-innospec.pdf.; David Leigh & Rob Evans, *British Firm Mabey and Johnson Convicted of Bribing Foreign Politicians*, GUARDIAN (Sept. 25, 2009, 12:50 PM), http://www.guardian.co.uk/business/2009/sep/25/mabey-johnson-foreign-bribery.

prevent bribery.[133] Foreign bribery investigations have led to sanctions against one company (BAE) for accounting-related misconduct,[134] and to civil recovery orders under proceeds of crime legislation against four companies (Balfour Beatty, DePuy International, Ltd., M.W. Kellogg, and Macmillan).[135]

The impediments in the law of corporate criminal liability meant that simply to enact the new bribery offences (that is, those under sections 1, 2, and 6 of Bribery Act 2010) would still have left the United Kingdom significantly short of complying with the Paris Convention. In order to comply with Articles 2 and 3, the United Kingdom had to do something to deal effectively with corporations bribing abroad. Driven by a rather belated keenness to comply with international obligations, arising in particular from the adverse international response to the Al-Yamamah affair, the Bribery Act 2010 put in place the following offence:

> **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.
>
> (3) For the purposes of this section, A bribes another person if, and only if, A—
>
> (a) is, or would be, guilty of an offence under section 1 or 6 (whether or not A has been prosecuted for such an offence), or
>
> (b) would be guilty of such an offence if section 12(2)(c) and (4) were omitted.
>
> (4) See section 8 for the meaning of a person associated with C and see section 9 for a duty on the Secretary of State to publish guidance.[136]

On the face of it, this offence does not create criminal liability for corporate bribing (which is what is required by the Convention).[137] The offence is unusual

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[133] Press Release, Fin. Servs. Authority, FSA Fines Willis Limited £6.895 Million for Anti-Bribery and Corruption Systems and Controls Failings (July 21, 2011), *available at* http://www.fsa.gov.uk/library/communication/pr/2011/066.shtml.

[134] R v. BAE Systems PLC, [2010] EW Misc (Crown) 16, [19], *available at* http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/r-v-bae-sentencing-remarks.pdf.

[135] And for details of the enforcement measures, see OECD, PHASE 3, *supra* note 124, at 72–74.

[136] Bribery Act 2010, c. 23, § 7 (U.K.).

[137] OECD Convention, *supra* note 44, at arts. 2, 3 & 7.

in terms of the general principles of criminal law. It is not, strictly speaking, a form of vicarious liability nor is it a substantive bribery offence. It does not replace or remove direct corporate liability for bribery. If anything, in analytical terms, it is an extension of the general law of complicity. If it can be proved that someone representing the corporation as its "directing mind" bribes or receives a bribe or encourages or assists someone else to do so, then it may be appropriate to charge the organisation with a section 1 or 6 offence as an alternative or in addition to any offence under section 7 (or a section 2 offence if the offence relates to being bribed).

The new offence is of the "failure-to-prevent" type. It does not require knowledge, intention, or recklessness.[138] The danger that is traditionally ascribed to such offences is that they can generate liability without fault at all, with the usual dangers of unwarranted prosecutions and wide prosecutorial discretions.[139] Liability for omissions is usually only thought of as being justified exceptionally, when there is reason to suppose the person made liable should act, and then generally because of some sort of previous action of that actor (starting the fire)[140] or the actor's status. Liability without a conscious mental state is justifiable in circumstances when it is legitimate to say that the actor ought to have known.[141] The point of framing the prohibition as it is in section 7 is to place a clear onus upon the employer to do something to ensure that employees do not engage in the proscribed activity.

Section 7 does not require a prosecution for the predicate offences under section 1 or 6 to take place, but there needs to be sufficient evidence to prove against the section 7 defendant, to the normal criminal standard, the commission of such an offence.[142] The jurisdiction for this offence is wide.[143] Provided that the commercial organisation is incorporated or formed in the United Kingdom, or that the organisation carries out its business or part of its business in the United Kingdom, courts in the U.K. will have jurisdiction, irrespective of where in the world the acts or omissions which form part of the offence take place.[144]

Crucially, a defence is provided where the commercial organisation can show it had adequate procedures in place to prevent persons associated with it from bribing.[145] This means that any organisation that does have in place adequate procedures will avoid liability. The standard of proof the defendant will need to satisfy to have the defence is the balance of probabilities.[146]

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[138] Bribery Act 2010, c. 23, § 7 (U.K.).

[139] DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW 26–27 (2008).

[140] R v. Miller, [1983] 2 A.C. 161 (H.L.) 175–76 (appeal taken from Eng. & Wales).

[141] DAVID ORMEROD, SMITH AND HOGAN'S CRIMINAL LAW 146 (13th ed. 2011).

[142] This follows from the absence of a contrary provision.

[143] Bribery Act 2010, c. 23, § 12 (U.K.).

[144] *Id.*

[145] *Id.* § 7(2).

[146] *Id.* § 7.

Whether the procedures are adequate will ultimately be a matter for the courts to decide on a case-by-case basis.

