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EXPANSIVE REACH—USELESS GUIDANCE: AN INTRODUCTION TO THE U.K. BRIBERY ACT 2010

Bruce W. Bean and Emma H. MacGuidwin***

I.	BRIBERY ACT: SECTION 1	325
	A. <i>Active Bribery Described</i>	325
	B. <i>Relevant Function or Activity and Improper Performance</i>	327
	C. <i>The Ministry of Justice’s Guidance on Section 1</i>	329
II.	BRIBERY ACT: SECTION 2	330
III.	BRIBERY OF FOREIGN PUBLIC OFFICIALS, FACILITATION PAYMENTS, AND HOSPITALITY EXPENDITURES.....	331
	A. <i>Section 6: Bribery of Foreign Public Officials</i>	331
	B. <i>Facilitation Payments</i>	334
	C. <i>Hospitality Expenditures</i>	336
IV.	JURISDICTIONAL NEXUS TO THE UNITED KINGDOM.....	338
V.	SECTION 7: REESTABLISHING BRITISH DOMINION OVER THE PLANET.....	339
	A. <i>Relevant Commercial Organization</i>	339
	B. <i>Adequate Procedures Defense</i>	342
	C. <i>Person Associated with a Relevant Commercial Organization</i>	344
VI.	CONCLUSION	346

Following two decades of incessant pressure from American diplomats, in 1997, the international Organization for Economic Cooperation and Development (OECD) completed negotiation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.¹ The Convention, which became effective on February 15, 1999, obligates signatories to enact domestic

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1. See generally Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Feb. 15, 1999, 37 I.L.M. 1, available at <http://www.oecd.org/dataoecd/4/18/38028044.pdf> (last visited Mar. 7, 2011) [hereinafter Convention on Combating Bribery].

legislation criminalizing bribery of foreign government officials.² Five other anti-bribery conventions have since come into force.³ However, the nearly universal formal acceptance of the principle that overseas bribery should be criminalized, as demonstrated by the broad acceptance of these conventions, has done little to reduce corruption. This is likely based in part on a similarly universal lack of interest in seriously enforcing the laws implementing these conventions. The U.K. Bribery Act 2010 [note the formal name of U.K. acts include the year, with no “of.” I do not think we should change the name of their Act], enacted after more than a decade of debate, delay, and deliberation by Parliament, is the culmination of the United Kingdom’s (U.K.) effort to finally comply with the OECD Convention.⁴ Because the Act is a complete revision to all U.K. bribery-related statutes, it applies to both domestic and foreign bribery.⁵

This Article will provide an overview of the Bribery Act offenses of bribing another person, requesting or agreeing to receive a bribe, bribery of a foreign public official, and, most importantly, the corporate offense of failure to prevent bribery. As mandated by section 9 of the Bribery Act, the U.K. Ministry of Justice has published “Guidance about procedures which relevant commercial organisations can put into place to prevent persons

2. *Id.*

3. These are the United Nations Convention Against Corruption, Council of Europe Civil Law Convention on Corruption, Council of Europe Criminal Law Convention and Protocol on Corruption, Inter-American Convention Against Corruption, and the African Union Convention on Preventing and Combating Corruption. See *Anti-Corruption Conventions and Instruments*, TRANSPARENCY INT’L, http://www.transparency.org/global_priorities/international_conventions/conventions_instruments (last visited Feb. 12, 2012). The most important of these is the United Nations Convention Against Corruption, which currently binds 140 states, with eleven others dealing with ratification. See *United Nations Convention Against Corruption*, UNODC.ORG, <http://www.unodc.org/unodc/en/treaties/CAC/signatories.html> (last visited Feb. 12, 2012).

4. The United States’ effort to eliminate bribery and corruption in international and business transactions began in 1997 with the enactment of the Foreign Corrupt Practices Act (FCPA), which is enforced by the U.S. Department of Justice and the Securities and Exchange Commission. Commercial organizations subject to the Bribery Act that have adopted anti-bribery procedures under the FCPA will already have satisfied some of the Bribery Act’s requirements. However, certain of the substantive requirements of the Act go beyond those required by the FCPA, so companies adhering to the FCPA must still reevaluate their policies and procedures. See Richard Alderman, Dir., Serious Fraud Office, *Managing Corruption Risk in the Real World* (Apr. 7, 2011) available at <http://www.sfo.gov.uk/about-us/our-views/director's-speeches/speeches-2011/salans---bribery-act-2010.aspx> (last visited Mar. 7, 2012). See Lista M. Cannon & Richard C. Smith, *US Foreign Corrupt Practices Act versus the UK Bribery Act: a perspective from both sides of the Pond*, in *SERIOUS ECONOMIC CRIMES*, ch. 11, at 92 (Serious Fraud Office, 2011) available at <http://www.seriouseconomiccrime.com/ebooks/Serious-Economic-Crime.pdf> (last visited Mar. 11, 2012).

5. See LAW COMMISSION NO. 313, *REFORMING BRIBERY*, 2008, H.C. 928, at 137 (U.K.) [hereinafter LAW COMMISSION NO. 313].

associated with them from bribing.”⁶ This Article will refer to the Guidance in addressing the various sections of the Act. We demonstrate that the overly broad and far-reaching effects of the Bribery Act go too far, particularly with respect to the corporate offense of failure to prevent bribery. We will also show that the Ministry of Justice’s Guidance fails to provide useful guidance as to how the Act will be enforced and fails to reassure the public that such enforcement will not be overly aggressive.⁷

I. BRIBERY ACT: SECTION 1

A. Active Bribery Described

Section 1 sets forth the offense of bribing another person, or active bribery.⁸

Section 1 prohibits a person—either directly or through an agent—from offering, promising, or giving an advantage to another.⁹ This is a

6. See generally MINISTRY OF JUSTICE, THE BRIBERY ACT 2010: GUIDANCE (2010) [hereinafter GUIDANCE]. See Bribery Act, 2010, c. 23, § 9 (U.K.). See discussion *infra* Part V.B. Kenneth Clarke, Secretary of State for Justice, explained in the Foreword to the Guidance: “In line with the Act’s statutory requirements, I am publishing this guidance to help organizations understand the legislation and deal with the risks of bribery. My aim is that it offers clarity on how the law will operate.” Foreword to GUIDANCE, *supra* note 7, at 2.

