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Deterring bribery: law, regulation and the export trade

JEREMY HORDER

“We’ve got to have rules and obey them. After all, we’re not savages. We’re English, and the English are best at everything.”

(William Golding, *Lord of the Flies*, ch. 2)

The Bribery Act 2010 (‘the 2010 Act’) deserves critical attention by virtue of at least three of its key features. There is the wide-reaching new offence of failing to prevent bribery (section 7(1)), the collapsing of the distinction between public and private sector bribery (sections 1–5), and the wide extraterritorial application of the law (section 12). These features will form part of the background to the discussion here. My concern will be on the impact these changes will have on UK businesses¹ that trade – often through subsidiary companies or agents – overseas. My specific focus will be the impact of the new law on the arms trade, where more research and data are available to assist the analysis, and respecting which the greatest controversy concerning overseas trade has arisen.² In exploring this concern, I will consider whether the 2010 Act, which seeks to punish and deter bribery (and the failure to prevent it) through the ordinary criminal law, needs further buttressing in the form of regulatory intervention to reduce the risks that bribery (or the failure to prevent it) will be committed. I suggest that we have much to learn from the dominance of regulatory

¹ I will for simplicity’s sake for the most part speak of ‘UK’ businesses or public officials, and of ‘UK’ law and the ‘UK’ Parliament, rather than seeking to distinguish when it would be more appropriate to use terms such as ‘companies doing business in the UK’, ‘British businesses’ or ‘the law of England and Wales’, and so forth. This will entail some inaccuracies in the text.

² A controversy centred not only on the risk of bribery and corruption in the activities of private firms, but also on the activities of public officials whose job it is to assist those companies when trading overseas: R. Neild, *Public Corruption: The Dark Side of Social Evolution* (London: Anthem Press, 2002), 139–40.

law in the governance of export control. The 'prophylactic' character of regulatory legal intervention in that field provides an important example of what could, and should, be done to further the goal of bribery prevention, especially in relation to export trade itself. The absence of such a regulatory infrastructure symbolises a broader failing. The 2010 Act, whatever its legal merits, has not been adequately supported by an unequivocal policy commitment to harness the energies of UK officials at all levels, at home and abroad, in the service of anti-corruption when facilitating the advancement of commerce.

Law and regulation: towards a truly modern law of bribery

Criminal law and (corporate) compliance: a familiar story

In relatively recent times, a familiar story in criminal law enforcement against companies runs along these lines.³ Prosecutors seeking to deter and punish wrongful conduct in certain areas find that they have at their disposal only out-dated or poorly drafted criminal laws, often providing only inappropriate or inflexible penalties. These laws in themselves, together with the high standard of proof they carry, and the costs and delay involved in invoking them, manage at one and the same time both to provide obstacles to successful prosecution in anything other than the clearest cases, and to inspire little or no respect among those liable to prosecution.⁴ The result has been under-enforcement, and very substantial reliance on negotiation to secure compliance, although that is a strategy notorious either for the dubious compromises it involves or for its ineffectiveness against serial offenders accustomed to evading the law.⁵ In some areas of commercial activity, the remedy for this defect has been the creation or use of expert bodies to enforce more specialised forms of regulatory criminal law, and sometimes also new forms of civil penalty drawn up (and then used) in consultation with the relevant industry. Together, these can provide a more effective and respected system of enforcement, the more so when they buttress codes of conduct.⁶

³ For an analysis, see Law Commission, 'Criminal Liability in Regulatory Contexts', Law Com. CP No. 195, 2010, paras. 3.52–3.96, and App. A.

⁴ Law Commission, 'Criminal Liability in Regulatory Contexts'.

⁵ J. Black, 'A Review of Enforcement Techniques', in Law Commission, 'Criminal Liability in Regulatory Contexts', Law Com. CP No. 195 2010, App. A; K. Hawkins, *Law as a Last Resort* (Oxford University Press, 2003).

⁶ See Law Commission, 'Criminal Liability in Regulatory Contexts', paras 3.83–3.102.

The emerging ideal is that the criminal law, pursued through the traditional route of prosecution in the Magistrates' or Crown Court, is reserved for the most serious wrongdoing or for persistent flouting of the law.⁷ Less serious wrongdoing and, most particularly, the accidental or careless creation of a threat thereof, is dealt with through specialised criminal offences or civil penalties in the form of fines, restrictions on a licence, expulsion from a licensing regime, or cancelling of or suspension from membership of a trade association.⁸ An example is the approach now taken to employers employing people with no right to work in the United Kingdom.⁹ Alongside an older strict liability criminal offence,¹⁰ a new and more serious criminal offence targeted at deliberate wrongdoers has been created.¹¹ Its function is not so much to support the strict liability offence, as to support a newer system of civil penalties administered by an expert body, the UK Border Agency.¹² Such penalties involve (in a basic form) a fixed fine for each person illegally employed, and 'naming and shaming' in the Border Agency's annual reports.¹³ How should one view the development of the law of bribery against this general background?

In important ways, the picture appears to fit well in terms of how problems arose under the old law. Until the coming into force of the 2010 Act, England and Wales were governed by an out of date set of laws that resulted in only a tiny number of prosecutions each year: only one or two convictions for public sector bribery, and around ten convictions annually for (largely) private sector bribery.¹⁴ Even after the outdated domestic legislation was extended in 2001 to cover, for the first time, bribery of foreign public officials, prosecutions remained at a low level relative to the number conducted by countries with a comparable share of international trade.¹⁵ The new law certainly improves the quality of the prosecutor's toolkit, and – insofar as this improvement becomes common knowledge – that may do something to improve international

⁷ Law Commission, 'Criminal Liability in Regulatory Contexts', paras 3.137–3.138.