As stated in the Code for Crown Prosecutors,[147] prosecutors must consider what the defence case may be and how it is likely to affect the prospects of conviction during the evidential stage of the decision whether or not to prosecute.[148] Clearly, the defence under section 7(2) of adequate procedures is likely to be relevant when considering whether there is sufficient evidence to provide a realistic prospect of conviction. Prosecutors must look carefully at all the circumstances in which the alleged bribe occurred, including the adequacy of any antibribery procedures. A single instance of bribery does not necessarily mean that an organisation's procedures are inadequate. For example, the actions of an agent or an employee may be wilfully contrary to very robust corporate contractual requirements, instructions, or guidance. In such a case it is appropriate that the blame fall on the individual.

An issue which is common to all areas of legal discourse is how much guidance need the law give to its subjects as to how they should behave in order to avoid falling foul of it. At its most basic the doctrine of the rule of law states that law must be expressed with sufficient precision and clarity that people should be able to order their affairs according to accurate predictions of the consequences.[149] In criminal law, this is expressed by the maxim *nulla poena sine lege*.[150] There is a subsidiary and debateable issue, not directly in point here, whether this doctrine applies equally to procedural and evidential requirements.[151] Other areas of law have developed, whether by courts or legislation, "anti-avoidance" mechanisms, for instance to strike down shams or otherwise to look to the substance and not the form of transactions, to look at the commercial reality, or to deploy doctrines of "abuse of rights,"[152] based on considerations of good or bad faith or otherwise.[153] English criminal law has only recently (and very dubiously) embraced the doctrine that ordering one's

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[147] CROWN PROSECUTION SERV., THE CODE FOR CROWN PROSECUTORS § 4.5 (2010), *available at* http://www.cps.gov.uk/publications/docs/code2010english.pdf.

[148] The decision is usually said to have two stages—the evidential and the public interest. The evidential test is sometimes characterised in numerical terms (e.g., Is there a 51% chance of a conviction?).

[149] H.L.A. HART, *Prolegomenon to the Principles of Punishment*, *in* PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 1, 23 (1968).

[150] Jerome Hall, Nulla Poena Sine Lege, 47 YALE L.J. 165, 165 (1937).

[151] Michael Bohlander, *Retrospective Reductions in the Severity of Substantive Criminal Law: The Lex Mitior Principle and the Impact of* Scoppola v Italy No. 2, 2011 CRIM. L. REV. 627, 628.

[152] Joseph M. Perillo, *Abuse of Rights: A Pervasive Legal Concept*, 27 PAC. L.J. 37, 95 (1995).

[153] *See generally* Samuel W. Buell, *Good Faith and Law Evasion*, 58 UCLA L. REV. 611 (2011).

behaviour so as best to avoid liability can itself be regarded as criminal itself.[154] It is hoped that this is an aberration.

Despite the redolence of the criminal codes of Stalin and Hitler,[155] there is still in ordinary speech and in the law reports a body of pejorative references to persons who do order their conduct by reference to the rules, so as to avoid adverse consequence: "playing the system"; "looking for loopholes"; "shams"; "compliance with the letter and not the spirit"[156]; "sailing close to the wind." There remains the question, expressed by Lord Morris, whether "[t]hose who skate on thin ice can hardly expect to find a sign which will denote the precise spot where they may fall in."[157] Three observations need to be made about this apparent dichotomy. First, however hard legislators try, and however well they do, it is impossible to write laws that allow every possible subsequent decision made under the rules to be made with total predictability. As Hart pointed out, "our relative ignorance of fact" and "relative indeterminacy of aim" stand in the way.[158] Second, there is a range of attitudes that may be adopted towards a law by someone who is seeking to avoid liability under any given law. There is, or there may be, a difference between people acting in good faith to minimise their liability to taxation consistently with a desire not to break the law and people who will do anything lawful or otherwise not to pay. In criminal law, there may be a difference between someone who sets out to obey the law at all costs and the person who sets out to acquire a particular advantage irrespective of the legality of the behaviour. Third, frequently some other method of communicating the wishes of the legislator is better than the use of legislation. We are used to the deployment of codes of practice like the Highway Code or those published under the Police and Criminal Evidence Act 1984.[159] These can be expressed in language that is more easily comprehensible to the general reader than can legislation. Different means of expression are available. It is possible to use diagrams and worked examples far more easily in codes than in legislation.

The issue that was debated throughout the process of the enactment of the Act was whether or not any guidance should be given as to what might amount to "adequate procedures."[160] Some argued that it is a mistake to give any guidance because anything at all that was said could be used by the corporations

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[154] Terrorist Asset-Freezing etc. Act 2010, c. 38, § 18 (U.K.) (creating an offence of circumventing the prohibitions of the preceding few sections).

[155] Hall, *supra* note 150, at 186–87.

[156] For a discussion of the role of such references in shaping the law, see LEO KATZ, ILL-GOTTEN GAINS: EVASION, BLACKMAIL, FRAUD, AND KINDRED PUZZLES OF THE LAW 1–132 (1996).

[157] Knuller Ltd. v. DPP, [1973] A.C. 435 (H.L.) 463 (appeal taken from Eng. & Wales).

[158] H.L.A. HART, THE CONCEPT OF LAW 125 (1961).

[159] Road Traffic Act 1988, c. 52, § 38 (Gr. Brit.); Police and Criminal Evidence Act 1984, c. 60, § 67 (Eng. & Wales).