7. The authors retain British spelling where the Bribery Act is quoted.

8. Bribery Act, 2010, c.23, § 1 (U.K.). This section provides as follows:

(1) A person (“P”) is guilty of an offence if either of the following cases applies.

(2) Case 1 is where—

(a) P offers, promises or gives a financial or other advantage to another person, and

(b) P intends the advantage—

(i) to induce a person to perform improperly a relevant function or activity, or

(ii) to reward a person for the improper performance of such a function or activity.

(3) Case 2 is where—

(a) P offers, promises or gives a financial or other advantage to another person, and

(b) P knows or believes that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity.

(4) In case 1 it does not matter whether the person to whom the advantage is offered, promised or given is the same person as the person who is to perform, or has performed, the function or activity concerned.

(5) In cases 1 and 2 it does not matter whether the advantage is offered, promised or given by P directly or through a third party.

Id.

9. *Id.*

general bribery offense, applicable within the United Kingdom and abroad. Section 1 thus covers domestic bribes, kickbacks, and the like between private parties, as well as bribes of government officials in international business.¹⁰ An offense under section 1 is not limited to payments of money, but includes offers, promises, or gifts of financial or other advantage.¹¹ One commits this offense even without actually carrying through with the offer or promise of a payment or advantage; a simple offer or promise completes the offense.¹² A section 1 offense also includes indirect payments made through a third party.¹³ However, the offense is limited to circumstances where the party making the payment intends the advantage so proffered to induce the recipient to improperly perform an act or to reward the recipient for having done so.¹⁴ The offense is also completed where a party offers the advantage, knowing that acceptance of the advantage would constitute the improper performance of a relevant function or activity.¹⁵

The person to whom the advantage is offered is the key distinction between cases 1 and 2, the situations described in subsections (2) and (3).¹⁶ In case 1, it does not matter whether the person to whom the advantage is offered is the same person who is to perform, or has performed, the activity; whereas in case 2, the person whose acceptance of the advantage constitutes an improper performance must be the same person to whom the advantage is offered.¹⁷ Moreover, in case 1, the advantage must be intended to induce or reward the improper performance of a relevant function or activity, while in case 2, the acceptance of the advantage itself is the improper performance.¹⁸ In summary, a person offering an advantage as described in section 1 is guilty if this was done with the intent to induce the recipient to improperly act, or reward the recipient for having done so, or where the recipient's acceptance or agreement is itself improper.¹⁹

10. *Id.*

11. *Id.* § 1(2)(a).

12. Bribery Act, 2010, c.23, § 1(3) (U.K.).

13. *Id.* § 1(4)–(5).

14. *Id.* § 1(2)(b)(i).

15. *Id.* § 1(2)(b)(ii).

16. *Id.* § 1.

17. Bribery Act, 2010, c.23, § 1(2) (U.K.).

18. *Id.* § 1(3).

19. *Id.* § 1(2)(b).

B. Relevant Function or Activity and Improper Performance

Sections 3 and 4 of the Act set forth, respectively, the broad range of activities to which the Act applies and the meaning of improper performance as used in the Act.²⁰ As stated, the section 1 offense is where the advantage is intended:

- (i) to induce a person to perform improperly a relevant function or activity, or
- (ii) to reward a person for the improper performance of such a function or activity [or where]
 - (a) P offers, promises or gives a financial or other advantage to another person, and
 - (b) P knows or believes that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity.²¹

A relevant function or activity is defined in section 3 to include any public or business activity performed in the course of employment.²² The activity must also meet one of three conditions: it is normally expected to be performed in good faith, is performed impartially, or is performed by a

20. *Id.* §§ 1(4)–(5).

21. *Id.* §§ 1(2)(b), (3).

22. Bribery Act, 2010, c.23 § 3 (U.K.). Section 3 provides:

- (1) For the purposes of this Act a function or activity is a relevant function or activity if—
 - (a) it falls within subsection (2), and
 - (b) meets one or more of conditions A to C.
- (2) The following functions and activities fall within this subsection—
 - (a) any function of a public nature,
 - (b) any activity connected with a business,
 - (c) any activity performed in the course of a person’s employment,
 - (d) any activity performed by or on behalf of a body of persons (whether corporate or unincorporate).
- (3) Condition A is that a person performing the function or activity is expected to perform it in good faith.
- (4) Condition B is that a person performing the function or activity is expected to perform it impartially.
- (5) Condition C is that a person performing the function or activity is in a position of trust by virtue of performing it.
- (6) A function or activity is a relevant function or activity even if it—
 - (a) has no connection with the United Kingdom, and
 - (b) is performed in a country or territory outside the United Kingdom.
- (7) In this section “business” includes trade or profession.

person in a position of trust by virtue of performing it.²³ Importantly, the relevant function or activity can be carried out abroad and need not have any connection to the United Kingdom.²⁴ However, the measure of what is improper is determined by U.K. standards, not by those of the foreign country where the bribing occurs.²⁵ Enforcement of this far-reaching language may well prove controversial as other sovereign nations begin to feel the effects of this measure.

Section 4 explains that a relevant function or activity is performed improperly if it is performed in breach of a relevant expectation, or if there is a failure to perform the function or activity, and that failure is a breach of a relevant expectation.²⁶ Section 5 of the Act elaborates on the term “expectation” as that term is used in sections 3 and 4.²⁷ This section clarifies that, for the purpose of sections 3 and 4, “the test of what is expected is a test of what a reasonable person in the United Kingdom would

23. *Id.* § 3(3)–(5).

24. *Id.* § 3(6)(a)–(b).

25. *See id.* §§ 4, 5. This applicability of U.K. standards to transactions occurring in foreign nations with very different societies and cultures will doubtless trigger accusations of “cultural imperialism” comparable to those previously raised in connection with application of the FCPA. *See, e.g.*, Christopher Duncan, *The 1998 Foreign Corrupt Practices Act Amendments: Moral Empiricism or Moral Imperialism*, 1 *ASIAN-PAC. L. & POL’Y J.* 16:1 (2000); Elizabeth Spahn, *International Bribery: The Moral Imperialism Critiques*, 18 *MINN. J. INT’L L.* 155, 156 (2009); Padideh Ala’i, *Legacy of Geographical Morality and Colonialism: A Historical Assessment of the Current Crusade against Corruption*, 33 *VAND. J. TRANSNAT’L L.* 877, 881 (2000).

