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The Effect of the Bribery Act 2010

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Introduction

The Bribery Act 2010 (the Act) is a notable statute that brought about a whole-scale reform of bribery-related offences in Scotland and the rest of the United Kingdom (UK).¹ As the Explanatory Notes to the Act state “The purpose of the Act is to reform the criminal law of bribery to provide for a new consolidated scheme of bribery offences to cover bribery both in the United Kingdom and abroad”.² It was commonly assumed that the Act would have meaningful and material consequences in the form of criminal prosecutions. Indeed, the Act was passed because of the UK’s “... poor record in prosecuting offences”.³ The reason for this centred upon, in the words of Jack Straw, the old law being “outdated, complex and, in some respects, uncertain in its effect”, with the result that it was difficult for “investigators and prosecutors to apply the law sensibly”.⁴ The Act was passed to address these deficiencies. It is reasonable to assume, then, that prosecutions and convictions would have followed the Act’s entry into force on 1 July 2011. These have been few and far between. They are, instead, only one of number of effects that can be discerned.⁵ This article identifies, describes and scrutinises the various effects of the Act, and in doing so highlights the differences between Scotland and the rest of the UK in law and practice in the area.

Six main effects of the Act can be identified. These are changes to the substantive law, the issuance of guidance by the Ministry of Justice and the revision or enhancement of corporate compliance programmes, the amendment of commercial contracts, several prosecutions and convictions, the expansion in scope of new prosecution policies and the UK partially addressing its international legal obligations in the field.

¹ The Act has spawned a considerable body academic and professional literature, including Rose, C., The UK Bribery Act 2010 and accompanying guidance: belated implementation of the OECD Anti-Bribery Convention, (2012) 61(2) ICLO 484 and Sullivan, G., The Bribery Act 2010: Part 1 - An Overview, (2011) 2 CLR 87. In a Scottish context see Arnell, P., and Evans, N., The Bribery Act 2010 in Scotland, (2013) 81 Scottish Law Gazette 93 and Arnell, P., The New Crimes of Bribery in Scotland, (2010) 78 Scottish Law Gazette 42.

² The Explanatory Notes are cited at: <http://www.legislation.gov.uk/ukpga/2010/23/notes/contents>.

³ Bribery Bill [HL] Research Paper 10/19, 1 March 2010, at p 1, cited at <http://www.parliament.uk/documents/commons/lib/research/rp2010/rp10-019.pdf>.

⁴ House of Commons, Hansard Debates, 3 March 2010, Column 947.

⁵ The effects of the Act are the focus of this article, as opposed to its effectiveness. In other words, it is the consequences of the Act *per se* that are the subject of discussion, not those consequences relative to a third factor, such as the level of bribery and corruption committed by UK nationals and companies.

Effect 1 – Changes to the Substantive Law

The most immediate and apparent effect of the Act is the replacement of long-standing bribery-related crimes with new offences. The Act repealed and replaced all the previous law at common law and under statute. Repealed were the common law crimes, in Scotland, "... to bribe and attempt to bribe a judicial officer and for the officer himself to take a bribe"⁶ and, in England and Wales, of "... the receiving or offering [of] any undue reward by or to any person whatsoever, in a public office, in order to influence his behaviour in office, and incline him to act contrary to the known rules of honesty and integrity".⁷ The repealed statutory offences were found in the Public Bodies Corrupt Practices Act 1889 and the Prevention of Corruption Act 1906.

Introduced by the Act were two general bribery offences, a specific bribery of a foreign public official offence and a corporate offence of failing to prevent bribery. The two general offences criminalise the direct or indirect offering, promising or giving of a financial or other advantage (in section 1) and the requesting, agreeing to receive or receiving of a financial or other advantage (in section 2). The Act requires that the offering etcetera take place in circumstances amounting to the improper performance of a relevant function or activity. A relevant function or activity includes, by section 3(2), any activity performed in the course of a person's employment or by or on behalf of a body corporate or unincorporate. The performance of a relevant function is improper if it is not performed in good faith, impartially, or it breaches a position of trust. The two offences may be committed by individuals, bodies corporate, partnerships and senior managers of a body corporate.

The third offence created by the Act, under section 6, provides that it is an offence for a person to bribe a foreign official (promise or give a financial or other advantage) with an intention to influence him in his capacity as such. The offence requires an intention to obtain or retain business or an advantage in the conduct of business. It also requires the prosecution to prove that the foreign official was not permitted nor required by law to be influenced. Of particular note here are corporate hospitality and promotional expenditure. The possibility of bribery charges resulting from this type of expenditure exercised the professional press in and around the enactment of the Act. Assuaging this in part was the Guidance about Procedures which Relevant Commercial Organisations can put into Place to Prevent Persons Associated with them from Bribing, published in March 2011. It provides "The Government does not intend for the Act to prohibit reasonable and proportionate hospitality and promotional or other similar business expenditure intended for these purposes".⁸ The ambit of the

⁶ Hume, *Commentaries*, Vol. 1, pp 407-408.

⁷ Cecil Turner, J.W., *Russell on Crime*, 12th Edition, Sweet and Maxwell, London, 1964, p.381.