[160] Bribery Act 2010, c. 23, § 7(2) (U.K.).

at whom Section 7 was directed to find ways to comply with the letter but not the spirit, to find loopholes, or otherwise to engage in "constructive compliance."[161] It was suggested that the organisation should act entirely at its own risk, and that if guidance were not given it would try harder than if guidance were given, to which it might wish to do no more than minimally to comply.[162] After debates, the government did decide to insert in the Bribery Bill provisions placing a duty upon the Secretary of State to publish guidance about procedures that relevant commercial organisations can put in place to prevent persons associated with them from bribing,[163] and (by implication) to provide themselves with a defence under section 7 in the event that such bribery occurred.

The Colville Committee recognised that there needed to be guidance but left a number of questions to be resolved.[164] The first important question of principle was whether the guidance should be on liability or on prosecution policy. One recent development in English criminal law is the increased use of published guidance on prosecution as a mechanism for reducing the rigour of the law.[165] Before the Committee, the Director of Public Prosecutions drew a clear distinction between prosecutorial practice and "compliance" issues such as the meaning of "adequate procedures."[166] He considered that the second type of issue would be best addressed by informal industry-led guidance which prosecutors and juries would then take into account when deciding whether to charge or convict.[167]

The second issue was whether the guidance should come from the Government or from within the organisation and to what extent it should be able to be referred to in court. There are various mechanisms for causing guidance to be legally relevant. One, like the Highway Code or the Codes of Practice under the Police and Criminal Evidence Act 1984, is to specify that breach of the guidance is not of itself a crime or a tort, but that the Code may be taken into

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[161] DRAFT BRIBERY BILL, vol. I , *supra* note 60, at para. 112 (U.K.). This was the position adopted by the U.K. chapter of Transparency International. JOINT COMM. ON THE DRAFT BRIBERY BILL, DRAFT BRIBERY BILL: FIRST REPORT OF SESSION 2008-09, 2008-9, H.L. 115-II, H.C. 430-II, at Ev 284–85 (U.K.) [hereinafter DRAFT BRIBERY BILL, vol. II], *available at* http://www.publications.parliament.uk/pa/jt200809/jtselect/jtbribe/115/115ii.pdf.

[162] DRAFT BRIBERY BILL, vol. I, *supra* note 60, at para. 112.

[163] Bribery Act 2010, c. 23, § 9 (U.K.).

[164] DRAFT BRIBERY BILL, vol. I, *supra* note 60, at para. 108.

[165] Rightly or wrongly. *R v. DPP*, [2009] UKHL 45, [54]–[56], [2010] 1 A.C. 345, 395–96 (appeal taken from Eng. & Wales), gave rise to the guidance in policy for prosecutors in respect of cases of encouraging or assisting suicide issued by the DPP in February 2010. CROWN PROSECUTION SERV., POLICY FOR PROSECUTORS IN RESPECT OF CASES OF ENCOURAGING OR ASSISTING SUICIDE, at para. 4 (2010), *available at* http://www.cps.gov.uk/publications/prosecution/assisted_suicide_policy.pdf.

[166] DRAFT BRIBERY BILL, *supra* note 60, at para. 111.

[167] *Id.*

account in determining other questions.[168] Another is to provide that breach of such guidance is evidence of wrongdoing. Consultation then follows as to the form that the guidance should take.[169]

After debates, a decision was made to furnish guidance, and that was done by the Ministry of Justice.[170] The guidance was eventually (because the bringing into force of the Act was itself delayed and the guidance came into force with the Act in July 2010) published by the Ministry of Justice.[171] Although criticised from some quarters,[172] the guidance is generally thought helpful.[173] As to the status of the guidance, the Bribery Act 2010 is not explicit, but the guidance itself states that:

> The question of whether an organisation had adequate procedures in place to prevent bribery in the context of a particular prosecution is a matter that can only be resolved by the courts taking into account the particular facts and circumstances of the case. The onus will remain on the organisation, in any case where it seeks to rely on the defence, to prove that it had adequate procedures in place to prevent bribery. However, departures from the suggested procedures contained within the guidance will not of itself give rise to a presumption that an organisation does not have adequate procedures.[174]

The guidance provides some explanation of the government policy behind the formulation of the offences and gives assistance on the particular concepts relevant to the application of sections 1, 6, and 7 in the context of commercial bribery. Prosecutors may find this helpful when reviewing cases involving commercial bribery. Prosecutors must take it into account when considering

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[168] Road Traffic Act 1998, c. 60, § 38(7) (Gr. Brit.); Police and Criminal Evidence Act 1984, c. 60, § 67(10) (Eng. & Wales).

[169] *See generally* MINISTRY OF JUSTICE, CONSULTATION ON GUIDANCE ABOUT COMMERCIAL ORGANISATIONS PREVENTING BRIBERY (SECTION 9 OF THE BRIBERY ACT 2010) (2010), *available at* http://www.justice.gov.uk/downloads/consultations/bribery-act-guidance-consultation1.pdf.

[170] *See generally* MINISTRY OF JUSTICE, GUIDANCE ABOUT COMMERCIAL ORGANISATIONS PREVENTING BRIBERY (SECTION 9 OF THE BRIBERY ACT 2010) (2011) [hereinafter MINISTRY OF JUSTICE, GUIDANCE ABOUT COMMERCIAL ORGANISATIONS], *available at* http://www.justice.gov.uk/downloads/consultations/bribery-response-consultation.pdf.