26. Bribery Act, 2010, c.23, § 4 (U.K.). Section 4 provides:

(1) For the purposes of this Act a relevant function or activity—

(a) is performed improperly if it is performed in breach of a relevant expectation, and

(b) is to be treated as being performed improperly if there is a failure to perform the function or activity and that failure is itself a breach of a relevant expectation.

(2) In subsection (1) “relevant expectation”—

(a) in relation to a function or activity which meets condition A or B, means the expectation mentioned in the condition concerned, and

(b) in relation to a function or activity which meets condition C, means any expectation as to the manner in which, or the reasons for which, the function or activity will be performed that arises from the position of trust mentioned in that condition.

(3) Anything that a person does (or omits to do) arising from or in connection with that person’s past performance of a relevant function or activity is to be treated for the purposes of this Act as being done (or omitted) by that person in the performance of that function or activity.

Id.

27. *Id.* § 5(1).

expect in relation to the performance of the type of function or activity concerned.”²⁸ Section 5 further provides:

In deciding what such a person would expect in relation to the performance of a function or activity *where the performance is not subject to the law of any part of the United Kingdom*, any local custom or practice is to be disregarded unless it is permitted or required by the written law applicable to the country or territory concerned.²⁹

Thus, once again, the statute purports to apply U.K. standards to conduct that occurs in other nations.³⁰

C. *The Ministry of Justice’s Guidance on Section 1*

The Ministry of Justice’s Guidance explains that the section 1 offense of active bribery applies to “bribery relating to any function of a public nature, connected with a business, performed in the course of a person’s employment or performed on behalf of a company or another body of persons.”³¹ While this explanation is broad in all respects, the situation most open to prosecutorial discretion—and thus prosecutorial abuse—is bribery performed “on behalf of a company or another body of persons.”³² However, the Guidance does not elaborate on this situation.

The Guidance also presents a scenario that would not, in all likelihood, implicate section 1:

By way of illustration, in order to proceed with a case under section 1 based on an allegation that hospitality³³ was intended as a bribe, the prosecution would need to show that the hospitality was intended to induce conduct that amounts to a breach of an expectation that a person will act in good faith, impartially, or in accordance with a position of trust. This would be judged by what a reasonable person in the UK thought. So, for example, an invitation to foreign clients to attend a Six Nations match at Twickenham as part of a public relations exercise designed to cement good relations or enhance

28. *Id.*

29. *Id.* § 5(2) (emphasis added).

30. *See* Bribery Act, 2010, c.23, § 5(2).

31. GUIDANCE, *supra* note 7, ¶ 18.

32. *Id.*

33. The term “hospitality” as used in the Guidance refers generally to business entertainment expenses that would include such items as meals, travel, and accommodation. *Id.* ¶¶ 26, 27.

knowledge in the organisation's field is extremely unlikely to engage section 1 as there is unlikely to be evidence of an intention to induce improper performance of a relevant function.³⁴

It should be noted that the Ministry is careful to state only that such an invitation would be "extremely *unlikely* to engage section 1[.]" because there is "*unlikely* to be evidence of an intention to induce improper performance of a relevant function."³⁵ This opinion is certainly not conclusive, however, because the Guidance is not law, does not have the force of law, and thus, cannot offer much comfort to those seeking to determine how to comply with the Act.³⁶

II. BRIBERY ACT: SECTION 2

Section 2 of the Act describes the offense of passive bribery, where the perpetrator requests or agrees to receive a bribe.³⁷ Under section 2, one

34. *Id.* ¶ 20. Twickenham is the world's largest rugby stadium located close to London.

35. *Id.*

36. See GUIDANCE, *supra* note 7, ¶ 4.

37. Bribery Act, 2010, c.23, § 2 (U.K.). Section 2 of the Act provides:

(1) A person ("R") is guilty of an offence if any of the following cases applies.

(2) Case 3 is where R requests, agrees to receive or accepts a financial or other advantage intending that, in consequence, a relevant function or activity should be performed improperly (whether by R or another person).

(3) Case 4 is where—

(a) R requests, agrees to receive or accepts a financial or other advantage, and

(b) the request, agreement or acceptance itself constitutes the improper performance by R of a relevant function or activity.

(4) Case 5 is where R requests, agrees to receive or accepts a financial or other advantage as a reward for the improper performance (whether by R or another person) of a relevant function or activity.

(5) Case 6 is where, in anticipation of or in consequence of R requesting, agreeing to receive or accepting a financial or other advantage, a relevant function or activity is performed improperly—

(a) by R, or

(b) by another person at R's request or with R's assent or acquiescence.

(6) In cases 3 to 6 it does not matter—

(a) whether R requests, agrees to receive or accepts (or is to request, agree to receive or accept) the advantage directly or through a third party,

(b) whether the advantage is (or is to be) for the benefit of R or another person.

(7) In cases 4 to 6 it does not matter whether R knows or believes that the performance of the function or activity is improper.

(8) In case 6, where a person other than R is performing the function or activity, it also does not matter whether that person knows or believes that the performance of the function or activity is improper.

does not need to receive a bribe, but merely ask for or agree to receive it, and the bribe need not be monetary.³⁸ The same definitions of relevant function or activity and improper performance found in sections 3 and 4 also apply to section 2.³⁹ As with active bribery, the action must be improper, i.e., the actor needs to do or intend to do something wrong.⁴⁰ Moreover, the improper conduct could be intended to be done by a third party, or a third party could be the source of the bribe.⁴¹ As one might imagine, section 2 encompasses a wider range of possible conduct than does section 1 and may well be easier to prove from the prosecutor's standpoint. Moreover, the irony of labeling this offense as passive bribery, and yet defining the four cases constituting varieties of the offense with the term "requests," was apparently lost on Parliament.⁴² As Professor Peter Alldrige, a U.K. authority in this area, has remarked: "Calling it passive bribery—as do some in international instruments—rather misses [the] point."⁴³

III. BRIBERY OF FOREIGN PUBLIC OFFICIALS, FACILITATION PAYMENTS, AND HOSPITALITY EXPENDITURES

A. Section 6: Bribery of Foreign Public Officials

Section 6 of the Act outlines the offense of bribery of a foreign public official.⁴⁴ A foreign public official is defined as one who holds a

Id.