⁸ Law Commission, 'Criminal Liability in Regulatory Contexts', paras 3.137–3.139.

⁹ See the discussion in Law Commission, 'Criminal Liability in Regulatory Contexts', paras 3.72–3.82.

¹⁰ Under the Asylum and Immigration Act 1996, s. 8.

¹¹ Immigration, Asylum and Nationality Act 2006, s. 21.

¹² Immigration, Asylum and Nationality Act 2006, s. 15.

¹³ See www.ukba.homeoffice.gov.uk/sitecontent/documents/employersandsponsors/listemployerspenalties.

¹⁴ See, Law Commission, 'Reforming Bribery', Law Com. CP 185, 2007, para. 2.30.

¹⁵ See text at n. 3, above.

business confidence in the UK's anti-corruption strategy.¹⁶ However, some of the problems of a simple 'criminal law-led strategy'¹⁷ to tackle bribery are going to plague the new law just as much as they plagued the old law. For example, the need for proof to the criminal standard of bribes paid, for the purposes of a prosecution for failing to prevent bribery under section 7, may involve very considerable delay and cost, perhaps especially in relation to the discovery of documents (if any exist), but also in relation to the costs of extradition proceedings (if available), the use (often of dubious value) of covert human intelligence sources, and the need to cooperate or collaborate with other investigating jurisdictions (including the jurisdiction where the recipient was based) having very different legal traditions and standards. In that regard, the Serious Fraud Office (SFO) faces an all too familiar dilemma. Is it better to husband precious resources, so that they can be devoted to the biggest cases posing perhaps the greatest legal, evidential and cross-border challenges, but with the risk that excessive delay or failure will bring the SFO into disrepute? Alternatively, should resources be spread more thinly and criminal prosecution focused on less high-profile cases with better prospects for success (where, for whatever reason, other prosecution authorities cannot or will not act)?

These problems are far from fatal, and may seem exaggerated in the rudimentary form in which they have just been presented. However, they throw into relief some crucial advantages of a 'regulatory' as opposed to a 'criminal offence-led' strategy, in some (if not all) contexts.¹⁸ A 'criminal offence-led' strategy, as the name implies, relies on the deterrent effect of the ordinary criminal process to reduce the incidence of unacceptable risk posed or harm done in a given context. Such a strategy may not necessarily be 'second best', simply because criminal proceedings are expensive to invoke, may involve considerable delay, and require high standards of proof that may be difficult to meet. In some – perhaps many – contexts, sporadic criminal law enforcement may be preferred to regulatory intervention, even if the former is a less effective deterrent to rule-breaking, because it is feared that the cure – the imposition of

¹⁶ On which see the text at n. 4, above.

¹⁷ For the term, 'criminal offence-led strategy', and a critical analysis of its utility in tackling certain kinds of problem, see Law Commission, 'Criminal Liability in Regulatory Contexts', Part 2.

¹⁸ For this contrast, see Law Commission, 'Criminal Liability in Regulatory Contexts', Part 2.

regulatory burdens – will turn out to be worse than the disease, insofar as it threatens people’s willingness to engage in the relevant activity at all.¹⁹ Where it is appropriately deployed, a regulatory strategy will typically have a number of distinctive features. Four important ones are these. First, such a strategy will usually be focused primarily on prevention and minimising risk, or on changing future behaviour plans systematically, and will probably much more rarely involve punishment purely for just deserts’ sake.²⁰ Secondly (a related point), a regulatory prosecution strategy is likely to be focused on unacceptably risky practices in themselves, meaning that proof of harm done in consequence will often be significant only insofar as it highlights unacceptable risk-taking. Thirdly, a regulatory strategy may involve giving priority to the use of specialised context-specific criminal offences, or – or additionally – a flexible range of civil penalties that avoid the need for costly and lengthy criminal court proceedings.²¹ Finally, a regulatory strategy will usually involve enforcement carried out by an expert body or bodies, familiar with patterns and kinds of offending as well as with the appropriateness of particular sanctions.²²

Two questions in relation to the development of a regulatory strategy to counter bribery, alongside the new criminal offences, will be addressed here. First, to what extent does the criminal law, including the 2010 Act, already flirt with some element of a regulatory strategy for dealing with bribery? Secondly, is there a sufficiently strong analogy between bribery and other kinds of corporate wrongdoing dealt with through a mixture of traditional criminal offence-led and regulatory strategies to make the case for a partly regulatory approach to bribery compelling?

¹⁹ See, in this context, the Law Commission’s analysis of the law’s ‘criminal offence-led’ strategy for dealing with cyclists: Law Commission, ‘Criminal Liability in Regulatory Contexts’, Part 2. The threat posed by cyclists is one of low risk of relatively trivial harm. By contrast, the prospect that having to obtain a licence to cycle, or the like, will deter many people from cycling at all is very real; hence, the absence of regulatory oversight, and the reliance on sporadic law enforcement to secure a tolerable degree of compliance with the rules of the road.

²⁰ For a subtle analysis of this point, illustrating how retributive thinking has recently come to intrude on regulatory ideals in the road safety context, see S. Cunningham, ‘Punishing Drivers Who Kill: Putting Road Safety First?’, *Legal Studies*, 27 (2007), 288–311.

²¹ Although that is not uncontroversial, see R. M. White, ‘Civil Penalties: Oxymoron, Chimera and Stealth Sanction’, *Law Quarterly Review*, 126 (2010), 593–606.