[171] *See generally* MINISTRY OF JUSTICE, THE BRIBERY ACT 2010: GUIDANCE (2011) [hereinafter GUIDANCE], *available at* http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf.

[172] Bruce W. Bean & Emma H. MacGuidwin, *Expansive Reach—Useless Guidance: An Introduction to the U.K. Bribery Act 2010*, ILSA J. INT'L & COMP. L. (forthcoming), *available at* http://ssrn.com/abstract=2037200.

[173] *See generally* MINISTRY OF JUSTICE, GUIDANCE ABOUT COMMERCIAL ORGANISATIONS, *supra* note 170.

[174] GUIDANCE, *supra* note 171, at 6.

whether the procedures put in place by commercial organisations are adequate to prevent persons performing services for them or on their behalf from bribing.

The six governing principles of the Guidance are as follows[175]: First, there must be proportionate procedures. "A commercial organisation's procedures to prevent bribery by persons associated with it are [to be] proportionate to the bribery risks it faces and to the nature, scale and complexity of the commercial organisation's activities. They [must also be] clear, practical, accessible, effectively implemented and enforced."[176]

Second, "[t]he top-level management of a commercial organisation (be it a board of directors, the owners or any other equivalent body or person) [must be] committed to preventing bribery by persons associated with it," possibly by the use of a champion at the highest level.[177] They foster a culture within the organisation in which bribery is never acceptable. Third, the policies must be risk based—that is, "[t]he commercial organisation [must assess] the nature and extent of its exposure to potential external and internal risks of bribery on its behalf by persons associated with it."[178] The assessment must be reiterated periodically.[179] Fourth, the commercial organisation must apply due diligence procedures to all "persons who perform or will perform services for or on behalf of the organisation, in order to mitigate identified bribery risks."[180] Fifth, "[t]he commercial organisation [should seek] to ensure that its bribery prevention policies and procedures are embedded and understood throughout the organisation through internal and external communication, including training, that is proportionate to the risks it faces."[181] Last, "[t]he commercial organisation monitors and reviews procedures designed to prevent bribery by persons associated with it and makes improvements where necessary."[182]

These governing principles are helpful in informing the organisation how to proceed, but more importantly the Guidance also incorporates some (very useful) practical examples. How exactly should organisations guide against the most obvious possibilities? For reasons of space this Article will treat three examples.

Facilitation Payments: One of the areas of greatest practical concern is the case—lawful under the U.S. Foreign Corrupt Practices Act—of so-called "facilitation payments," that is, relatively small payments to deal with some threat to the eventuation of the transaction.[183] The example used most frequently is that of a payment to dockers or port authorities to get a perishable

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[175] *Id.* at 20.
[176] *Id.* at 21.
[177] *Id.* at 23.
[178] *Id.* at 25.
[179] *Id.*
[180] GUIDANCE, *supra* note 171, at 27.
[181] *Id.* at 29.
[182] *Id.* at 31.
[183] *Id.* at 18.

or otherwise urgent cargo off a dock. The combination of the urgency and the relative smallness of the bribe, with the potentially catastrophic consequences faced, is sometimes used to justify laxness in this regard. What is required is training: properly communicating the policy of nonpayment of facilitation payments and training staff about resisting demands for facilitation payments; (where necessary) providing advice on the local law relating to certificates of inspection and fees for these to differentiate between properly payable fees and disguised requests for facilitation payments; and creating schedules for the project so that shipping, importation, and delivery schedules allow where feasible for resisting and testing demands for facilitation payments. The corporation should have in place accounting procedures to minimise the risk of hidden payments questioning of legitimacy of demands; it should try to avoid paying "inspection fees" (if not properly due) in cash and directly to an official; it should request receipts and identification details of the official making the demand; and it should have in place internal procedures, which may include one or more of the following, if appropriate: requesting to consult with superior officials, informing those demanding payments that compliance with the demand may mean that a company (and possibly its agent) will commit an offence under U.K. law, and informing those demanding payments that it will be necessary to inform the U.K. embassy of the demand. This will trigger the obvious general consideration that these sorts of payments are generally only sought covertly. It may also be possible to use U.K. diplomatic channels or participation in locally active nongovernmental organisations, so as to apply pressure on the authorities of the destination country to take action to stop demands for facilitation payments.

Corporate Hospitality: Another cause of uncertainty in the law prior to the Act was the case of corporate gifts, including hospitality. It is very difficult to distinguish expenditure on hospitality, which can be justified by reference to the legitimate interests of both concerns in better relations between their employees and corrupt attempts to secure contracts. How is the distinction to be made and the boundary policed? A range of techniques are suggested. It is important that there be a published policy statement committing a corporation to transparent, proportionate, reasonable, and bona fide hospitality and promotional expenditure. Such a policy should include internal guidance, which must provide that any procedures are designed to seek to ensure transparency and conformity with any applicable laws and codes; that any hospitality should reflect a desire to cement good relations and show appreciation; that promotional expenditure should seek to improve the image of the commercial organisation; and, critically, that recipients should not be given the impression that they are under an obligation to confer any business advantage or that the recipients' independence will be affected. Guidance should set out criteria to be applied when deciding the appropriate levels of hospitality for both private and public business partners, clients, suppliers, and foreign public officials, and the type of hospitality that is appropriate in different sets of circumstances. When dealing abroad, a corporation's provision of hospitality for public officials

should be cleared with the relevant public body so that it is clear whom and what the hospitality is for, and the internal guidance should set limits above which senior managerial approval is required, precisely a reliable rules for accounting and regular monitoring.