⁸ At p 12, cited at <http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>. Hereinafter the section 9 Guidance, on account of the Government being obliged to issue it under section 9 of the Act, it is discussed below.

offences within sections 1, 2, and 6 is notable. All three apply if there is either a territorial or relationship connection between the alleged offender or crime and the UK. A requisite relationship connection exists if the accused is a citizen, resident, body corporate or partnership of or within the UK.⁹ Significantly, section 14 of the Act provides that where bodies corporate and Scottish partnerships have been found guilty of an offence under sections 1, 2, and 6 senior officers and partners will also be liable if the offence was committed with that person's consent or connivance. The effect of this is to open to criminal liability senior managers who did not act as the controlling mind of the company for the purposes of the identification principle of corporate liability.¹⁰

The fourth and arguably most significant offence under the Act is found in section 7. It criminalises the failure to prevent bribery committed by relevant commercial organisations. Particularly, a commercial organisation may be found guilty under section 7 where it failed to prevent conduct that would amount to the commission of an offence under sections 1 or 6 of the Act. That individual who engaged in the conduct (the 'associated person') need not have been convicted of one of the offences. There is, however, an obligation on the prosecution to establish beyond reasonable doubt that such an offence has been committed. It is this crime that has led to the greatest response in the corporate community in the form of enhanced compliance programmes and amendments to commercial contracts, discussed below. This is a result of the breadth of enterprises that it covers, its strict liability, and the possibility of the extraterritorial acts of agents and employees creating domestic criminal liability (its territorial and personal ambit).

The section 7 offence applies to 'relevant commercial organisations'. These include bodies incorporated within the UK and those incorporated outwith the UK where they carry on at least part of their business within it. Also included are partnerships under the Partnership Act 1890. 'Part of a business' is not defined by the Act, however it has been noted that a UK representative office or agent may be sufficient whilst a London stock market listing may not be.¹¹ The section 7 offence does not require the accused to act with a particular state of mind. It is a strict liability offence. An organisation can be found guilty when the offence is committed by someone who performs services on its behalf. The commercial organisation itself, in the form of its controlling mind, need not intend that it be committed, or be aware that the offence is to be committed. The associated person must act with an intention to obtain or retain business or an advantage for the commercial organisation. A defence to the crime, in

⁹ The previous law on bribery had been given explicit extraterritorial effect, albeit not as expansive, under ss 69 and 68 of the Criminal Justice (Scotland) Act 2003 in Scotland and ss 109 and 108 of the Anti-terrorism, Crime and Security Act 2001 in England and Wales.

¹⁰ Corporate criminal liability is discussed below.

¹¹ The Government expects a common sense approach to be taken by the prosecution and judiciary such that companies who do not have a "demonstrable business presence in the United Kingdom" do not get caught, see the section 9 Guidance, *supra* note 8 at paras 34-36.

section 7(2), applies where the organisation can prove that it had in place adequate procedures designed to prevent bribery. Similar to the offences within sections 1, 2, and 6 that under section 7 has a wide territorial and personal ambit. Section 12(5) of the Act provides that it does not matter whether the acts or omissions which form part of the offence take part in the UK or elsewhere. It may be wholly extraterritorial. The offence's personal ambit turns upon the definition of an 'associated person'. An associated person, by section 8, is one who performs services for or on behalf of the company. He or she need not have any connection with the UK, and the precise capacity of that person is immaterial.

The changes to the substantive law wrought by the Act are not limited to the criminal law and crimes of bribery. There are a number of others. One such change is the amendment to public procurement regulations. Regulation 21(1)(c) of the Public Contracts (Scotland) Regulations¹² adds convictions under sections 1 and 6 of the Act to the list of offences which result in the mandatory exclusion of suppliers at the selection stage in the award of public contracts. There is similar provision in England and Wales. Notably both statutory instruments are silent on the section 7 offence.¹³ Similar debarment exists in EU law under article 45 of the European Parliament and of the Council on the Coordination of Procedures for the Award of Public Works Contracts, Public Supply Contracts and Public Service Contracts.¹⁴ A quasi-legislative effect of the Act is the publication of specific sentencing guidelines covering the new crimes of bribery. These apply in England and Wales. The provisions within Criminal Justice and Licensing (Scotland) Act 2010 creating a Scottish Sentencing Council are not yet in force. The Sentencing Council in England and Wales published its Definitive Guideline in regard to Fraud, Bribery and Money Laundering on 23 May 2014. It entered into force on 1 October 2014. It provides a detailed scheme for the assessment of a sentence of a person convicted of an offence under sections 1, 2 and 6 of the Act and of a corporate offender convicted under sections 1, 2, 6 and 7.¹⁵ The Guideline iterates a multi-step approach to sentence determination for both individuals and bodies corporate.

Effect 2 – The Section 9 Guidance and Revised Corporate Compliance Programmes

A second main effect of the Act is the section 9 Guidance and, related to it, revised corporate compliance programmes. The Guidance is significant because it contains detailed provision on what will constitute 'adequate procedures' to prevent bribery. As noted, adequate procedures may be the basis of a defence under section 7(2) of the Act. The Guidance contains six principles which are necessarily general and somewhat vague. The wide

¹² SI 2012/88.