²² See Law Commission, ‘Criminal Liability in Regulatory Contexts’, Part 2.

Beyond make-do-and-mend: in search of regulatory impact

Turning to the first question, the Law Commission recommended an offence of failing to prevent bribery by someone acting (in a loose sense) on its behalf, with a defence that a company or partnership had adequate procedures in place to prevent such wrongdoing.²³ In making that recommendation, the Law Commission regarded this offence as having some regulatory dimension to it. The Commission remarked:

The new criminal offence that we are recommending is not regulatory in nature ... However, the new offence does have a regulatory dimension to it in that the defence – proof that the company had adequate procedures designed to prevent bribery being committed on its behalf – is concerned with measuring the adequacy of ‘internal standards’ ... that might otherwise be disregarded. We regard this inclusion of a regulatory element as a positive virtue, but so also is the fact that the offence is in itself an ordinary criminal offence.²⁴

The regulatory element was regarded as virtuous, in that it might encourage companies to take prophylactic measures (central to any regulatory scheme) to minimise risks, such as introducing or improving anti-bribery policies and procedures appropriate to the size and nature of the company. This view was in accord with the government’s reaction to criticism by a House of Commons Select Committee that it had done too little to address the risk of bribery involved in granting export licences in relation to contracts to export defence equipment and the like (considered further below).²⁵ In response, the Secretary of State for Justice published a UK Foreign bribery strategy, in which it was said that there was a commitment to:

establish a clear legal, *regulatory and policy* framework for action against foreign bribery. Law reform through the new Bribery Bill will be the keystone of this approach but the strategy also reinforces links to the wider international anti-corruption agenda – reflecting our commitment to focus on the causal drivers of foreign bribery and deepen our collaboration with international partners.²⁶

However, probably motivated by fear that the reform of bribery law would become tarred by broader criticisms of excessive bureaucratic

²³ Law Commission, ‘Reforming Bribery’.

²⁴ Law Commission, ‘Reforming Bribery’, paras 6.19–6.20.

²⁵ Security of Arms Export Control: First Joint Report (2007/8) of the Committee on Arms Export Controls (2008 HC 254), paras 115–117.

²⁶ Ministry of Justice, ‘UK Foreign Bribery Strategy’, Cm 7791 (2010) (added emphasis).

intervention to shape corporate participation in the market place, in introducing the legislation the government sought to make clear that its strategy was criminal offence-led and not regulatory. In the Impact Assessment that accompanied the consultation on guidance concerning what may count as ‘adequate procedures’ to prevent bribery, for the purposes of the offence in section 7, the Ministry of Justice said that the guidance would be concerned with broad principles of relevance, ‘if [commercial organisations] are to avoid prosecution ...’²⁷ The Ministry went on to add, ‘there is no regulatory framework to monitor compliance’.²⁸ So, there was consequently ‘no requirement on commercial organisations to adopt anti-bribery procedures’.²⁹ There is, then, to be no analogy with the approach to, say, corporate manslaughter, where the stigmatic criminal offence under the Corporate Manslaughter and Corporate Homicide Act 2007, focused on harm done, is underpinned by an already existing regulatory strategy centred on prevention and backed by specialised offences under the Health and Safety at Work Act 1974. This resolutely pure, criminal offence-led strategy (backed by a discriminating prosecution policy) for bribery would normally be appropriate only where the incentives to engage in valuable activities of the relevant kind – in this instance, commercial trading overseas – will not be strong enough if there are regulatory hurdles of any significant kind that must be surmounted to engage in that activity lawfully.³⁰ However, there is little or no evidence that people are deterred from participating – indeed, they may actually be encouraged to participate – in UK-based national and international markets by a moderate degree of regulation.³¹ As far as a regulatory approach to deterring bribery is concerned there is, quite simply, no evidence that, to use the government formula when considering legal intervention, ‘the proposed intervention itself [will or may create] a further set of disproportionate costs and distortions’.³² On the

²⁷ Ministry of Justice, ‘Guidance about Commercial Organisations Preventing Bribery’ (section 9 of the Bribery Act 2010), Impact Assessment No. MOJ008, 2 August 2010, p. 5.

²⁸ Ministry of Justice, ‘Guidance about Commercial Organisations Preventing Bribery’.

²⁹ Ministry of Justice, ‘Guidance about Commercial Organisations Preventing Bribery’.

³⁰ See, in this respect, the Law Commission’s analysis of a criminal offence-led, as opposed to a regulatory, strategy towards cycling, as opposed to driving and car ownership: Law Commission, ‘Criminal Liability in Regulatory Contexts’, paras 2.10–2.20.

³¹ See the discussion in J. Kitching, ‘Better Regulation and the Small Enterprise’, in S. Weatherill (ed.), *Better Regulation* (Oxford: Hart, 2007), pp. 155–73, at 156–8.