Complicated Transactions: The final common theme against which corporations must guard is that of bribes remaining unidentified amidst complicated transactions, especially those that involve some elements of community benefits and charitable donations. These are the cases where the acquisition of a contract is linked to benign investment in the jurisdiction—for example, the building of schools and hospitals collateral to a foreign mining operation. In these cases the prescription includes making efforts to conduct due diligence, including consultation with staff members and any business partners the corporation has in the country in order to satisfy itself that the suggested arrangement is legitimate and in conformity with any relevant laws and codes applying to the foreign public official responsible for approving the product, and adopting an internal communication plan designed to ensure that any relationships with charitable organisations are conducted in a transparent and open manner and do not raise any expectation of the award of a contract or licence. Collateral policies which should be considered include adopting company-wide policies and procedures about the selection of charitable projects or initiatives and informing those policies by appropriate risk assessments. If charitable donations made in a given country are routinely channelled through government officials or to others at the official's request, a red flag should be raised and the corporation may seek to monitor the way its contributions are ultimately applied or investigate alternative methods of donation, such as official "off-set" or "community gain" arrangements with the local government. Again, transparency is the key. Of course, all these procedures are far easier to suggest in the abstract than to operate when the issues actually arise. Nonetheless when taken in the round, the Guidance and the attention it draws to the importance of appropriate internal procedures are very much to be welcomed.

The shift underpinning the introduction of section 7 is also one in the allocation of responsibility for enforcement. In recent years there has been a move in a number of areas to "third party policing," that is, the shifting of some of the burdens of policing away from the established state institutions (police forces or regulators) onto institutions (usually private-sector institutions) within the sector under consideration.[184] This has an evident financial advantage to the authorities but can also be argued to be more efficient. The body with the incentive to put in place adequate procedures is closer and has more day-to-day contact with the individuals for whom it is made responsible than the regular enforcement authorities, and it is far better placed to be proactive and to give specific guidance. This part of the legislation was never intended primarily to

[184] LORRAINE MAZEROLLE & JANET RANSLEY, THIRD PARTY POLICING 2 (2005).

give rise to prosecutions and arguments in courts as to whether a given corporation had in place adequate procedures. Rather the effect will be that all major corporations include these procedures in their corporate-governance compliance procedures and that inclusion will impact significantly upon the primary rates of offending by employees.

VIII. PLEA AGREEMENTS, BRIBERY PROSECUTIONS, AND THE INTERNATIONAL ELEMENT

There is no clearer case of bribery, whatever the age of the laws and whatever the jurisdiction, than that of paying someone not to prosecute the briber for an offence s/he is alleged to have committed. If a person is able to pay to avoid criminal liability then s/he is not really subject to the criminal law at all. Yet every system of criminal justice develops some mechanism for diverting cases away from the most resource-intensive mechanisms furnished for their resolution. One of the respects, traditionally, in which comparisons have been drawn between criminal justice systems in the United States and England and Wales is in the use of plea agreements.[185]

Some departure from the traditional "no bargains" rule is now permitted by statute. Under the "plea before venue system,"

> [t]he accused is entitled to request an indication of sentence, whether "a custodial sentence or noncustodial sentence would be more likely to be imposed if he were to be tried summarily . . . and to plead guilty." The court is entitled, but not obliged, to respond to such a request. In short, there is no longer any absolute prohibition against an advance indication of sentence.[186]

In cartel offences under the enforcement authority of the Office of Fair Trading (OFT), bargains of some sorts have been permitted.[187] The question is whether and how this should be extended to bribery offences.

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[185] *See* Peter Alldridge, Bribery and the Changing Pattern of Criminal Prosecution, *in* Modern Bribery Law, *supra* note 117.

[186] R v. Goodyear, [2005] EWCA (Crim) 888, [45], [2005] 1 W.L.R. 2532 [2539] (Eng.) (quoting Criminal Justice Act 2003, c. 44, sched. 3, *available at* http://www.legislation.gov.uk/ukpga/2003/44/pdfs/ukpga_20030044_en.pdf). "In Schedule 3 to the Criminal Justice Act 2003, dealing with the allocation of cases triable either way, and sending cases to the Crown Court, paragraph 6, substituting section 20 of the Magistrates' Court Act 1980, addresses the procedure where summary trial appears more suitable." *Id.* at [45]–[46], 2539. Venue is significant because of the differing sentencing powers of the Magistrates' and Crown Courts. Magistrates' Courts may not pass custodial sentences longer than six months. Magistrates' Courts Act 1980, c. 43, § 31 (Eng. & Wales), *available at* http://www.legislation.gov.uk/ukpga/1980/43/pdfs/ukpga_19800043_en.pdf.

[187] Jon Lawrence, Michael O'Kane, Suzanne Rab & Jasvinder Nakhwal, *Hardcore Bargains: What Could Plea Bargaining Offer in UK Criminal Cartel Cases?*, 1 COMPETITION L.J. 17, 34 (2008).