¹³ See Novak R., Henty P., and Tullis C., The Bribery Act and its Interaction with the Public Procurement Rules in the UK, (2011) 5 Public Procurement Law Review 230.

¹⁴ Directive 2004/18/EC, article 45(2)(c).

¹⁵ Cited at http://sentencingcouncil.judiciary.gov.uk/docs/Fraud_bribery_and_money_launde ring_offences_-_Definitive_guideline.pdf.

range of commercial organisations and the circumstances in which they do business are amongst the reasons for this. In essence, the Guidance provides that commercial organisations should apply an effective set of anti-bribery procedures in light of the particular risks they face. Principle 1, for instance, iterates the need for proportionate principles and procedures in light of the bribery risks the commercial organisation faces and the nature, scale, and complexity of its activities. The remaining principles within the Guidance relate to management commitment, risk assessment, due diligence, communication and monitoring and review.

Related to the section 9 Guidance are revised corporate compliance programmes relating to bribery. Evidence of this effect of the Act is not difficult to find. The Guidance itself encourages commercial organisations to publish their compliance programmes. Many do, and refer to the Act and Guidance as amongst the factors conditioning their policies. The Wood Group plc, for example, makes explicit reference to the Act (as well as the US Foreign and Corrupt Practices Act 1977) in its ethics policy and provides guidance to assist employees in understanding what is required of them.¹⁶ The company's June 2013 Business and Ethics Policy provides "Wood Group and Wood Group Personnel may be subject to anti-bribery legislation, including the... UK Bribery Act 2010... the UK legislation relates to the bribery of both public or government officials and everyone in the private sector. The legislation prohibits bribery even when it is committed outside these countries' own borders".¹⁷ Exxonmobil makes a similar reference to the Act. In what can be seen as a specific effect of the Guidance, in that it includes the requirement of training staff, ExxonMobil's website provides that "... in 2012, approximately 31,000 employees took part in anti-corruption training. This training covers the basics of the FCPA, the United Kingdom Bribery Act ...".¹⁸ There is little doubt that the Act has had an impact upon corporate compliance policies, with one author noting that it has been "... a catalyst for corporations to revisit or introduce anti-bribery systems and controls that they never had before, putting bribery firmly on the corporate agenda of UK businesses".¹⁹

Effect 3 – Amendment of Commercial Contracts

The amendment of commercial contracts by way of the addition or revision of a clause or clauses relating to bribery is a third main effect of the Act. This is related to the effect just discussed in that commercial organisations have acted to meet their potential criminal liability in this way. Simply, contracts have been amended to include new or revised anti-bribery clauses. This can be seen in both industry-wide initiatives taking the form

¹⁶ Cited at <http://www.woodgroup.com/SiteCollectionDocuments/about-us/WoodGroup-BusinessEthicsPolicy.pdf>.

¹⁷ Ibid at p 7.

¹⁸ See <http://corporate.exxonmobil.com/en/investors/corporate-governance/ethics/ethics>. A further example is that of BP plc at: <http://www.bp.com/en/global/corporate/sustainability/our-people-and-values/ethics-and-compliance.html>.

¹⁹ Taddia, M., Economic Crime: Corruption Conundrum, (2014) 111(37) Law Society's Gazette 13.

of publicly available model contracts and private party to party commercial contracts. An example of an industry-specific standard contract in the oil and gas sector containing an anti-bribery and corruption clause, or 'abc' clause, is found in the General Conditions of Contract for Services On and Off-shore, published by LOGIC.²⁰ The Explanatory Notes to the General Conditions refer to the section 9 Guidance: "In drafting Clause 28 [Anti-Bribery and Corruption] consideration was given to approaches throughout the industry to date... In addition, the Ministry of Justice's publication entitled 'Guidance about procedures which relevant commercial organisations can put into place...' was also considered when developing rights such as audit, suspension and termination".²¹ Importantly for the defence to the section 7 offence, the terms within model contracts may oblige parties to state they have not, and will not, be involved in the giving or receiving of bribes or other corrupt behaviour, to exercise due diligence in regard to sub-contractors and affiliates and to contain sufficient anti-bribery policies and procedures.

Specific evidence of the amendment of commercial contracts in light of the Act is understandably less readily evident than model contracts. This is due to their non-public nature. It can be found, however. An instance from the public sector is a clause used by the University of Bristol. It has produced a standard anti-bribery and corruption clause which *inter alia* provides that the party contracting with the University shall "... comply with all applicable laws, statutes, regulations relating to anti-bribery and anti-corruption including but not limited to the Bribery Act 2010 and not engage in any activity, practice or conduct which would constitute an offence under the Bribery Act 2010 if such activity, practice or conduct had been carried out in the UK", and that a breach of the clause shall be deemed a material breach and entitle the University to terminate it immediately.²² In the field of human resources, Northgate Information Solutions' December 2012 Anti-Corruption Policy Statement states that it will abide by the anti-corruption laws in every country and in particular the Bribery Act 2010. The Policy continues in regard to anti-corruption clauses "Internal legal teams will ensure that suitable Anti-Bribery clauses are incorporated into all contractual documents with all third parties, including customers, suppliers, consultants, advisers etc.... Precedent clauses can be found on the Northgate Intranet under the Compliance section".²³