38. *Id.* § 2(3)(a).

39. *Id.* §§ 3, 4.

40. *Id.* § 3(7).

41. Bribery Act, 2010, c.23, § 2(6) (U.K.).

42. *Id.* § 2.

43. Peter Alldrige, *Reforming Bribery: Law Commission Consultation Paper 185: (1) Bribery Reform and the Law—Again*, 2008 CRIM. L. R. 671, 681 (2008).

44. Bribery Act, 2010, c.23, § 6(1)–(4) (U.K.). Section 6 provides, in relevant part: (1) A person ("P") who bribes a foreign public official ("F") is guilty of an offence if P's intention is to influence F in F's capacity as a foreign public official. (2) P must also intend to obtain or retain— (a) business, or (b) an advantage in the conduct of business. (3) P bribes F if, and only if— (a) directly or through a third party, P offers, promises or gives any financial or other advantage— (i) to F, or (ii) to another person at F's request or with F's assent or acquiescence, and

legislative, administrative, or judicial position of any kind of a country or territory outside the United Kingdom, exercises a public function, or is an official or agent of a public international organization.⁴⁵ This definition closely tracks the definition included in the OECD Convention.⁴⁶ A public international organization is defined as an organization whose members include countries or territories, governments of countries or territories, other public organizations, or a mixture of any of the above.⁴⁷

The Guidance explains that this standalone offense is committed where a person offers, promises, or gives a financial or other advantage to a foreign public official with the intention of influencing the official in the performance of his or her official functions; the person must also intend to obtain or retain business or an advantage in the conduct of business by doing so.⁴⁸ The language “obtain or retain business or, an advantage in the conduct of business,” likewise, carefully tracks the requirement of Article 1

(b) F is neither permitted nor required by the written law applicable to F to be influenced in F’s capacity as a foreign public official by the offer, promise or gift.

(4) References in this section to influencing F in F’s capacity as a foreign public official mean influencing F in the performance of F’s functions as such an official, which includes—

(a) any omission to exercise those functions, and

(b) any use of F’s position as such an official, even if not within F’s authority.

Id.

45. *Id.* § 6(5). Specifically, section 6 provides, in relevant part:

(5) “Foreign public official” means an individual who—

(a) holds a legislative, administrative or judicial position of any kind, whether appointed or elected, of a country or territory outside the United Kingdom (or any subdivision of such a country or territory),

(b) exercises a public function—

(i) for or on behalf of a country or territory outside the United Kingdom (or any subdivision of such a country or territory), or

(ii) for any public agency or public enterprise of that country or territory (or subdivision), or

(c) is an official or agent of a public international organisation.

Id.

46. Convention on Combating Bribery, *supra* note 1, art. 1, § 4(a). For the purpose of this Convention:

a) “foreign public official” means any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organization.

Id.

47. Bribery Act, 2010, c.23, § 6(6) (U.K.).

48. GUIDANCE, *supra* note 7, ¶ 21.

of the OECD Convention.⁴⁹ For this separate offense, offering or paying a bribe to a foreign public official is criminalized, but as with the FCPA, receipt of the advantage by the foreign public official is not.⁵⁰

The Ministry of Justice asserts in the Guidance that an offense under section 6 has no jurisdictional limit.⁵¹ A foreign public official includes anyone, whether elected or appointed, who holds a legislative, administrative, or judicial position “of any kind of a country or territory outside the UK” and includes:

[A]ny person who performs public functions in any branch of the national, local or municipal government of such a country or territory or who exercises a public function for any public agency or public enterprise of such a country or territory, such as professionals working for public health agencies and officers exercising public functions in state-owned enterprises.⁵²

Such an official “can also be an official or agent of a public international organisation, such as the UN or World Bank.”⁵³

According to the Guidance, sections 1 and 6 “may capture the same conduct but will do so in different ways.”⁵⁴ The policy underlying section 6 is “the need to prohibit the influencing of decision making in the context of

49. Convention on Combating Bribery, *supra* note 1, art. 1, § 1. Article 1 provides, in relevant part:

Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official. . . .

Id. For the unusual treatment of the phrase “or other advantage” by the United States, which amended the FCPA to incorporate this phrase following ratification of the OECD Convention, *see* United States v. Kay, 513 F. 3d 461 (5th Cir. 2008), one of just a handful of cases brought under the FCPA that have actually been resolved in the federal courts.

50. *Id.* art. 1.

51. GUIDANCE, *supra* note 7, ¶ 22.

52. *Id.* (emphasis added).

53. *Id.*

This expands slightly on the text of the OECD Convention, which provides that a foreign public official means any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organization.

Convention on Combating Bribery, *supra* note 1, art. 1, § 4(a).

54. GUIDANCE, *supra* note 7, ¶ 23.

publicly funded business opportunities by the inducement of personal enrichment of foreign public officials or to [sic] others at the official's request."⁵⁵ While such activity is likely to involve conduct amounting to improper performance of a relevant function or activity, to which section 1 applies, the Guidance explains that section 6 does not require proof of improper performance or an intention to induce such performance, because "the exact nature of the functions of the persons regarded as foreign public officials is often very difficult to ascertain with any accuracy, and the securing of evidence will often be reliant on the co-operation of the state any such officials serve."⁵⁶ Thus, Parliament felt the need to create the separate, standalone offense of bribing a foreign public official. While the Guidance states that it is "not the Government's intention to criminalise behavior where no such mischief occurs, but merely to formulate the offense to take account of the evidential difficulties referred to above," this is less than helpful, and in fact, provides no useful guidance at all.⁵⁷

B. Facilitation Payments

The Bribery Act also outlawed facilitation payments, small bribes paid to facilitate or expedite routine government action.⁵⁸ The Guidance provides:

As was the case under the old law, the Bribery Act does not (unlike US foreign bribery law) provide any exemption for such payments. The 2009 [OECD] Recommendation recognises the corrosive effect of facilitation payments and asks adhering countries to discourage companies from making such payments. Exemptions in this context create artificial distinctions that are difficult to enforce, undermine corporate anti-bribery procedures, confuse anti-bribery communication with employees and other associated persons, perpetuate an existing "culture" of bribery and have the potential to be abused.⁵⁹

The Guidance also states that these payments could trigger either the section 6 offense or, "where there is an intention to induce improper conduct, including where the acceptance of such payments is itself improper, the section 1 offense and therefore potential liability under

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* ¶ 45.