Following the guidance published by the Sentencing Guidelines Council in December 2004,[188] in *Goodyear*,[189] adopting the procedure in *Attorney-General's Reference (No. 1 of 2004)*[190] and *Simpson*,[191] a five-judge Court of Appeal, presided over by the Lord Chief Justice, was convened to consider whether the *Turner* rule of practice should be modified and, if so, to what extent.[192] It laid down new guidelines which state that, normally speaking, an indication of sentence should not be given until the basis of the plea has been agreed or the judge has concluded that he or she can properly deal with the case without the need for a trial of the issue. The plea and case management hearing in the Crown Court now specifically requires the judge to seek and be given first, whether the defendant has in fact been advised about the credit to be obtained for a guilty plea, and second, what steps have been taken to see whether the case might be resolved without a trial.[193]

In *McKinnon v. United States*, the lower court expressed "a degree of distaste" for the way in which plea negotiations had taken place but said that these "cultural reservations" were not such that extradition should not take place.[194] The House of Lords, when considering the same case, found that the differences between the system in the United Kingdom and the United States were not as stark as was sought to be portrayed and found the comments of the High Court to be too "fastidious."[195]

The matter, especially in the area of economic crime, is politically sensitive. The last few years have seen a contrast between the attitude of the Director of the Serious Fraud Office, Richard Alderman, and the courts, in particular the judges at Southwark Crown Court (where most fraud prosecutions in England and Wales take place) and, especially, Lord Justice Thomas, the President of the Queen's Bench Division. Alderman inherited a very poor record of prosecutions in serious fraud cases.[196] The dispute centred around *Innospec*.[197] In this case

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[188] SENTENCING GUIDELINES COUNCIL, REDUCTION IN SENTENCE FOR A GUILTY PLEA: DEFINITIVE GUIDELINE 5–7 (2007).

[189] *Goodyear*, [2005] EWCA (Crim) 888 at [1]–[3], [2005] 1 W.L.R. at 2533.

[190] A-G's Reference, [2004] EWCA (Crim) 1025, [9], [2004] 1 W.L.R. 2111, 2119–20.

[191] R v. Simpson, [2003] EWCA (Crim) 1499, [21], [2004] Q.B. 118, 126.

[192] *Goodyear*, [2005] EWCA (Crim) 888 at [1]–[3], [2005] 1 W.L.R. at 2533.

[193] *Goodyear*, [2005] EWCA (Crim) 888 at [45]–[46], [2005] 1 W.L.R. at 2539.

[194] McKinnon v. United States, [2007] EWHC (Admin) 762, [54], [60], *available at* http://www.bailii.org/ew/cases/EWHC/Admin/2007/762.html.

[195] McKinnon v. United States, [2008] UKHL 59, [37], [2008] 1 W.L.R. 1739, 1749–50 (appeal taken from Eng. & Wales).

[196] Ruth Sunderland, *Serious Fraud Office Hits a Zenith with Its Victory over Asil Nadir*, THIS IS MONEY.CO.UK (Aug. 23, 2012, 4:28 PM), http://www.thisismoney.co.uk/money/news/article-2192752/Serious-Fraud-Office-hits-zenith-victory-Asil-Nadir.html#ixzz24vlmoRBn.

[197] *See generally* R v. Innospec Ltd., [2010] EW Misc (Crown) 7, *available at* http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/sentencing-remarks-thomas-

an agreement had been arrived at between the U.S. Department of Justice, the SFO, and the defendants whereby a series of guilty pleas, fines, confiscation orders, and civil recovery orders were to be presented to a judge, in effect, for ratification.[198] Lord Justice Thomas was very firm both in rejecting such a restricted view of the role of the judge and in refusing to differentiate between types of serious crime:

> It is of the greatest public interest that the serious criminality of any, including companies, who engage in the corruption of foreign governments, is made patent for all to see by the imposition of criminal and not civil sanctions. It *would* be inconsistent with basic principles of justice for the criminality of corporations to be glossed over by a civil as opposed to a criminal sanction.[199]

Of the sentencing role of the judge in general, in what is rapidly becoming a *locus classicus*, Lord Justice Thomas said,

> [T]he imposition of a sentence is a matter for the judiciary . . . . It is in the public interest, particularly in relation to the crime of corruption, that although, in accordance with the Practice Direction, there may be discussion and agreement as to the basis of plea, a court must rigorously scrutinise in open court in the interests of transparency and good governance the basis of that plea and to see whether it reflects the public interest.[200]

As a consequence of these statements, the SFO's policy of deal making was much more closely circumscribed. Notwithstanding *Innospec*, we can expect to see greater use of deal making with corporate defendants and for those deals to include civil recovery,[201] but deal making should not take place unconstrained. Lord Justice Thomas in *Innospec* and Mr. Justice Bean in *BAE Systems* each consented to the deal that had been struck between prosecutor and defendant, but neither was happy about it.[202] If this practice of negotiation is to continue or

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lj-innospec.pdf. *See also* R v. Dougall, [2010] EWCA (Crim) 1048, [26], *available at* http://www.bailii.org/ew/cases/EWCA/Crim/2010/1048.html.

[198] *Innospec*, [2010] EW Misc (Crown) 7 at [7]–[8].

[199] *Id.* at [38] (emphasis added).

[200] *Id.* at [27]; *see also* R v. BAE Systems PLC, [2010] EW Misc (Crown) 16, [13], *available at* http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/r-v-bae-sentencing-remarks.pdf.