³² Ministry of Justice, ‘Guidance about Commercial Organisations’.

contrary, there is every reason to think that a regulatory approach is required, alongside modernised general offences, because, using the same government formula, 'there are strong enough failures in the way markets operate ... [and] there are strong enough failures in existing government interventions (e.g., waste generated by misdirected rules)'.³³ The government's economic justification for modernising the criminal law hinged on the law's capacity to avoid:

A position where all businesses pay bribes in the course of competing for contracts, and in particular compete on the basis of who can pay the highest bribe. If all businesses, including overseas competitors, were to offer the highest bribes they can, the cycle of corruption would be perpetuated ... The ideal position is for markets to operate efficiently and for UK businesses to compete without making additional payments.³⁴

Increasingly commonly, it is the function of more formal (self-) regulatory strategies to play a role in securing compliance with sufficiently high standards on an adequately wide scale, in pursuit of ideal market conditions for exchange.³⁵ A sophisticated range of expert-led interventionist strategies now exists to further such goals in a range of contexts.³⁶

In purporting to reject such a strategy for bribery and corruption, very revealing in policy terms was the Secretary of State for Justice's claim that the offences under the 2010 Act are aimed at, 'making life difficult for the mavericks responsible for corruption, not unduly burdening the vast majority of decent, law-abiding firms'.³⁷ There is, of course, an important question begged here about what kind or degree of legal burdens will be 'undue'; but of equal significance is the fact that, if the 2010 Act is principally aimed at 'mavericks', then this puts the failure to prevent bribery offence in section 7 in tension with that aim. To begin with, the

³³ Ministry of Justice, 'Guidance about Commercial Organisations'. On the importance of regulation as a means of preventing market failure, see S. Weatherill (ed.), 'The Challenge of Better Regulation', *Better Regulation* (Oxford: Hart, 2007), pp. 1–18.

³⁴ Ministry of Justice, 'Guidance about Commercial Organisations'.

³⁵ For example, such a strategy is pursued through the expert work of Trading Standards officials, the Competition Commission and the Financial Services Authority.

³⁶ See the Regulatory Enforcement and Sanctions Act 2008 and, for an example, the brief analysis of the role of Trading Standards authorities in Law Commission, 'Criminal Liability in Regulatory Contexts', paras 3.89–3.96. See also the discussion of export controls in the text at n. 69, below.

³⁷ Ministry of Justice, *The Bribery Act 2010: Guidance about Procedures which Relevant Commercial Organisations can put into Place to Prevent Persons Associated with Them from Bribing* (London: Ministry of Justice, 2011), p. 2.

section 7 offence is one of strict liability, apt to catch failures to prevent bribery by mavericks and non-mavericks alike. Moreover, the official guidance now available on the ‘adequate procedures’ defence (presumably, aimed principally at the non-mavericks) contains just the kind of detail that one would expect in a regulator’s handbook or code. So, in illustrating the ‘six principles’³⁸ that should inform anti-bribery procedures, the overwhelming impression given is of a need for ‘hands on’ preventative (regulatory) impact, even though the language itself is permissive in character. For example, in a case study to demonstrate the need for adequate communication and training (Principle 5), the Guidance suggests that when dealing with a commercial agent (K) in a foreign country where there is a high risk of bribery, a firm (J) ‘could consider’:

Making employees of J engaged in bidding for business fully aware of J’s anti-bribery statement [and] code of conduct ... Including suitable contractual terms on bribery prevention measures in the agreement between J and K ... Supplementing the information, where appropriate, with specially prepared training to J’s staff involved with the foreign country.³⁹

For the government itself to be suggesting prophylactic measures at this level of detail, while at the same maintaining that firms are perfectly free to avoid taking any notice whatsoever of the measures, creates a tension between an officially endorsed criminal offence-led strategy and a ‘shadow’ regulatory strategy. Mavericks will largely ignore ‘bureaucratic red tape’ of this kind, and are likely to be deterred only by a real prospect of criminal prosecution and punishment: at the heart of a criminal offence-led strategy. By contrast, only the conscientious will take the ‘red tape’ seriously, undermining the claim that the guidance is not principally (or at all) aimed at, ‘unduly burdening the vast majority of decent, law-abiding firms’.⁴⁰

What is more, the SFO, although thwarted in its attempts to strike legally binding plea bargains,⁴¹ is already behaving in an important sense

³⁸ ‘Proportionate procedures’, ‘top-level commitment’, ‘risk assessment’, ‘due diligence’, ‘communication’, ‘monitoring and review’.

³⁹ Ministry of Justice, *The Bribery Act 2010: Guidance*, p.49.

⁴⁰ See n. 39, above.

⁴¹ See *R. v. Innospec Ltd* [2010] EW Misc 7, 26 March 2010, available at: www.judiciary.gov.uk/media/judgments/2010/r-v-bae-systems-plc (sentencing remarks of Thomas LJ). However, see now the plans of the Ministry of Justice and Attorney General for deferred prosecution agreements to tackle economic crime, available at: [www.attorneygeneral.gov.uk/NewsCentre/Pages/Newtoolto tackleeconomiccrime.aspx](http://www.attorneygeneral.gov.uk/NewsCentre/Pages/Newtoolto%20tackleeconomiccrime.aspx).

as if it were a regulatory authority. For example, in one case it rewarded self-reporting (confession) by an offender through showing itself willing to facilitate the improvement of compliance programmes agreed as a part of sentence:

The company [Mabey & Johnson] having agreed that it would be subject to financial penalties to be assessed by the Court, will pay reparations and will submit its internal compliance programme to an SFO approved independent monitor.⁴²

In legal policy terms, we appear to be in no-man's land, stuck with a purportedly criminal offence-led strategy whose specifics nonetheless draw heavily on practices common to a regulatory strategy. That position may be *made* to work (scholars can always tell you why something that may work perfectly well in practice does not work in theory), but it is an opportunity missed to develop a context-sensitive and coherent regulatory strategy to prevent bribery and corruption.