Referring to changes made to contracts in the medical equipment sector was the Group Sales Director of Deltex Medical Ltd. in giving evidence to the House of Lords Select Committee on Small and Medium Enterprises. He stated: "BRIC countries especially raise challenging questions around the Bribery Act. My fellow directors and I have concerns over how we operate

²⁰ LOGIC is a subsidiary of the industry body Oil & Gas UK. The clause appears in the Third Edition of the General Conditions of Contract, 31 March 2014, at clause 28, cited at <http://www.logic-oil.com/standard-contracts>.

²¹ Ibid at paragraph 2.15, p 8.

²² It is cited at <http://www.bris.ac.uk/secretary/legal/briberyact/clause>.

²³ The policy is dated December 2012, it is found at http://www.ngahr.co.uk/sites/master_uk/files/Abridged_Anti_Corruption_Policy_Statement_07.12.12.pdf.

correctly under the Bribery Act within those countries. We have taken legal advice. We have made changes to our contracts... ".²⁴ Finally, evidence of the effect of the Act in the form of new and revised contractual terms can be discerned from the plethora of advice and guidance provided by law firms on anti-bribery clauses. The existence of numerous statements and publications by law firms and the legal press can, at least in part, be put down to the demand by industry to address the Act contractually.²⁵

Effect 4 - Prosecutions and Convictions

Standing in contrast to the effects of the Act identified above in terms of scale are the relatively few prosecutions and convictions under it. To-date only five individuals have been convicted under the Act.²⁶ Not one of these has been in Scotland. Notably, the first charges under the Act brought by the Serious Fraud Office in England ended in the convictions in December 2014 of two persons involved in a £23m fraud involving the promotion and selling of South East Asia-based bio-fuel investment products to UK investors. This was a case against individuals *per se* and not a corporation under section 7, as indeed have been all of the convictions under the Act.²⁷ The dearth of prosecutions and convictions exists within a context where greater prosecutorial vigour in the area has been noted. It has been stated "A significant, sustained increase in international enforcement of anti-corruption legislation has been evident in the last 10 years. US, UK and German authorities, among others, have co-operated to impose criminal and other penalties against transnational corporations as well as against individual senior executives".²⁸ The question arising is how are the two facts

²⁴ House of Lords Select Committee on Small and Medium Sized Enterprises - Report Roads to Success: SME Exports, Feb. 2013, Chapter 10, at <http://www.publications.parliament.uk/pa/ld201213/ldselect/ldsmall/131/13114.htm>, at 10.3.

²⁵ In addition those sources cited above is McInnes, N., Addressing the Bribery Act in your Contracts: a Tiered Approach, Practical Law – Construction, June 2012, at <http://construction.practicallaw.com/blog/construction/pinsents/?p=167>.

²⁶ Damian Green, Minister for Policing, Criminal Justice and Victims, stated in 2013 "There have been three successful and no unsuccessful prosecutions under the Bribery Act 2010 since the act came into force in July 2011", Hansard 19 July 2013, col 159868. Subsequently, on 8 December 2014, two further individuals were convicted.

²⁷ The five convictions are of Munir Patel (Oct. 2011, a court clerk convicted of receiving bribes, sentence reduced May 2012 (R. v. Patel (Munir Yakub) [2012] EWCA (Crim) 1243), Yang Li (April 2013, pleaded guilty of attempting to bribe a university tutor), Mawia Mushtaq (Dec. 2012, pleaded guilty of attempting to bribe a driving instructor) and James Whale and Stuart Stone (Dec. 2014, both guilty of making and accepting a financial advantage, see *The Times* 9 Dec. 2014). See in regard to the Dec. 2014 convictions the speech of Stuart Alford, Joint Head of Fraud at the SFO), at <http://www.sfo.gov.uk/about-us/our-views/other-speeches/speeches-2014/stuart-alford-qc-enforcing-the-uk-bribery-act--the-uk-serious-fraud-office's-perspective.aspx>.

²⁸ Wells, C., Corporate Criminal Liability – a Ten Year Review, (2014) 12 Crim. L.R. 849. In regard to prosecution under the Act generally, the Director of the SFO and the Director of the DPP have published guidance, Joint Prosecution Guidance of the Directory of the SFO and the Director of Public Prosecutions on the Bribery Act

reconciled? The answer is multifaceted. Relevant factors include the considerable difficulties attendant to the detection, investigation and prosecution of bribery. The deterrent effect of the Act and the operation of the section 9 Guidance may also be factors. Also relevant are the relative novelty of the Act, the difficulties attendant to establishing corporate criminal liability and the emergence of novel prosecution policies.