[201] *BAE Systems*, [2010] EW Misc (Crown) 16 at [13]. The *BAE* court held:

> The Consolidated Criminal Practice Direction section IV.45 and the decision of the Court of Appeal in *R v Underwood [2004] EWCA Crim 2256* establish that whether or not pleas have been agreed the judge is not bound by any such agreement, and that any view formed by the prosecution on a proposed basis of plea is deemed to be conditional of the Judge's acceptance of the basis of plea.

Id.

[202] *Innospec*, [2010] EW Misc 7 at [42]; *BAE Systems*, [2010] EW Misc 16 at [6].

increase a series of issues will need to be addressed. The first is the general one of the appropriate role of the judge in sentencing. Even though it bears many of the hallmarks of an executive function, the judicial discretion in sentencing is maintained to be one of the stigmata of the independent judicial role, and it is one of which judges in England and Wales are fiercely protective.

Second, proper attention needs to be given to the basis for plea. Lord Justice Thomas in *Innospec* and Mr. Justice Bean in *BAE Systems* were both critical of the factual basis upon which the agreements constrained them to pass sentence.[203] Most obviously, Mr. Justice Bean had to sentence on the technical regulatory charge of failing to keep proper accounts, whereas the evidence seemed to point very strongly to an offence of bribery.[204] This was wholly artificial and offends the general considerations of transparency and publicity. It would be unacceptable for defendants to be able to buy their way out of adverse publicity or convictions of offences of an appropriate gravity to the conduct in question. The judges eventually allowed the case to proceed to sentence on the agreed basis but made it clear that there may be cases in which the charges were so inappropriate that the judge ought not to let the case proceed.[205] Likewise, in *Innospec*, the judge (quite correctly) criticised the fact that the wording of the SFO press release to be published at the time of the announcement of the settlement had formed part of the deal.[206]

The third major consideration in putting in place appropriate rules for deal making is the penalty "on offer." The incentive for pleading guilty should be a reduced sentence and not, at least in the first instance, a civil recovery order. When civil recovery orders were introduced they were a fallback mechanism to deal with the case where criminal proceedings could not successfully be brought.[207] Now this sequential relationship has been changed to one in which civil recovery can supplement or provide an alternative to criminal proceedings.[208] The calculation is more complex, and the possibility of the power of money operating to prevent adverse publicity and the other effects of convictions is a clear one to which regard must be had. The existence of civil recovery as a mechanism threatens the power of the judge to give effect to the denunciatory role of the criminal law because, in principle, it makes the matter a

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[203] *Innospec*, [2010] EW Misc (Crown) 7 at [40]; *BAE Systems*, [2010] EW Misc (Crown) 16 at [8].

[204] *BAE Systems*, [2010] EW Misc (Crown) 16 at [2], [8].

[205] *Innospec*, [2010] EW Misc (Crown) 7 at [25.iii]; *BAE Systems*, [2010] EW Misc (Crown) 16 at [13].

[206] *Innospec*, [2010] EW Misc (Crown) 7 at [50].

[207] PETER ALLDRIDGE, MONEY LAUNDERING LAW: FORFEITURE, CONFISCATION, CRIMINAL LAUNDERING AND TAXATION OF THE PROCEEDS OF CRIME 239–40 (2003).

[208] Serious Crime Act 2007, c. 27, § 74, sched. 8 & 9 (U.K.), *available at* http://www.legislation.gov.uk/ukpga/2007/27/pdfs/ukpga_20070027_en.pdf (amending Proceeds of Crime Act 2002, c. 29, §§ 1–5, sched. 1 (U.K.), *available at* http://www.legislation.gov.uk/ukpga/2002/29/pdfs/ukpga_20020029_en.pdf).

civil one, and so long as it is civil it is susceptible to agreement between civil parties.[209]

Most of Lord Justice Thomas's objections to the deal that the SFO had made in *Innospec* were to deals between prosecution and defendant and, in particular, to what he regarded as a usurpation of the appropriate role of the courts.[210] To encompass the international dimension, the additional feature that must be addressed is that international dealing should not be permitted to extend to overseas prosecutors dictating the criminal justice policy of the United Kingdom, any more than to overseas diplomats. Reliable and transparent mechanisms must be in place to determine priorities between countries asserting jurisdiction. Global plea agreements can only work if plea agreements work. It is no coincidence that *Innospec* and *BAE Systems* both involve U.S. and U.K. prosecutors, and the relationship between the Department of Justice and the Serious Fraud Office. Guidance has been published for handling criminal cases with concurrent jurisdiction between the United Kingdom and the United States.[211] This relationship can only work if the "Alderman" line of negotiating with defendants is followed.

An additional consideration is provided by the operation of the U.K.–U.S. extradition treaty. The treaty has been in point recently, partly as a result of the numbers and partly as a result of the high profile cases in which extraditions have been challenged.[212] A recent review found there to be no significant difference between the relevant legal tests (respectively, the "probable cause" test and the "reasonable suspicion" tests).[213] The problems that have arisen in the United Kingdom in these cases have generally been as a result of the use of extraterritorial jurisdiction by the United States.[214] That is outside the scope of this Article.

Notwithstanding the approach of Lord Justice Thomas, we can expect that if bribery law is to be enforced, Alderman's approach will prevail. Alderman has

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[209] Albeit in accordance with the guidance.