59. GUIDANCE, *supra* note 7, ¶ 45.

section 7.”⁶⁰ Thus, Parliament has purported to take a hard line by outlawing any use of facilitation payments.

The Ministry of Justice’s Guidance and commentary from the U.K. Serious Fraud Office (SFO), the agency that investigates and prosecutes fraud and corruption,⁶¹ state that facilitation or grease payments have always been prohibited by the OECD Convention.⁶² While it is not within the scope of this Article to analyze in detail the accuracy of this contention, there is clear evidence that this statement is wrong. Commentary 9 to the OECD Convention, as originally published, provides:

Small “facilitation” payments do not constitute payments made “to obtain or retain business or other improper advantage” within the meaning of paragraph 1 and, accordingly, are also not an offence. Such payments, which, in some countries, are made to induce public officials to perform their functions, such as issuing licenses or permits, are generally illegal in the foreign country concerned. Other countries can and should address this corrosive phenomenon by such means as support for programmes of good governance. However, criminalisation by other countries does not seem a practical or effective complementary action.⁶³

Thus, as originally interpreted in 1997 by paragraph 9 of the Commentary to the Convention, facilitation payments did not constitute “payments made to obtain or retain business or other improper advantage,” and, thus, were not considered an offense under the Convention.⁶⁴

The SFO Senior Staff has “stated that a company’s policies should address the possibility of such payments being made, incorporating the relevant AG and Ministry of Justice Guidance in this regard.”⁶⁵ The Staff explained that:

[T]he SFO takes a sympathetic approach toward “emergency facilitation payments,” and offered an example: a visitor to a foreign country requires an inoculation and is offered the choice of paying \$5 to be inoculated with a clean needle, or not paying

60. *Id.* ¶ 44.

61. *See generally* SERIOUS FRAUD OFFICE, <http://www.sfo.gov.uk> (last visited Feb. 17, 2012).

62. GUIDANCE, *supra* note 7, ¶ 45.

63. Convention on Combating Bribery, *supra* note 1, at 15.

64. *Id.* at 103.

65. *UK Serious Fraud Office Discusses Details of UK Bribery Act with Gibson Dunn* (Gibson, Dunn, & Crutcher, LLP) Sept. 7, 2010, at 3, available at <http://www.gibsondunn.com/publications/pages/UKSeriousFraudOfficeDiscussion-RecentlyEnactedUKBriberyAct.aspx> (last visited Mar. 10, 2012) [hereinafter *Gibson Dunn*].

and being inoculated with a used needle. They stated that in this case, prosecution is unlikely if the payment is made.⁶⁶

Likewise, the Ministry of Justice acknowledged that eradicating facilitation payments will be no small feat:

The Government does, however, recognize the problems that commercial organisations face in some parts of the world and in certain sectors. The eradication of facilitation payments is recognised at the national and international level as a long term objective that will require economic and social progress and sustained commitment to the rule of law in those parts of the world where the problem is most prevalent.⁶⁷

Thus, even now, the Government's position on these payments is not black and white. It is illegal under the Act to make such payments, except in emergencies such as the \$5 payment to avoid a contaminated needle.⁶⁸ But suppose the price is \$100? Is prosecution still unlikely? Is unlikely comfort enough? And what about the case of a ship loaded with fresh food which cannot be unloaded without the approval of a local customs official or health inspector? Will the \$5 paid to secure this essential permission, lest the entire shipment spoil, qualify as an emergency facilitation payment such that prosecution is unlikely? It is clear that the continued outlawing of facilitation payments under the Bribery Act will be one of the most difficult aspects of the new law to deal with.

C. Hospitality Expenditures

With regard to hospitality payments, the Ministry of Justice attempts to reassure that:

[B]ona fide hospitality and promotional, or other business expenditure which seeks to improve the image of a commercial organisation, better to present products and services, or establish cordial relations, is recognised as an established and important part of doing business and it is not the intention of the Act to criminalise such behaviour.⁶⁹

66. *Id.*

67. GUIDANCE, *supra* note 7, ¶ 46.

68. *See Gibson Dunn, supra* note 66.

69. GUIDANCE, *supra* note 7, ¶ 46.

However, it is worth noting that the Ministry's attempts to explain what will and will not be considered bribery in this context simply muddies the water and do not provide any meaningful, practical guidance. For example, the Guidance states that in order to amount to a bribe, there must be "an intention for a financial or other advantage to influence the official in his or her official role and thereby secure business or a business advantage," but that "[i]n many cases . . . the question as to whether such a connection [between the advantage offered and the intention to secure a business advantage] will depend on the totality of the evidence which takes into account all of the surrounding circumstances."⁷⁰

In the Parliamentary consideration of the Bribery Act, obvious questions were raised regarding hospitality. In a letter from Lord Tunnicliffe, speaking for the Ministry of Justice during Parliamentary consideration of the proposed Act, the Government's position was set forth:

We recognise that corporate hospitality is an accepted part of modern business practice and the Government is not seeking to penalize expenditure on corporate hospitality for legitimate commercial purposes. But lavish corporate hospitality can also be used as a bribe to secure advantages and the offences in the Bill must therefore be capable of penalising those who use it for such purposes.

Corporate hospitality would . . . trigger the offence only where it was proved that the person offering the hospitality intended the recipient to be influenced to act improperly.⁷¹

One commentator also noted that "[f]ixing the appropriate borderline between generous hospitality . . . and the criminal giving and taking of unconscionable, material advantages on the other, is not easy to capture in language suitable for forensic use."⁷² Thus, hospitality may demonstrate an intention to influence a guest, but not necessarily influence him or her to do anything improper. But is improper to be determined based upon British sensibilities? As the examples provided by the Guidance demonstrate, whether a hospitality payment would be found to be illegal depends heavily

70. *Id.* ¶¶ 27, 28.