That brings me to the second question bearing on the case for a regulatory strategy to deal with bribery. As I indicated earlier, the risk of wrongdoing in many areas of corporate and commercial activity is now confronted through a mixture of traditional criminal offences (such as theft and fraud), more specialised criminal offences, and sometimes also civil penalties: in essence, a regulatory strategy. The question is whether activities liable to carry a risk of bribery and corruption are so different in nature or context that they are not appropriately subjected to the same treatment. I argue that they are not so different. To begin with, it is already the case that prosecutors and regulatory authorities have been adopting a make-do-and-mend approach towards the absence of a regulatory strategy to deal with instances of bribery where the costs of, and risk of failure in, a criminal prosecution for bribery itself have been too high. Prosecutors and regulators have used specialised regulatory offences, or civil penalties, concerned with risky accounting malpractice to deal with instances of corruption where use of the pre-2010 Act law would have been impossible or inappropriate:

- (1) In January 2009, the Financial Services Authority (FSA) fined the insurer AON £5.25 million for failing to take reasonable care to establish and maintain effective systems and controls to counter

⁴² Available at: www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2009/mabey-johnson-ltd-sentencing-.aspx.

the risks of bribery and corruption associated with making payments to overseas firms and individuals. AON had made what were described as 'suspicious' payments of US\$7 million to overseas firms and individuals who were assisting AON to win business. AON cooperated with the FSA and agreed the settlement. The case followed proactive steps taken by the FSA in 2007, in which it sent out an industry-wide letter to commercial insurance intermediaries reminding them of their regulatory obligations in relation to the risks of bribery and corruption.⁴³

- (2) In 2010, British Aerospace Defence Systems (BAE Systems) was convicted under section 221(5) of the Companies Act 1985, in respect of failures to keep proper accounting records to show and explain certain payments that it had made. These payments, to a covert adviser, related to a contract to supply a radar defence system in Tanzania at Dar-es-Salaam airport. To cover the activities of its covert advisers on confidential matters, the company set up a BVI-based company, Red Diamond Trading Company. Red Diamond Trading made a secret agreement with a covert adviser to pay, to a Panamanian company controlled by the adviser, up to just over 30 per cent of the contract price, although publicly the adviser was set to receive only 1 per cent of the contract price. No auditor inspecting BAE Systems' accounts would have discovered these arrangements. The agent was paid over US\$12 million. The company was fined £500,000, but also agreed to make a payment of £29.5 million to Tanzania in the form of ex gratia compensation.⁴⁴

Whether or not these individual cases could have been successfully prosecuted as bribery cases, it is certainly one of the major aims of the 2010 Act, and in particular of the section 7 offence of failing to prevent bribery, to target egregious cases of this type. Convictions under section 7 would enable the nature and amount of harm actually done to be better reflected through both criminal conviction and sentence; but this is not my present concern. More significant, in the present context, is that the alternatives to prosecution employed in these cases stemmed from legislation that was not primarily intended to deal with bribery and corruption. Quite simply, there is no set of specialised offences or civil

⁴³ See www.fsa.gov.uk/pages/Library/Communication/PR/2009/004.shtml.

⁴⁴ For the relevant links, see www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2010/bae-fined-in-tanzania-defence-contract-case.aspx.

penalties – putting aside the general offences of assistance and encouragement⁴⁵ – dealing with conduct posing an unacceptable risk of bribery.⁴⁶

I have already alluded to the contrast, in this respect, with corporate manslaughter.⁴⁷ Shoring up this offence there is a long-standing regime of specialised criminal offences relating to health and safety, whose prosecution is in the hands of an expert regulatory authority (the Health and Safety Executive) that also issues guidance on, among other things, good practice in particular industries.⁴⁸ Moving beyond that example, set against the background of the serious offences created by the Fraud Act 2006, there are a very large number of specialised regulatory criminal laws and civil penalties to deal with fraud, dishonesty, misrepresentation and wrongful failure to provide information in a wide variety of industries.⁴⁹ More broadly in relation to the provision of financial services, the FSA exists as a specialised body to provide regulatory oversight of the financial sector in the interest of the consumer.⁵⁰ The FSA has the power to impose civil penalties on those who have engaged in misconduct, and this power can be used in pursuit of one of its four statutory objectives: ‘fighting financial crime’.⁵¹ A very significant proportion of such specialised regulatory offences and civil penalties deal with unacceptably risky conduct, rather than with harm done. The primary concern (admittedly also true, albeit more controversially, of the Fraud Act 2006), is the giving of false or misleading information, the concealment of important information, the maintenance of poor accounting practices and similar conduct of the ‘ticking time bomb’ variety: the conduct has not as yet caused harm, but creates an unacceptable risk that such harm may be done.

Closer to present theme (but still in the shadow of the Fraud Act 2006), there is now an expert authority, the Independent Parliamentary Standards Authority, charged with devising a code of conduct to

⁴⁵ See Serious Crime Act 2007, Part 2.

⁴⁶ In some contexts, potentially corrupt conduct may be dealt with by specialised fraud offences: see, e.g., the offences in the Insolvency Act 1986, ss. 206–210.

⁴⁷ See text following n. 29, above.

⁴⁸ See www.hse.gov.uk/business/index.htm.

⁴⁹ See Law Commission, ‘Criminal Liability in Regulatory Contexts’, paras 3.123–3.128, 4.62–4.81. See also the enormous number of specialised finance-related offences set out in J. Richardson (ed.), *Archbold: Criminal Pleading, Evidence and Practice 2010* (London: Sweet & Maxwell, 2009), ch. 30 (‘Commerce, financial markets and insolvency’).

⁵⁰ See also Monteith, Chapter 9, this volume.