The detection of bribery is particularly difficult "... given the secretive manner in which it is conducted and that the agreement to gain an unfair advantage is often retained between a close number of individuals whether acting in their own interest or acting in their capacity of employees of a company".²⁹ In addition, bribery-related crimes do not produce immediate and obvious victims, making detection difficult. Investigation can be affected where those suspected of bribery hold senior roles and are able to disguise or indeed erase evidence of wrong-doing. A pertinent example of this very thing is seen in the case of Afren plc, a London-listed oil and gas exploration company whose CEO and COO were dismissed for gross misconduct by the company in October 2014 upon the discovery of a series of 'unauthorised payments'.³⁰ Investigative difficulties are exacerbated when the conduct is extraterritorial. In such cases inter-state co-operation is necessary.³¹ Relevant here is the extent of the resources available to prosecution and investigatory authorities. It has been noted in regard to England and Wales that the SFO's heightened recent activity "... tends to suggest that the main reason for the United Kingdom's relatively low level of bribery prosecutions in the past has not been the substantive law but an unwillingness to devote resources to investigation and enforcement".³² Indeed, the resourcing point has been highlighted by the OECD in the past.³³

Effect 5 – Expansion in Scope of Novel Prosecution Policies

The expansion in the scope of novel prosecution policies is a fifth main effect of the Act. Relevant here are corporate self-reporting and deferred prosecution agreements (DPAs). Both can be seen as effects of the Act because they apply to the offences under it and were, in part, instituted or extended on account of it. This is not to suggest that they were introduced

2010, it is cited at: http://www.sfo.gov.uk/media/167348/bribery_act_2010_joint_prosecution_guidance_of_the_director_of_the_serious_fraud_office_and_the_director_of_public_prosecutions.pdf.

²⁹ Dickson, D.J., Cross Border Investigation and Prosecution of Bribery and Corruption Offences, (2014) 15 ERA Forum 51, at p 52. The author has first hand prosecutorial experience, being Head of the International Co-operation Unit at the Crown Office and Procurator Fiscal Service.

³⁰ The company issued a press release on the matter 13 October 2014, at <http://www.afren.com/>.

³¹ Dickson, supra note 29, outlines a number of the substantive and institutional avenues that exist in the area.

³² Wells, C., Who's Afraid of the Bribery Act 2010?, (2012) 5 Journal of Business Law 420 at p 431.

³³ Resourcing, corporate criminal liability and the relative novelty of the Act are mentioned below.

following the Act, both pre-date it (in some jurisdictions of the UK) and indeed apply to a wider range of crimes than those under the Act.³⁴ It is clear, though, that they are intended to enhance the effectiveness of the Act. In regard to DPAs the Ministry of Justice's Consultation on a New Enforcement Tool to Deal with Economic Crime Committed by Commercial Organisations: Deferred Prosecution Agreements provides "Although the creation under the Bribery Act 2010 of criminal liability for a commercial organisation that fails to prevent bribery is a notable improvement and although prosecuting agencies are taking more pro-active approaches in identifying and investigating serious economic crime, more needs to be done".³⁵ In a Scottish context the self-reporting initiative was brought into force on the same day as the Act itself, undoubtedly in an attempt to increase its effect. Notably, self-reporting and DPAs do not apply equally as between Scotland and the rest of the UK. In general terms, self-reporting applies in Scotland and DPAs in the rest of the UK. However, as will be mentioned presently, the precise position is not that simple.

The first novel prosecution policy within in the UK applying to bribery was self-reporting. It originally applied in England, Wales and Northern Ireland. Its first manifestation took the form of SFO guidance issued in 2009. The policy, which encouraged civil settlement, has now been withdrawn.³⁶ The current SFO policy on the issue is that there is no presumption in favour of civil settlement in any circumstances.³⁷ The general test as to criminal prosecution in England and Wales applies, viz. is there sufficient evidence to prosecute, and if so, is a prosecution in the public interest? Self-reporting may be an "... additional public interest factor against prosecution".³⁸ Summarising the present position the Director of the SFO noted the "SFO's message is carefully expressed and nuanced... If a company made a genuine self-report to us (that is, told us something we did not already know and did so in an open-handed, unspun way), in circumstances where they were willing to cooperate in a full investigation and to take steps to prevent recurrence, then in those circumstances it is difficult to see that the public interest would require a prosecution of the corporate".³⁹

³⁴ The crimes which may be dealt with by a DPA are specified in paragraphs 15-27 of schedule 17 to the Crime and Courts Act 2013, with the four bribery offences mention in paragraph 26.

³⁵ Consultation Paper CP9/2012, May 2012, at para 11, it is cited at https://consult.justice.gov.uk/digital-communications/deferred-prosecution-agreements/supporting_documents/deferredprosecutionagreementsconsultation.pdf.

³⁶ Wells, supra note 32, notes that "The partial reversal since the introduction of civil negotiated penalties was a result of pressure from a number of directions including the United States, the OECD Convention monitoring group and Transparency International", at p 431.

³⁷ Joint Prosecution Guidance, supra note 28, at p 5.

³⁸ DPP, SFO, and Director of the Revenue and Customs Prosecution Office, Joint Guidance on Corporate Prosecutions, at page 8, found at http://www.sfo.gov.uk/media/65217/joint_guidance_on_corporate_prosecutions.pdf.