71. Letter from Lord Tunnicliffe, Opposition Deputy Chief Whip, to Lord Henley, Minister of State for Crime Prevention and Anti-Social Behaviour Reduction (Jan. 14, 2010), available at <http://www.justice.gov.uk/publications/docs/letter-lord-henley-corporate-hospitality.pdf> (last visited Mar. 10, 2012).

72. G.R. Sullivan, *Reforming Bribery: Law Commission Consultation Paper 185 (2) Reforming the Law of Bribery LCCP No. 185: Bribery Outside England and Wales; Corporate Liability; Defences; Consent to Prosecution*, 2008 CRIM. L. REV. 687, 687 (2008).

on context.⁷³ The Guidance thus proves itself to be virtually useless in this context. The public and company compliance officers will simply have to wait to see how prosecution of activity involving hospitality payments will be carried out.

IV. JURISDICTIONAL NEXUS TO THE UNITED KINGDOM

In the discussion of the offenses created by sections 1, 2, and 6 of the Act, the jurisdictional nexus to the United Kingdom is quite evident. The traditional territorial basis for jurisdiction is also explicitly set out in section 12, entitled “Offenses under this Act: territorial application.”⁷⁴

The SFO Senior Staff has explained that the test for jurisdiction is whether the company in question carries out business in the United Kingdom, and this is yet another fact-specific inquiry to be made on a case-

73. See, e.g., GUIDANCE, *supra* note 7, ¶¶ 30, 31.

74. Bribery Act, 2010, c.23, § 12 (U.K.). Section 12 provides:

(1) An offence is committed under section 1, 2 or 6 in England and Wales, Scotland or Northern Ireland if any act or omission which forms part of the offence takes place in that part of the United Kingdom.

(2) Subsection (3) applies if—

(a) no act or omission which forms part of an offence under section 1, 2 or 6 takes place in the United Kingdom,

(b) a person’s acts or omissions done or made outside the United Kingdom would form part of such an offence if done or made in the United Kingdom, and

(c) that person has a close connection with the United Kingdom.

(3) In such a case—

(a) the acts or omissions form part of the offence referred to in subsection (2)(a), and

(b) proceedings for the offence may be taken at any place in the United Kingdom.

(4) For the purposes of subsection (2)(c) a person has a close connection with the United Kingdom if, and only if, the person was one of the following at the time the acts or omissions concerned were done or made—

(a) a British citizen,

(b) a British overseas territories citizen,

(c) a British National (Overseas),

(d) a British Overseas citizen,

(e) a person who under the British Nationality Act 1981 was a British subject,

(f) a British protected person within the meaning of that Act,

(g) an individual ordinarily resident in the United Kingdom,

(h) a body incorporated under the law of any part of the United Kingdom,

(i) a Scottish partnership.

(5) An offence is committed under section 7 irrespective of whether the acts or omissions which form part of the offence take place in the United Kingdom or elsewhere.

by-case basis.⁷⁵ The SFO has made it quite clear, however, that it “intends to assert broad jurisdiction under the provisions of the Bribery Act.”⁷⁶ The SFO has apparently already been approached by U.K. companies complaining about competitors in foreign countries that are paying bribes, so one of the SFO’s objectives “is to prevent ethical companies from being competitively disadvantaged by the actions of other companies whether they are within or outside the UK.”⁷⁷ Here, too, the prosecuting authorities’ intent to assert the Bribery Act’s vast extraterritorial reach is apparent.

V. SECTION 7: REESTABLISHING BRITISH DOMINION OVER THE PLANET

While the broad reach of the Act’s treatment of facilitation payments and business hospitality is obvious, section 7 of the Bribery Act, Failure of Commercial Organizations to Prevent Bribery, is by far the most outrageously overreaching aspect of the Act.⁷⁸ This provision creates a separate strict liability criminal offense for a corporation or other entity subject to this section.⁷⁹

A. Relevant Commercial Organization

To appreciate the broad extent of the operative provisions of section 7, which provides that “[a] relevant commercial organisation (“C”) is guilty of an offence under this section if a person (“A”) associated with C bribes another person . . . ,” it is necessary to determine what constitutes a relevant commercial organization and who is a person associated with the relevant commercial organization. Subsection (5) of section 7 begins its definition

75. *Gibson Dunn*, *supra* note 66, at 4.

76. *Id.*

77. *Id.*

78. Bribery Act, 2010, c.23, § 7 (U.K.).

79. *Id.* Section 7 provides, in relevant part:

(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.

Id. § 7(1)–(4).

of a relevant commercial organization, non-exceptionally, to include “a body which is incorporated under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere),” or “a partnership which is formed under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere).”⁸⁰ As with the jurisdictional applicability of sections 1, 2, and 6, this is traditional territorial jurisdiction. U.K. domiciled entities are subject to the strict criminal liability of section 7 with only the defense set out in section 7(2).⁸¹

The unique aspect of the jurisdictional reach of section 7 appears in subsection 7(5)(b) and (d).⁸² In these provisions, Parliament has abandoned any thought of either territorial jurisdiction or traditional notions of due process by aiming this strict criminal liability statute at the entire world. This subsection makes section 7 equally applicable to: “(b) any other body corporate (*wherever incorporated*) which carries on a business, *or part of a business*, in any part of the United Kingdom, [or] (d) any other partnership (*wherever formed*) which carries on a business, *or part of a business*, in any part of the United Kingdom.”⁸³

To understand how the relevant commercial organization definition applies in practice, we must consider what these provisions mean. Certainly, if a commercial organization of any kind carries on a business in any part of the U.K. Parliamentary power to legislate is well within traditionally accepted limits so long as “the United Kingdom” has a reasonable meaning.⁸⁴ That term is defined in section 12 of the Act as England, Wales, Scotland, or Northern Ireland⁸⁵ and does not include British overseas territories, such as Bermuda, the Falkland Islands, or the exotic South Atlantic islands;⁸⁶ each still maintaining their pink tinge on detailed world maps. Rather, the potentially overreaching aspect of the parallel provisions is found in the phrase “*which carries on a business, or part of a business, in any part of the United Kingdom.*”⁸⁷

80. *Id.* § 7(5).