⁵¹ The FSA was set up under the Financial Services and Markets Act 2000, to pursue the ‘regulatory objectives’ of ‘market confidence’, ‘financial stability’, ‘the protection of consumers’ and ‘the reduction of financial crime’ (s. 2).

eliminate what has hitherto been the participation of MPs in borderline corrupt practices in making expense claims.⁵² The Authority can investigate possible breaches of the code, which is backed up with a specialised regulatory offence of making a claim, knowing it is supported by false or misleading information.⁵³ What kind of regulatory offences or civil penalties would be appropriate if the 2010 Act were to be embedded, at least in some sectors of commerce, in a more regulatory strategy?

It is noticeable that the US Federal anti-bribery statute, the Foreign Corrupt Practices Act 1977, contains a linked set of criminal and civil provisions.⁵⁴ First, there is the main bribery offence (of a kind now found in section 6 of the 2010 Act). Secondly, there are accounting provisions – aimed at issuers of securities – that require the maintenance of accurate corporate books and records and internal company controls to prevent misuse of corporate funds, especially for the purpose of bribery. Admittedly, there is no exact equivalent of the section 7 offence (failure to prevent bribery) in the 1977 Act. However, very broadly speaking, under US law companies are held strictly liable for the corrupt actions of their employees (if not their agents).⁵⁵ That diminishes, albeit without eliminating, the significance of the extra reach provided by the section 7 offence. Additionally, it is important to note that the prosecuting authority, the Department of Justice, has at its disposal civil penalties that can be imposed when the offender has acted ‘corruptly’ (additional proof of ‘wilfulness’ is required for criminal conviction).⁵⁶ This is something with no equivalent in the 2010 Act, given the avowedly criminal offence-led

⁵² The Independent Parliamentary Standards Authority was set up under the Parliamentary Standards Act 2009.

⁵³ Parliamentary Standards Act 2009, s. 10. Perhaps predictably, the regulatory offence covers ground already covered by the Fraud Act 2006 (or by an attempt to commit an offence under that Act), but with a maximum sentence of only one year’s imprisonment, as compared with ten years under the Fraud Act 2006. Further, the regulatory offence is narrower in scope, requiring (unlike the Fraud Act 2006) knowledge of the false or misleading nature of the information supporting the claim. I know of no other regulated group so favoured by the narrowness of the fault requirement in the only regulatory offence applicable to it.

⁵⁴ For an appreciative evaluation of the FCPA 1977, see now N. Cropp, ‘The Bribery Act 2010: A Comparison with the Foreign Corrupt Practices Act: Nuance v. Nous’, *Criminal Law Review*, 2 (2011), 122–40.

⁵⁵ See, e.g., the general discussion in H. Lowell Brown, ‘Vicarious Criminal Liability of Corporations for the Acts of their Employees and Agents’, *Loyola Law Review*, 41 (1995), 279–327; see also the discussion in Cropp, ‘The Bribery Act 2010’.

⁵⁶ See the discussion by Cropp, ‘The Bribery Act 2010’, p. 128.

nature of its strategy.⁵⁷ Even with such a strategy solely in mind, though, some consideration might have been given to turning the civil offence created by the FSA – failing to take reasonable care to establish and maintain effective systems and controls to counter the risks of bribery and corruption⁵⁸ – into a more general regulatory criminal offence under the 2010 Act.⁵⁹ Building on that possibility, it would have been possible to introduce such an offence, but make its application limited to particular kinds of transaction through the use of secondary legislation. Examples are transactions governed by the Export Control Act 2002 ('the 2002 Act'), such as defence contracts, consideration of which helps us to contrast the criminal offence-led strategy of the 2010 Act with the regulatory approach of the 2002 Act.⁶⁰

A regulatory strategy to deter bribery: the case of the arms industry

The US Department of Commerce has suggested that something like 50 per cent of all bribery allegations in the late 1990s were in the defence sector, in spite of the fact that this sector accounts for only 1 per cent of world trade.⁶¹ In 2006, Britain was ranked second in the world in terms of its expenditure on military equipment (US\$61,925 million), behind only the United States (US\$546,018 million). BAE Systems – the fourth largest defence manufacturer in the world in 2005 – is dependent for 79 per cent of its income on defence contracts. About 60 per cent of the global arms trade is accounted for by developing countries, where the risk

⁵⁷ Under the 1977 Act, settlements with offenders almost always include an agreement whereby an independent monitor is retained by the offending firm for a number of years. In the interests of compliance, the monitor has the power to obtain documents, and to recommend reform of the firm's practices, and hence its culture. Such agreements are virtually unheard of in the United Kingdom, although the SFO's settlement with Mabey & Johnson (referred to at n. 42, above) is a version of this.

⁵⁸ See text at n. 43, above.

⁵⁹ The Joint Committee on the draft Bribery Bill opposed the introduction of regulatory civil penalties, seemingly on the assumption that they would be taking the place of, rather than (as suggested here) supplementing criminal legislation, available at: www.publications.parliament.uk/pa/jt200809/jtselect/jtbribe/115/11508.htm#a16, paras 88–90.

⁶⁰ See further, Z. Yihdego and A. Savage, 'The Arms Export Regime: Progress and Challenges', *Public Law*, Autumn (2008), 546–65.

⁶¹ US Department of Commerce Trade Promotion Coordinating Committee Report (March 2010), cited by the Committee on Arms Export Controls, 'Scrutiny of Arms Export Controls (2010): UK Strategic Export Controls Annual Report 2008, Quarterly Reports for 2009, Licensing Policy and Review of Export Control Legislation' (2010 HC 202), para. 108.

of bribery and corruption is also much higher than in the developed world.⁶² It is obvious that very considerable risks are present for both the firms in question and the state when firms export military hardware and equipment. For example, such goods may end up being used against civilians, or against combatants from the exporting state itself or from its allies.⁶³ Such risks also exist in relation to the export of material of use in manufacturing weapons of mass destruction or devices commonly associated with torture; and the risks extend to the provision of certain kinds of service rather than goods, such as 'know-how' or technical assistance in relation to the use of the items just mentioned. For these reasons, certain kinds of technology transfer or expert assistance, along with the export (and import) of items of the relevant type – and of certain 'dual use' items that may have legitimate or illegitimate uses – are governed by the 2002 Act. There is no space to say much about it here, but the 2002 Act is an unusual piece of legislation from a criminal lawyer's point of view.