³⁹ In a speech in October 2013, cited at <https://www.sfo.gov.uk/about-us/our-views/director-s-speeches/pinsent-masons-and-legal-week-regulatory-reform-and-enforcement-conference-.aspx>.

The position in Scotland in regard to self-reporting differs markedly. The Lord Advocate approved a self-reporting initiative relating to the crimes under the Act on the day it entered into force. The initiative remains applicable, having been extended to 30 June 2015. Under the initiative corporations may self-report bribery offences. This is done on the understanding that the case may be referred to the Civil Recovery Unit (CRU) for civil settlement in lieu of a criminal prosecution. Self-reporting does not bind the Crown and the Lord Advocate remains 'master of the instance' and may choose to prosecute or not. Self-reporting guidance has been published by the Crown Office which specifies the information that should be contained with a report and the circumstances in which it should be made.⁴⁰ Notably, there have been two instances of self-reporting in Scotland. The first occurred in May 2011, when Abbot Group plc detailed corrupt payments made by an overseas subsidiary in 2007. The company, a Scottish oil services provider, successfully complied with the Guidance and avoided possible criminal liability.⁴¹ The second instance was reported in December 2014. Aberdeen-based firm International Tubular Services admitted benefitting from corrupt payments made by a former employee, and remitted £172,000 to the CRU.⁴²

DPAs are somewhat akin to self-reporting in that they are an attempt to increase the impact of the criminal law in the corporate sphere. They differ, however, in nature and application. Section 45 and schedule 17 of the Crime and Courts Act 2013 govern DPAs.⁴³ Whilst both apply throughout the UK, the present restriction of 'designated prosecutors' to the Director of the SFO and DPP mean they may be employed in England and Wales and Northern Ireland but not Scotland. The Lord Advocate is not amongst the list of designated prosecutors. The recent extension of the self-reporting initiative suggests that the inclusion of the Lord Advocate is unlikely. The law governing DPAs entered into force 24 February 2014. A DPA is a voluntary agreement between a prosecuting authority and a commercial organisation whereby, in general terms, the prosecutor agrees to defer prosecution in return for the company agreeing to comply with a list of conditions. A DPA can only be imposed on a body corporate, partnership or unincorporated association. Under a DPA criminal charges are laid but then lay dormant. Fixed period terms and conditions are imposed which, if complied with, prevent the prosecution being brought. Schedule 17 of the Act provides that the DPA must contain a statement of facts, an expiry date and list the

⁴⁰ Guidance on the Approach of the Crown Office and Procurator Fiscal Service to Reporting by Businesses of Bribery Offences, it is found at <http://www.crownoffice.gov.uk/publications/prosecution-policy-and-guidance>.

⁴¹ Note that the corrupt payments were made prior to the entry into force of the Act and may not have been criminal under the previous law.

⁴² See <http://www.copfs.gov.uk/media-site/media-releases/935-aberdeen-company-pays-over-170-000-after-admitting-bribery-and-corruption-in-kazakhstan>.

⁴³ See generally on DPAs Bisgrove, M., and Weekes, M., Deferred Prosecution Agreements: a Practical Consideration, (2014) 6 Crim LR 416, and Mazzacuva, F., Justifications and Purposes of Negotiated Justice for Corporate Offenders: Deferred and Non-prosecution Agreements in the UK and US Systems of Criminal Justice, (2014) 78(3) Journal of Criminal Law 249.

factors with which the defendant must comply. Examples of which include an obligation to pay a financial penalty, to compensate victims and to implement appropriate compliance programmes. There is judicial involvement in the process of concluding a DPA. A court must grant approval at both a preliminary and final hearing. The agreement must be published. No DPAs have been agreed to-date.

Effect 6 – The UK’s International Legal Deficiencies Partially Addressed

The furtherance of the UK’s compliance with international law in the area of bribery is the final main effect of the Act. Whilst it is beyond the scope of this article to address the previous law on bribery and its compatibility with international law in detail, that law was widely considered to be at variance with the UK’s international legal obligations.⁴⁴ The Organisation for Economic Co-operation and Development (OECD), in particular, was quite strident as to the deficiencies of UK law and practice. Its 2008 Working Group on Bribery highlighted both the UK’s failure to adequately provide for effective corporate criminal liability⁴⁵ as well as several factors related to the prosecution of offences. It should be noted that the subject of the criticisms was the UK itself, as the state party to the OECD Bribery Convention. That noted, the criticisms were largely applicable within a Scottish context, as well as the rest of the UK. The Act addresses certain of the criticisms. The Scottish Executive stated in the process leading to the Act “The Bribery Bill aims to provide a clearer and more effective legal framework to combat bribery in both the public and private sectors and will assist the United Kingdom, including Scotland, in more effectively fulfilling international obligations”.⁴⁶

The application of the crimes relating to bribery to bodies corporate has been altered significantly by the Act. The two general bribery offences and the bribery of a foreign public official offence may be committed by a body corporate. Liability here relies upon the identification principle whereby senior managers within a company are identified as the ‘brains’ or ‘controlling mind’ of the company. This legal construct has been developed in order to satisfy the requirement of the criminal law that an accused act with a certain mental state.⁴⁷ It has been criticised generally and forms a

⁴⁴ See Arnell, P., and Quiroz-Onate, D., UK Compliance with International Law: Bribery and Corruption, (2010) 3(3) Int. J. Liability and Scientific Enquiry 183.