81. *See* discussion *infra* Part V.B.

82. Bribery Act, 2010, c.23, §§ 7(5)(b), 7(5)(d) (U.K.).

83. *Id.* (emphasis added).

84. *See id.* § 7(5).

85. *Id.* § 12(1).

86. *See List of Crown Dependencies and Overseas Territories*, FOREIGN AND COMMONWEALTH OFFICE (Nov. 3, 2009, 10:28 AM), <http://www.fco.gov.uk/en/publications-and-documents/treaties/uk-overseas-territories/list-crown-dependencies-overseas> (last visited Mar. 10, 2012).

87. Bribery Act, 2010, c.23, §7(5) (U.K.) (emphasis added).

Within the Bribery Act, there is no further explanation of what a part of a business might entail. In the official Guidance, the Ministry simply restates the incredibly broad language of the statute:

A “relevant commercial organization” is defined at section 7(5) as a body or partnership incorporated or formed in the UK irrespective of where it carries on a business, or an incorporated body or partnership which carries on a business or part of a business in the UK irrespective of the place of incorporation or formation.⁸⁸

Likewise, in speeches by various current and former officials of the SFO we find discussion, but no helpful resolution, of this question.⁸⁹ The Ministry of Justice did seek to ease concerns by stating:

The Government would not expect . . . the mere fact that a company’s securities have been . . . admitted to trading on the London Stock Exchange, in itself, to qualify that company as carrying on a business or part of a business in the UK and therefore falling within the definition of a ‘relevant commercial organisation’ for the purposes of section 7.⁹⁰

However, Richard Alderman, as head of the SFO—the agency currently taking the lead on Bribery Act prosecutions—countered with his own view of the expansive jurisdiction the SFO could have:⁹¹

88. GUIDANCE, *supra* note 7, ¶ 34.

89. See, e.g., Richard Alderman, Dir., Serious Fraud Office, Address at the Financial Crime Conference (Nov. 29, 2011), available at <http://www.sfo.gov.uk/about-us/our-views/director's-speeches/speeches-2011/british-bankers-association.aspx> (last visited Mar. 10, 2012); GUIDANCE, *supra* note 7, at 2–3.

90. GUIDANCE, *supra* note 7, ¶ 36.

91. See, e.g., Caroline Binham, *SFO Chief Warns of New Global Reach*, FIN. TIMES, May 24, 2011, at 4.

Foreign companies with any kind of business link with the UK have been put on notice by the head of the Serious Fraud Office that they will be fair game once the biggest overhaul of the nation’s bribery laws in a generation comes into force. Richard Alderman, the agency’s director, is charging his investigators with rooting out bribery anywhere in the world when the legislation is introduced on July 1. The Bribery Act’s sweeping powers mean that companies based overseas come under the SFO’s jurisdiction if they have any business link with the UK, such as being listed here.

Asked whether all companies listed in the UK potentially fall under the remit of the Bribery Act, [Alderman] said: “Exactly. You bet we will go after foreign companies. This has been misunderstood. If there is an economic engagement with the UK then in my view they are carrying on business in the UK.”⁹²

As noted, it is clear that only the English courts can definitively resolve this uncertainty.⁹³ But where prosecutorial discretion is so important, it is extremely unsettling to see government spokesmen expounding inconsistent views on this crucial provision of a broadly overreaching statute. If a listing on the London Stock Exchange is economic engagement, what about a credit facility that includes London banks? What about the occasional sale of a product? These are just some of the questions prompted by the language of section 7, which have not been settled by the statutorily mandated Guidance.

B. Adequate Procedures Defense

In an unsuccessful attempt to soften the blow that section 7 levels against businesses, Parliament spelled out in section 7(2) of the Act the sole possible defense to the imposition of wholesale corporate liability. The adequate procedures defense is as follows: “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.”⁹⁴

With the establishment of the strict liability section 7 offense, the prosecutor and the courts of England no longer need to search for and attempt to prove the controlling mind of a legal entity.⁹⁵ Indeed, no intent

92. Jonathan Russell, *Serious Fraud Office Risks Clash with Ministry of Justice over Bribery Act*, TELEGRAPH (U.K.) (July 1, 2011), <http://www.telegraph.co.uk/finance/yourbusiness/bribery-act/8609486/Serious-Fraud-Office-risks-clash-with-Ministry-of-Justice-over-Bribery-Act.html> (last visited Mar. 10, 2012).

93. See, e.g., GUIDANCE, *supra* note 7, ¶ 46. (“The courts will be the final arbiter as to whether an organization ‘carries on a business’ in the UK taking into account the particular facts in individual cases.”). *Gibson Dunn*, *supra* note 66, at 4.

However, they made clear that the test for jurisdiction is simply whether the company in question carries out business in the UK. They noted that case law relating to this question will not necessarily be relevant to determining jurisdiction, and this will be a matter of fact in each case, clarifying that the SFO intends to assert broad jurisdiction under the provisions of the Bribery Act.

Id.

94. Bribery Act, 2010, c.23, §7(2) (U.K.).

95. The “controlling mind” element of a corporate prosecution under prior U.K. law required proof that a very senior executive of the defendant corporation actively and knowingly affected the

or knowledge is required at all for this crime. If a bribe within the very broad meaning of that term in the Bribery Act has occurred, the corporate or other commercial entity is guilty.⁹⁶ To establish this defense the company must prove that it “had in place adequate procedures designed to prevent persons associated with [the company] from undertaking such conduct.”⁹⁷ However, the term “adequate” is a curious choice here, since the procedures in place were clearly not entirely adequate, or the bribery would not have occurred in the first place.⁹⁸

In its Summary of its Recommendations, the U.K. Law Commission, after considering prior bribery laws and the proposed wholesale revision thereof which the Commission was endorsing, described the section 7 defense and the guidance required to understand it in the following terms:

In that regard, it will generally be sufficient guidance to those in a position to make payments to say:
“Do not make payments to someone (or favour them in any other way) if you know that this will involve someone in misuse of their position.”⁹⁹

Kenneth Clarke, then Justice Minister, likewise noted in his introduction to the Guidance:

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.¹⁰⁰

The Guidance characterizes section 7(2) as a full defense to a violation of the strict liability crime of failing to prevent bribery.¹⁰¹ The Guidance explains that “[i]n accordance with established case law, the standard of proof which the commercial organisation would need to discharge in order to prove the defence, in the event it was prosecuted, is the balance of

bribe. *See, e.g.*, *Tesco Supermarkets Ltd. v. Natrass*, [1972] A.C. 153 (H.L.) 170–71 (appeal taken from Eng.).