The 2002 Act is almost entirely 'permissive', granting powers to the Secretary of State to introduce through secondary legislation regulatory controls over exports and the provision of services of certain kinds (such as those just mentioned), and to create criminal offences in the same manner for breaches of the controls.⁶⁴ Consider, by way of example, the criminal law-creating activities of the Department for Business, Innovation and Skills (BIS) in 2008, under the 2002 Act. In 2008, BIS created no less than thirty-one criminal offences by Order under the 2002 Act. These offences are targeted at conduct that, more or less directly or indirectly, unjustifiably increases the risk that wrongful harm may be done. In this context, an example of conduct prohibited because it more directly increases the risk of wrongful harm being done is the prohibition involved in providing Burma with financial assistance related to military activities.⁶⁵ Given the directness of the increase in risk involved in such

⁶² Stockholm International Peace Research Institute Yearbook, *Armaments, Disarmament and International Security* (Oxford University Press, 2001), p. 326.

⁶³ For example, the Dassault-Breguet Super Étendard carrier-borne strike fighter, although designated for the French navy, was first used in combat by Argentina against British forces. Fourteen such aircraft had been purchased by Argentina in 1980, after an arms embargo imposed by the United States in the light of the political situation in Argentina, which meant that spare parts for Argentina's US-made planes became unavailable. Twenty members of the crew of HMS *Sheffield* were killed in an Argentine attack employing one of these fighters on 4 May 1982.

⁶⁴ On the regulatory nature of such offences, see text following n. 47, above.

⁶⁵ Export Control (Burma) Order No. 2008/1098.

conduct, the conduct will not be licensed by the UK Government in any circumstances. Other offences are targeted at more indirect ways in which risks of wrongful harm being done may unjustifiably be increased (a common example is failing to ensure one's vehicle has a valid MOT certificate).⁶⁶ In this context, prohibitions on indirectly risk-enhancing conduct can be found in rules and regulations governing the conditions on which one is entitled to engage in primary activities governed by Orders issued under the 2002 Act. An example is making a false statement or furnishing a document or information which to an applicant's knowledge is false in a material particular (*ex hypothesi*, in order to obtain an export licence).⁶⁷ Another example is failing to comply with any of the requirements or conditions to which a licence is subject.⁶⁸ Under the main piece of secondary legislation in this field, the Export Control Order 2008, we can see prohibitions on directly risk-enhancing conduct (paragraph (4), below) and more indirectly risk-enhancing conduct (paragraphs (6) and (7), below) placed together, as part of a coherent hierarchy of offences:

35 ... (4) Subject to paragraph (8), a person knowingly concerned in an activity prohibited or restricted by Article 3(1), 4(1), 4(2), 4(3) or 21(1) of the dual-use Regulation with intent to evade the relevant prohibition or restriction commits an offence and may be arrested.

(5) A person guilty of an offence under paragraph (4) shall be liable: ...

(b) on conviction on indictment to a fine or to imprisonment for a term not exceeding ten years, or to both.

(6) A person who fails to comply with Article 9(1) (provision of relevant information for licence applications) of the dual-use Regulation commits an offence and shall be liable on summary conviction to a fine not exceeding level 3 on the standard scale and any licence which may have been granted in connection with the application shall be void as from the time it was granted.

(7) A person who fails to comply with Article 16 (record-keeping), 21(5) (records of exportation and transfer of listed items within the customs territory) or 21(7) (requirement in relation to commercial documents for exportation and transfer of listed items within the customs territory) of the dual-use Regulation commits an offence and shall be liable on summary conviction to a fine not exceeding level 3 on the standard scale.

⁶⁶ This example can be explained more casuistically. It is a kind of 'secondary' prohibition, a prohibition on risk-enhancing conduct whose unjustifiability needs to be understood in relation to a 'primary' prohibition: in this case, the offence (and the offences related to it) of dangerous driving.

⁶⁷ Export Control Order No. 2008/3231.

⁶⁸ Export Control Order No. 2008/3231.

Consistent with the regulatory nature of the export control strategy, there is a specialist agency, the Export Control Organisation,⁶⁹ responsible for taking prophylactic steps to avoid breaches of the legislation, through (for example) compliance visits to companies registered for export licences. Where breaches of export control legislation are suspected, they may be investigated by a specialist arm of Her Majesty's Revenue and Customs (HMRC), on whose behalf a prosecution may be taken by the Crown Prosecution Service (CPS).⁷⁰ Typically, there are also between 50 and 100 instances annually in which HMRC seizes goods subject to export control that appear to be intended for export without a valid licence.⁷¹ The Committee on Arms Export Controls has also advocated the introduction of civil penalties to buttress the regulatory criminal law.⁷²

This background is of relevance here because there is a close association between defence (and associated) contracting, and the payment of bribes. Bribes may be paid to obtain or keep contracts. However, bribes may also be paid to secure evasion of rules meant to govern how, when, on what terms and so on, such contracts are entered into. A simple example of the latter would be a secret payment to an official to issue a licence to a firm to export military hardware, even though the exporter has not met the conditions for the issue of such a licence. A more complex example would be a secret payment by a UK firm to an end-user of military equipment authorised by the UK Government (say, a stable democracy), whereby the authorised end-user agrees to allow an unauthorised end-user (say, a state illegally occupying another state's territory) to purchase that equipment from the authorised end-user if they wish to do so. The close connection between bribery and defence contracting⁷³ has led respected organisations such as Transparency International, as well as the UK's Committee on Arms Export Controls,⁷⁴ to

⁶⁹ See www.bis.gov.uk/exportcontrol.