[210] *Innospec*, [2010] EW Misc (Crown) 7 at [26].

[211] R v. DPP, [2008] EWHC (Admin) 666, [15], *available at* http://www.bailli.org/ew/cases/EWHC/Admin/2008/666.html; Kate Brookson-Morris, *Conflicts of Criminal Jurisdiction*, 56 INT'L & COMP. L.Q. 659, 660 (2007).

[212] Tappin v. United States, [2012] EWHC (Admin) 22, [1], *available at* http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/tappin-v-usa.pdf; McKinnon v. United States, [2008] UKHL 59, [6]–[7], [2008] 1 W.L.R. 1739, 1742 (appeal taken from Eng. & Wales); R v. Dir. of the Serious Fraud Office, [2006] EWHC (Admin) 200, [1], [2007] Q.B. 727, 731.

[213] HOME OFFICE, A REVIEW OF THE UNITED KINGDOM'S EXTRADITION ARRANGEMENTS 242 (2011), *available at* http://www.homeoffice.gov.uk/publications/police/operational-policing/extradition-review?view=Binary; *see also* JOINT COMM. ON HUMAN RIGHTS, THE HUMAN RIGHTS IMPLICATIONS OF UK EXTRADITION POLICY, 2010-12, H.L. 156, H.C. 767, (U.K.), *available at* http://www.publications.parliament.uk/pa/jt201012/jtselect/jtrights/156/156.pdf.

[214] The FCPA is one such piece of legislation.

now departed, succeeded by David Green, QC.[215] A paper promised consultation by the Attorney-General's Office on Deferred Prosecution Agreements[216] has now been published and, at the time of writing, is subject to consultation.[217] The proposal is for the introduction of deferred prosecution agreements as a possibility for the prosecutor to use where the corporation proposes, in effect, to turn over a new leaf. The idea is that where a corporation approaches the prosecuting authority then an agreement may be entered into and approved by a court not to proceed directly with criminal charges but to leave those charges pending for a given period, upon successful compliance with conditions laid down in the agreement.[218] These conditions may include a financial penalty, restitution to victims, and disgorgement of profits, but also some proactive measures to prevent future wrongdoing.[219] This would be a further enlistment of the corporation in self-policing, thus, shifting the costs of policing and criminal justice away from the principal prosecuting body. It would be a useful addition to the armoury of the prosecutor.

IX. CONCLUSION

The Article has shown how the United Kingdom came to have its Bribery Act 2010 and has considered the offence of failing to prevent bribery by an employee and, in particular, the "adequate procedures" defence. The Article has also explored developments in the prosecution process, in particular, mechanisms for providing incentives to corporations to police themselves. The purpose of this Article is to draw attention, in particular, to four aspects of these developments.

First, and most important, as a piece of new law the Bribery Act 2010 is to be welcomed. It is better to have rational defensible law than irrational indefensible law.

Second, as a socio-legal study of recent legal history, the saga shows how badly things can go wrong and how they can adversely affect international relations, and it emphasises the element of chance in legal developments. There was never any particular reason why the 2003 Bill need have been so poor, or why it took so long to put in place efforts to rectify its defects. In seeking reasons for the delays and the wrong turnings, we should not look for conspiracies or for great forces at play in these events. From time to time, even

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[215] *Director*, SERIOUS FRAUD OFFICE, http://www.sfo.gov.uk/about-us/who-we-are/director.aspx (last visited Oct. 18, 2012).

[216] 20 Mar. 2012, PARL. DEB., H.C. (2012) 650 (U.K.).

[217] *See generally* MINISTRY OF JUSTICE, CONSULTATION ON A NEW ENFORCEMENT TOOL TO DEAL WITH ECONOMIC CRIME COMMITTED BY COMMERCIAL ORGANISATIONS: DEFERRED PROSECUTION AGREEMENTS (2012), *available at* http://consult.justice.gov.uk/digital-communications/deferred-prosecution-agreements.

[218] *Id.* at para. 15.

[219] *Id.* at para. 88.

the most admirably motivated and highly qualified individual agents get things wrong, and from time to time developments in one area are influenced by those in another. Stuff, as Mr. Rumsfeld reminded us, happens.[220]

Third, as to practical significance of the Act moving forward, there has only been one prosecution thus far under the Bribery Act and that one of such a quotidian nature that it certainly did not require the legislation. A newspaper sting caught a court clerk who was taking bribes to write off driving offences.[221] There have been no prosecutions under section 7. The real impact will not be measured in successful prosecutions, but in the importation into corporate governance of antibribery systems. That is not a bad thing.

Lastly, criminal law and international relations will become increasingly intertwined. We do not need globally homogenised criminal law and criminal justice. Criminal law has traditionally been one of the areas in which sovereign nations assert their individuality. Nonetheless, in this, as in other areas, they must increasingly work together, and bribery will be one of the principal areas of collaboration for the foreseeable future.

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[220] Donald H. Rumsfeld, Sec'y of Def., DoD News Briefing - Secretary Rumsfeld and Gen. Myers (Apr. 11, 2003, 2:00 PM) (transcript available at http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2367).

[221] R v. Patel, No. 2011/07001/AB, 2012 WL 1933501, at *[3] (EWCA (Crim) May 24, 2012).