

The Bribery Act 2010 – Post-Legislative Scrutiny

JULY 2, 2018

On 9 May 2018, the UK House of Lords appointed a Select Committee, chaired by Lord Saville of Newdigate, to scrutinise the implementation and enforcement of the UK Bribery Act 2010 (“the Act”).

On 4 June 2018, the Ministry of Justice published a memorandum of post-legislative scrutiny on the Act.¹ The memorandum presents a positive assessment of the Act and its enforcement. However, the numbers behind the memorandum indicate the Act has been insufficiently used and inconsistently applied.

The Purpose of the Review

The House of Lords stated in March 2018 that it was “*an opportune time for post-legislative scrutiny*” given that “*nearly all corrupt conduct is now prosecuted under the Bribery Act, and a number of cases have already reached the Court of Appeal*”.²

The House of Lords’ purpose in recommending post-legislative scrutiny was to determine “*whether the Act has, as intended, led to stricter prosecution of corrupt conduct, a higher conviction rate, and possibly a reduction in such conduct*”.

Although the overall assessment of the formulation and implementation of the Act is positive, the figures illustrate that its enforcement has, so far, failed to meet these expectations.

Insufficient Enforcement

The Act provided a much-needed consolidation and modernisation of the law, as well as broadening its scope and jurisdictional reach to reflect the transnational nature of corrupt activity with links to the UK. The Act also introduced measures seeking to improve corporate governance by extending corporate liability beyond the identification principle through the offence of failure to prevent bribery under section 7.

However, while the formulation and implementation of the Act may be judged successful, its enforcement has been insufficient. In the seven years since the commencement of the Act, prosecutors have proceeded against 22 individuals under section 1 (bribing another) and 13 individuals under section 2 (being bribed). Of these, a total of 27 led to convictions, of which 17

resulted in custodial sentences.

Given the broad scope of the Act, these are unimpressive figures, notwithstanding the long-term nature of many bribery and corruption investigations. However, there is an upward trend in the number of bribery investigations; prosecutors proceeded against more individuals (16) in 2017 than in any other year (the previous highest being six in 2013 and 2016).

Of greater concern are the figures relating to section 6 (bribery of a foreign public official) and section 7 (corporate failure to prevent bribery). To date, there have been no prosecutions under section 6. According to the Memorandum, *“The reason for the lack of prosecutions under section 6 of the Act is not clear but it may be in part because any individuals perpetrating bribery overseas on behalf of businesses seeking publicly funded business opportunities will typically not be UK nationals or non-nationals ordinarily resident in the UK.”* This ignores the fact that the offence under section 6 may be committed directly or through a third party. This justification risks giving a signal to businesses that such conduct carried out by overseas agents will not be effectively investigated or prosecuted.

This criticism would be less valid if such conduct had been consistently prosecuted under section 7. However there have only been two successfully prosecuted cases under section 7 and neither were linked to the bribery of foreign public officials.

Inconsistent Application

One of the House of Lords’ recommendations for the Committee was to consider the use of Deferred Prosecution Agreements (“DPAs”) as they affect bribery. The Memorandum praises the value of DPAs in supporting the aims of the Act, noting: *“The ability to influence the future conduct of an organisation, rather than just penalise past failures, makes a DPA an appropriate tool for addressing corporate economic crime, where the organisation fully and transparently cooperates with the authorities.”*

To date, there have been three DPAs related to offences under section 7 of the Act. The willingness of prosecutors to engage with companies in negotiating DPAs has appeared inconsistent. The DPA secured by Rolls-Royce overturned the assumption that self-reporting is a prerequisite to successful DPA negotiations,³ while the prosecution of Skansen Interiors Limited indicates that self-reporting is not sufficient to attract the offer of a DPA.⁴

The judgment in *Rolls-Royce* did not shy away from the influence of the size and national importance of the company in ensuring DPA negotiations were successful. In contrast, Skansen, a tiny company with no assets at the time of the prosecution, presented low-hanging fruit.

The fact that full and transparent cooperation on the part of Skansen was insufficient to prompt DPA negotiations means that SMEs may be left unclear as to the value of self-reporting, although as a dormant company, no financial penalty would have been possible.

A 2013 House of Lords Select Committee had called for post-legislative scrutiny of the Act *“at the earliest opportunity”* because of *“confusion and uncertainty”* about its application.⁵ After five years,

SMEs cannot be said to be in a significantly more certain position. The Memorandum recognises this issue, noting: “*the Government is aware that a shortfall in awareness of the Act and Ministry of Justice guidance remains, particularly among SMEs.*”

Conclusion

The implementation of the Act has not raised significant legal issues to date and stands as a clear and robust statement of the law. However, the Act has not, as intended, led to increased prosecution and a higher conviction rate, though there are signs that the latter is on the rise. An inconsistent approach to DPAs has led to a lack of clarity over the value of self-reporting, highlighting the need for clear guidance for SMEs.

The full post-legislative scrutiny report is due by the end of March 2019.

¹ 4 June 2018, *Bribery Act 2010: Post Legislative Scrutiny Memorandum*, accessible at https://www.gov.uk/government/publications/bribery-act-2010-post-legislative-scrutiny-memorandum?utm_source=08bfac73-670d-49a2-a4d7-48c22cc15110&utm_medium=email&utm_campaign=govuk-notifications&utm_content=immediate

² 20 March 2018, *New ad hoc Committees in 2018-19*, 2nd Report of Session 2017-19 – HL Paper 103, accessible at: https://publications.parliament.uk/pa/ld201719/ldselect/ldliaison/103/10307.htm#_idTextAnchor008

³ *Serious Fraud Office v Rolls-Royce PLC* (2017), unreported. Case number U20170036.

⁴ *R v Skansen Interiors Limited* (2018), unreported.

⁵ 8 March 2013, Report of the SME Committee into exports. Available at: <https://www.parliament.uk/business/committees/committees-a-z/lords-select/small-medium-enterprises-committee/news/house-of-lords-committee-welcome-benefits-of-increased-exporting-by-smes-but-says-government-must-do-more-to-ensure-smes-know-where-to-find-export-help/>