⁷⁰ See www.berr.gov.uk/policies/export-control-organisation/eco-press-prosecutions.

⁷¹ 'Security of Arms Export Control: First Joint Report (2007/8) of the Committee on Arms Export Controls' (2008 HC 254), para. 49.

⁷² Committee on Arms Export Controls, 'Scrutiny of Arms Export Controls', (2009 HC 178), paras 81–85.

⁷³ Recently noted by the Committee on Arms Export Controls, 'Scrutiny of Arms Export Controls (2011): UK Strategic Export Controls Annual Report 2009, Quarterly Reports for 2010, licensing policy and review of export control legislation – Committee on Arms Export Controls' (2011 HC 686), paras 108–116.

⁷⁴ See n. 25, above, at para. 115; C. Courtney, 'Corruption in the Official Arms Trade', in Transparency International (UK), Policy Research Paper No. 001 (London: Transparency International, 2002).

recommend the introduction of (in effect) a more regulatory strategy to combat bribery in this field. The UK Committee recommended extending the remit of the Export Control Organisation to include prophylactic measures to prevent bribery and corruption in its processing of applications for export licences.⁷⁵

the creation of a requirement for those seeking export licences to produce a declaration that the export contract has not been obtained through bribery or corruption; the revocation of licences where an exporter had been convicted of corruption; and the amendment of the National Export Licensing Criteria to make conviction for corruption by an exporter grounds for refusing an export licence.⁷⁶

For its part, in 2002, Transparency International made recommendations along similar lines:

Recommendation 2: export licensing should be strictly conditional on presentation by exporting countries of rigorous contract-specific no-bribery warranties. These should be reinforced by evidence that companies have in place sufficient internal compliance systems capable of detecting corruption-risk and preventing the payment of bribes. Exclusion from export licences should be used as a sanction against companies or brokers found to have paid bribes ...

Recommendation 7: Prior scrutiny of individual licences should be undertaken by a Parliamentary Committee of both Houses to ensure that sales conform with the UK Consolidated Criteria. This Committee should consider the potential for corruption in the procurement process in the importing country in its advice to the government on whether to award the licence.⁷⁷

The 'reinforcing' measures in Recommendation 2 look very much like the substance of the guidance now issued to firms on what should be taken into account in determining whether 'adequate procedures' were in place to avoid bribery being committed on a firm's behalf.⁷⁸ There is, though, a strong argument that such prophylactic regulatory measures should be mandatory in this sector of the economy, not merely advisory in all sectors (as they now are). In other words, it should not be left to the general prohibitions in the 2010 Act to deter and prevent bribery by incentivising only (potential) perpetrators. The strong association between defence contracting and the risk of corruption should

⁷⁵ See n. 25 above, at para. 117. ⁷⁶ HC (2007/8) 254, paras. 112–117.

⁷⁷ Courtney, 'Corruption in the Official Arms Trade', p. 6. ⁷⁸ See n. 38, above.

additionally be regarded as a reason to give officials and experts working in export control powers to develop a proactive regulatory strategy, to reduce the risk of perpetration by focusing on ‘at risk’ companies and risky practices.

Regrettably, that is not to be government policy in the near future. The official response of the Business, Innovation and Skills Minister, Mr Mark Prisk MP, to the proposal that the risk of corruption should be added specifically as a reason to refuse an export licence was to say:

I don't think it's something we would be minded to support, and I doubt whether it would be successful. I think on the whole we've got to distinguish here between dealing with the risks of an unacceptable use or an illegal use, and how a contract is secured, and they're actually two distinct things, so I think we shouldn't confuse in law those two different elements.⁷⁹

What all this shows is that the UK's commitment to an anti-corruption policy is not fully worked through, and is in effect half-hearted. The UK Government has adopted a criminal offence-led strategy without explaining why a (prophylactic) regulatory strategy, common to UK policy both in combating fraud and – to use my special focus – in reducing irresponsible exporting, is not also a necessary element in tackling bribery, if that is to be done in a fully committed way. Naturally, many will share the government's fears about the burdensomeness of increased regulatory impact in general. Acknowledging that, the government has nonetheless failed to explain why a regulatory strategy to address bribery should not be implemented sectorally. There is an extremely strong case for making the guidance on adequate anti-corruption procedures mandatory in some industries, even if it is only advisory for other industries, if the United Kingdom, as a world leader in arms export, is to be taken seriously as a force in anti-corruption policy across the world.

Conclusion

The criminal offence-led strategy for bribery has brought some improvements in the law, but government commitment to anti-corruption policy remains half-hearted. The strategy is unlikely to work as effectively as it might have done had it been supplemented by a regulatory strategy

⁷⁹ Cited by the Committee on Arms Export Controls, n. 73, above, para. 114.

aimed at reducing the risks of bribery being committed. That regulatory strategy could, in the first instance, have been targeted at sectors of industry, and practices such as commission payments, prone to bribery and corruption. Ironically, the scheme recently introduced under the Parliamentary Standards Act 2009 to deter misuse, and govern the use, of expense claims by MPs provides a rudimentary model.

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