96. *See, supra* Part III.C.

97. GUIDANCE, *supra* note 7, ¶ 4.

98. *See generally* JOSEPH HELLER, CATCH 22 (1961).

99. LAW COMMISSION NO. 313, *supra* note 6, at xvii (U.K.).

100. GUIDANCE, *supra* note 7, ¶ 4.

101. *Id.* ¶ 11.

probabilities.”¹⁰² However, these hints are of no help in deciphering what constitutes adequate procedures.

The Guidance also sets forth six principles that are the criteria to be used by companies formulating anti-bribery procedures.¹⁰³ These include proportionate procedures, top-level commitment, risk assessment, due diligence, communication, and monitoring and review.¹⁰⁴ While it is not within the scope of this Article to address each of these principles, it should be noted again that the Guidance, although mandated by section 9,¹⁰⁵ is not law, does not have the force of law, and merely expresses what the current Government thinks, hopes, believes, or intends.¹⁰⁶ It cannot be relied upon. The Courts may find it interesting that the Guidance provides that a common sense approach should prevail.¹⁰⁷ Once a prosecutor has made the decision to proceed under a particular set of facts, however, stale statements of the intentions of a prior government will provide little protection for the accused.

C. Person Associated with a Relevant Commercial Organization

Section 8 of the Act defines associated person for the purposes of section 7:

- (1) For the purposes of section 7, a person (“A”) is associated with C if (disregarding any bribe under consideration) A is a person *who performs services for or on behalf of C*.
- (2) The capacity in which A performs services for or on behalf of C does not matter.
- (3) Accordingly A may (for example) be C’s employee, agent or subsidiary.
- (4) Whether or not A is a person who performs services for or on behalf of C is to be determined by reference to all the relevant circumstances and not merely by reference to the nature of the relationship between A and C.

102. *Id.* ¶ 33.

103. *Id.* ¶ 4.

104. *See generally id.*

105. Section 9 provides, in relevant part, “(1) The Secretary of State must publish guidance about procedures that relevant commercial organisations can put in place to prevent persons associated with them from bribing as mentioned in section 7(1).” Bribery Act, 2010, c.23, § 9(1) (U.K.).

106. *See generally* GUIDANCE, *supra* note 7.

107. *Id.* ¶¶ 35, 36.

- (5) But if A is an employee of C, it is to be presumed unless the contrary is shown that A is a person who performs services for or on behalf of C.¹⁰⁸

The potential for expansive use of this definition by SFO prosecutors is clear. Subsection (4) elaborates by stating that “all the relevant circumstances” are more significant than the nature of the relationship.¹⁰⁹ Yet this makes the term “associated person” even more ambiguous and significantly expands the egregious overreach of this strict criminal law. Does associated person include the local FedEx driver who routinely pays off a policeman at a rural checkpoint in a Central American nation and who is delivering a package for a company that has recently made a sale in London? There is no doubt the driver is performing a service for the company as required by subsection (1).¹¹⁰ Since the capacity in which the person operates is not determinative, subsection (2) does not aid the analysis.¹¹¹ Subsection (3) seems satisfied if it can be found that the FedEx driver is an agent of the company. But this term is not defined in the Act, and there are no clues explaining how one might be found to be an agent.¹¹² It seems undeniable that under subsection (4), under all the relevant circumstances, the driver was performing a service for the company.¹¹³ Thus, might a nominal bribe to a local policeman or other small facilitation payment trigger strict corporate criminal liability under section 7?

In sum, it appears to be a wholesale violation of due process to allow the automatic imposition of criminal liability on a legal entity, particularly one with no significant connection to the United Kingdom and the entity’s officers. At the time the Government asked the Law Commission to once again review the laws on bribery, the Commission was specifically requested to draft a bill that would include recommendations that “are fair and non-discriminatory in accordance with the European Convention on Human Rights and the Human Rights Act of 1998.”¹¹⁴ Moreover, Article 6(2) of the European Convention provides that “[e]veryone charged with a criminal offense shall be presumed innocent until proved guilty according

108. Bribery Act, 2010, c.23, § 8 (U.K.). (emphasis added).

109. *Id.* § 8(4).

110. *Id.* § 8(1).

111. *Id.* § 8(2).

112. *Id.* § 8(3).

113. Bribery Act, 2010, c.23, § 8(4) (U.K.).

114. See LAW COMMISSION NO. 313, *supra* note 6, at 14 (U.K.).

to law.”¹¹⁵ However, the Act as written obviously contravenes this mandate.

VI. CONCLUSION

The Bribery Act of 2010, the U.K.’s attempt to finally comply with the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, goes too far in addressing the United Kingdom’s perceived lack of commitment to outlaw bribery by U.K. companies at home and abroad. The Bribery Act is a draconian measure that will prove extremely difficult to enforce, particularly in the areas of bribery of foreign public officials and failure of organizations to prevent bribery. Moreover, numerous provisions will be difficult to interpret, and the Ministry of Justice’s Guidance utterly fails to explain how one can comply with the Act and avoid liability. While it is clear that Parliament was attempting to craft a zero-tolerance approach to bribery, the current problems with the Act overshadow this attempt. It remains to be seen how other nations will respond once they begin to fully comprehend the far-reaching effects of this law.

115. European Convention on Human Rights art. 6(2), Sept. 3, 1950, 213 U.N.T.S. 221, available at <http://www.hri.org/docs/ECHR50.html#Convention> (last visited Mar. 10, 2012).