⁴⁵ The OECD’s scrutiny of the UK’s law and practice on bribery over the since 1999 is recorded here <http://www.oecd.org/daf/anti-bribery/unitedkingdom-oecdanti-briberyconvention.htm>

⁴⁶ Cited at <http://www.scotland.gov.uk/About/Sewel/SessionThree/BriberyBill>. The international law obligations upon the UK in the area of bribery are generally found in three treaties - the OECD Convention on Combating Bribery of Foreign Public Officials 1997, the United Nations Convention Against Corruption 2003 and the Council of Europe Criminal Law Convention on Corruption 1999.

⁴⁷ See Wells, supra note 37. See also Wells, C., Corporate Criminal Liability in England and Wales: Past, Present, and Future, in Pieth M., and Ivory, R., (eds), *Corporate Criminal Liability - Emergence, Convergence, and Risk*, Springer, Dordrecht, 2011, Chapter 3.

part of the OECD's criticism of the UK.⁴⁸ The House of Commons Justice Committee has noted "Corporate prosecutions for economic crime have in the past been rare for various reasons: in particular the difficulties in proving the culpability of "directing minds" in the case of alleged fraud committed by large enterprises...".⁴⁹ The section 7 offence overcomes this hurdle. It is in regard to it that the criminal law has been meaningfully extended to legal persons. As noted above, the offence is committed where relevant commercial organisations fail to prevent bribery. It is a strict liability offence – albeit qualified by the adequate procedures defence in section 7(2). The Act, therefore, addresses the criticisms in UK law in this area and indeed may go beyond what is required.⁵⁰

The OECD's prosecution-related criticisms of UK law and practice in the area of bribery included the lack of a specialised authority within the UK for the purpose of prosecuting bribery, the relevance of extraneous factors to prosecution decisions, and the requirement that the Attorney General agree to a prosecution. The Act has not created, nor is there otherwise, a single specialised authority throughout the UK existing for the purpose of prosecuting bribery. To that extent the first criticism remains, and indeed will remain. Of course, it is the Crown Office and Procurator Fiscal Service (COPFS) that may prosecute within Scotland bribery offences arising in or relating to it. As an April 2014 Memorandum of Understanding entitled Tackling Foreign Bribery (MOU) provides, the COPFS is "... the lead agency for receiving, investigating and prosecuting all allegations or reports of foreign bribery in or from Scotland...".⁵¹ In the rest of the UK the SFO has that role.⁵² It does not, however, have exclusive authority throughout the rest of the UK. The MOU is illustrative, party to it are not only the COPFS and the SFO, but also the City of London Police, the Crown Prosecution Service, the Financial Conduct Authority, MoD Police and the National Crime Agency. That noted, the MOU goes some way to facilitate co-operation between the parties to it, and as the OECD criticism is addressed to an extent. Of course the existence of the SFO as a leading specialised agency within the rest of the UK is one thing, its ability to function effectively is quite another. Relevant here are the resources allocated to it by government. These have been decreasing, the monies given to the SFO "...

⁴⁸ Wells, supra note 28, notes "The United Kingdom came under pressure from the OECD Working Group on Bribery, which believed that the identification route to corporate liability—which could otherwise apply to bribery offences—was wholly inadequate in meeting the UK's obligations under the Bribery Convention", at p 864.

⁴⁹ House of Commons Justice Committee, Fraud, Bribery and Money Laundering Offences Guideline: Consultation, Report of 2013-2014, 5 Nov. 2013, cited at: <http://www.publications.parliament.uk/pa/cm201314/cmselect/cmjust/804/804.pdf>. As noted above, the section 7 offence dispenses with this requirement. See also Green, D., The Global Financial Crisis: The Case for a Stronger Criminal Response (2013) Law and Financial Markets Review 159 at p 164.

⁵⁰ Wells, supra note 28, states "This more than satisfies the OECD's recent Good Practice Guidance", at p 865.

⁵¹ At para 4.5, cited at <https://www.fca.org.uk/static/documents/mou/mou-tackling-foreign-bribery.pdf>.

⁵² Its website contains bribery-specific pages, <http://www.sfo.gov.uk/bribery--corruption/bribery--corruption.aspx>.

have been severely pruned in the last few years. Its budget fell from £51 million in 2008–2009 to £29 million by 2014–2015”.⁵³ Indeed, the continued existence of the SFO itself is under re-evaluation.⁵⁴

The prosecution-related criticism of the UK relating to the applicability of extraneous factors in decision-making came to prominence in the moves to prosecute the arms firm BAE, which eventually ended in a plea bargain deal with UK and US authorities.⁵⁵ At issue specifically was the relevance of the UK’s national economic interest to the decision not to continue with a criminal investigation. The consideration of national economic interest is in conflict with article 5 of the OECD Bribery Convention, which expressly provides that it should not be a factor. The rest of the UK has addressed this point somewhat by way of a note within the Joint Prosecution Guidance that provides “Prosecutors dealing with bribery cases are reminded of the UK’s commitment to abide by Article 5 of the OECD Convention...”.⁵⁶ However, as that Guidance itself stipulates, prosecution decisions in England and Wales are governed by the Code for Crown Prosecutors. This entails the established two-stage evidential and public interest test.⁵⁷ In Scotland the Prosecution Code, published in 2001, provides that decisions are based upon legal and public interest considerations. The latter are said to include the interests of the ‘wider community’ and ‘public concern’.⁵⁸ It seems doubtful that a prosecution in Scotland would turn on Scotland’s, or indeed the UK’s, national economic interest. This is not precluded, however. The Lord Advocate’s independence and discretion in decision making remains. Finally, the point about the role of Attorney-General in decisions has been addressed. Section 10 of the Act provides that the Directors of Public Prosecutions for England and Wales, Northern Ireland and the SFO must consent to proceedings being instituted.⁵⁹ The basis of this criticism founded upon the relationship between the consent-giver and the government no longer subsists.

Conclusion

The Bribery Act 2010 has had six main effects to-date. These are changes to the substantive law, the issuance of guidance by the Ministry of Justice

⁵³ Wells, supra note 28 at p 874.

⁵⁴ A review of the institutional arrangements for prosecuting corruption led by Ken Clarke was announced in June 2014, see letter by Transparency International and others to the Prime Minister 2 October 2014, at <http://www.transparency.org.uk/>.

⁵⁵ The then Director of the SFO’s decision to stop the criminal investigation involving Saudi Arabia in 2006 was upheld by the House of Lords in R. (on the application of Corner House Research) v Director of the Serious Fraud Office, [2008] UKHL 60. See Roberts, A.J., Prosecution: Director of SFO - Lawfulness of Decision to Discontinue Prosecution, (2009) 1 Criminal Law Review 46.

⁵⁶ Joint Prosecution Guidance on the Bribery Act, supra note 28, at page 5.

⁵⁷ The Code is found here: http://www.cps.gov.uk/publications/code_for_crown_prosecutors/.

⁵⁸ The Prosecution Code is cited at: http://www.crownoffice.gov.uk/images/Documents/Prosecution_Policy_Guidance/Prosecution20Code20_Final20180412_1.pdf.

⁵⁹ There is no provision in the section in regard to Scotland - the Crown Office and Procurator Fiscal Service remains the sole public prosecutor for all crime.

and institution of revised compliance programmes by companies, the amendment of commercial contracts, several prosecutions and convictions, the expansion in scope of new prosecution policies and the UK partially addressing its international legal obligations in the area. There are others. They have not been discussed presently because they are embryonic, at best, or anecdotal. Amongst these are heightened international co-operation amongst prosecution authorities⁶⁰, a possible disinclination to export on account of the threat of prosecution under the Act⁶¹, and an increase in relevance of bribery to international arbitral proceedings.⁶² In addition to producing a number of distinct effects the Act has also highlighted the differences in law and practice between Scotland and the rest of the UK in the area. The applicability of the Act to partnerships in Scotland, differences in sentencing practice, and, notably, the distinct practice in regard to self-reporting and DPAs are all brought to the fore. The results, if any, of these differences – the two instances of self-reporting in Scotland excepted – largely remain to be seen. Indeed, as does whether the Act will have effect perhaps most reasonably expected from a statute introducing new substantive crimes – notable prosecutions and convictions, especially of bodies corporate under the section 7 offence. As the Act is not retrospective it covers conduct only committed after 1 July 2011. It is in a sense, then, still relatively novel. A comparison has been made to US experience, with it being noted that “... it takes time to mobilise resources to bring cases under a newly enhanced anticorruption law. In the US, for example, although the FCPA was enacted in 1977, vigorous enforcement of it did not begin until the early 2000s”.⁶³ Only time will tell if Scotland and the rest of the UK will follow a path and timescale akin to their transatlantic partner.

⁶⁰ International co-operation in the investigation and prosecution of bribery of course pre-dates the Act. A well-known case where it was at issue is *R. v Innospec Limited* [2010] Lloyd's Rep. F.C. 462. Whilst it is reasonable to conclude that the greater clarity and scope of the law will lead to increased international co-operation there is no hard evidence of this happening to-date.

⁶¹ In August 2013 the Institute of Directors stated that the Act may be discouraging SMEs from exporting. White, A., [Bribery Act 'needs overhaul' to help more small firms to export](#), *The Telegraph*, 27 August 2013.

⁶² In *Interprods Limited v De La Rue International Limited* [2014] EWHC 68 (Comm) the High Court considered an argument that an act of bribery had the effect of depriving an arbitral tribunal of jurisdiction.

⁶³ DiBianco, G., et al, [Bribery Act 2010: Still a Sleeping Giant](#), 23 October 2014, Practical Law Magazine, cited at <http://uk.practicallaw.com/8-584-9550>.