

The United Kingdom against Bribery through Bribery Act 2010: Does the Act can be considered as the One of the Best Anti-Bribery Legislation in the world?

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Abstract

Britain as one of the developed countries in the world has a fairly ancient law related to the eradication of corruption. Corruption as a modern crime requires a fairly revolutionary reform of the law to force Britain to make a new law. This new law will be more flexible in accordance with the common law school of law adopted by the UK. This article aims to assess whether the new law related to corruption eradication made by the UK can become a reliable law. This article will discuss about the new features in fighting corruption in the UK as well as some international aspects that allow legal subjects outside the British nationality to commit acts of corruption in the UK.

A. Introduction

In order to fight the bribery internationally, many countries evolved their laws and adding some crucial points. However, many countries are failed to fight the bribery because of the weakness of their legislation.¹ Moreover, not only evolving their legislation, they are also working together with a purpose to create a new mechanism, which can be used by the international community. Such laws will be designed to reduce the incentives related to any financial crimes, including the bribery, by increasing the cost and risk of detection of anyone that pays a bribe.² The current mechanism as a tool against bribery relies on the domestic criminal and civil administrative law of each country, which decentralised, and horizontal.³ Subsequently, states are joining in a cooperation to create the framework of the contemporary

¹ Alvaro Cuervo Cazorra, 'The Effectiveness of Laws against Bribery Abroad' [2008] J INT BUS STUD 634, 634-635

² Ibid. p. 635.

³ Elizabeth K. Spahn, 'Multijurisdictional Bribery Law Enforcement: The OECD Anti-Bribery Convention' [2012] VA J. Int. Law 1, 7

multilateral anti-bribery mechanism called the OECD Anti-Bribery convention.⁴ According to Robert and Joseph:⁵

“Cooperating networks of prosecutors from the signatory states now meet under the auspices of the OECD Working Group on Bribery (Working Group), exchange information, share technical expertise, and build relationships of trust. Cumbersome bilateral Mutual Legal Assistance Treaties and letters rogatory accomplish more formal exchanges of information and evidence.”

The United Kingdom as one of the parties of the convention has ratified the convention on December 14, 1998. However, until 2001, the United Kingdom still applied their old bribery laws as the basis of combating the bribery across the country.⁶ Historically, the United Kingdom have fought against Bribery since the 19th century, wrestling against a concept of corruption of public service and its obligation and duty to employers.⁷ However, after a long time, the common law system used by the court to prosecute the allegation of bribery, the United Kingdom finally created a coherent legislation namely Public Bodies Corrupt Practices Act 1889 and the Prevention of Corruption Act 1916.⁸ According to *Russell on Crime*, bribery under the common law system can be defined as:⁹

“Bribery is the receiving or offering [of] any undue reward by or to any person whatsoever, in a public office, in order to influence his behaviour in office, and incline him to act contrary to known rules of honesty and integrity.”

However, according to the Consultation Paper from the law commission, there are several issues regarding the existing law:¹⁰

- 1) Under the current law, there are imperfect distinction is made between bribery in the public sector and bribery in private sector. The 1889 Act is confined to bribery of members, officers, and servants of public

⁴ Convention on Combating Bribery of Foreign Public Officials in International Business Transaction (OECD Convention), 17th December 1997,

https://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf. Accessed on 30 April 2017.

⁵ Robert O. Keohane and Joseph S. Nye, 'Transgovernmental Relations and International Organizations' [1974] WORLD POL. 39, 43

⁶ Stuart H. Deming, *Anti-Bribery Laws in Common Law Jurisdictions* (OUP, 2014) 125-126.

⁷ Nick Kochan and Robin Goodyear, *Corruption, The New Corporate Challenge* (Palgrave Macmillan, 2011) 55

⁸ Nick Kochan and Robin Goodyear (n. 7) p. 55

⁹ JW Cecil Turner (ed.), *Russel on Crime*, (12th edn Stevens and Sons, 1964) 381.

¹⁰ Law Commission, *Reforming Bribery A Consultation Paper*, (Consultation Paper No 185, 2008) para 1.8 – 1.10.

bodies. By contrast, the 1906 Act extends to bribery of ‘agents’ irrespective of whether of the agent is employed serving in the public or the private sector.

- 2) Given that there are two different statutes, it might be thought that the substantive law governing in the public sector would be markedly different from the substantive law governing bribery in the private sector. The distinction has no direct bearing on the question which conduct is corrupt because the meaning of ‘corruptly’ under the 1889 Act and the 1906 Act is the same.
- 3) Rather, the distinction only affects the ease of proving corruption. This is because there is presumption in cases where the person given an advantage is someone who holds or is seeking a contract with such a body. Whether, such a presumption, is necessary or desirable is questionable.

Regarding the weakness of the existing legislation, the law commission was also measuring the effectiveness of the application of the existing law. The table below will explain the effectiveness of both 1889 Act and 1916 Act:¹¹

Table 1. Giving and receiving a bribe; Public Bodies Corrupt Practices Act 1889

	2001	2002	2003	2004	2005
Proceed against	1	1	4	1	-
Found guilty	2	-	1	-	-

Table 2. Corruption Transaction with Agents; Prevention of Corruption Act 1906

	2001	2002	2003	2004	2005
Proceed against	9	8	12	3	1
Found guilty	12	20	6	4	1

According to both table which measuring the effectiveness of both 1889 Act and 1906 Act in all courts in England and Wales from 2001 and 2005, it can be noticed that person who found guilty under the Act is exceeding the amount of person who has been proceeded under the Act. This condition might occur because the defendant was originally charged with a different offence.¹²

The lack of implementation of existing bribery law in the United Kingdom was criticised by the international community, in particular, to its limited impact in policing bribery and

¹¹ Ibid. para 2.30

¹² Law Commission (n. 10) para 2.30.

corruption within British company.¹³ Since United Kingdom is part of the OECD convention, the fact of the ineffectiveness of the laws against bribery in the United Kingdom was disappointed. The OECD Working Group report state that ‘overall, the Group is disappointed and seriously concerned with the unsatisfactory implementation of the Convention by the UK.’¹⁴

Regarding the disappointment from the OECD Working Group, the government of the United Kingdom preparing a new Bill in order to respond the ineffectiveness condition. The new Bribery Act 2010 finally comes into force on 1st July 2011. However, the implementation of the new Act is not the end of the problem. Despite the various guidance published by the government in order to explain the details of the Act, the problems still exist in relation with the business community regarding the uncertainty of the legal interpretation of the Act.¹⁵ This vague condition clearly creates a burden for business aspect. The question arises is despite the comprehensiveness and the purpose of the Act which establishing the ‘zero-tolerance’ attitude toward the bribery, however regarding the existence of the problem in the Bribery Act 2010, can we consider the Act as the one of the best anti-bribery act in the world? The purpose of this essay is to examine the effect of the application of the Bribery Act 2010, in particular, regarding the problem, which caused by the application of the Act.

The next part of this essay will discuss fighting against bribery in international level. It will discuss the effectiveness of the OECD Convention in order to fight the bribery including in the United Kingdom. Subsequently, it will be followed by a discussion about the condition of legislation against bribery in the United Kingdom before and after the application of the Bribery Act. The following part then will discuss the several problems regarding the enforcement of the new Act.

B. Discussion

1. OECD Convention: Fighting Against Bribery in International Level

¹³ Gordon Belch, ‘An Analysis of the Efficacy of the Bribery Act 2010’ (2014) Aberdeen Student Law Review https://www.abdn.ac.uk/law/documents/An_Analysis_of_the_Efficacy_of_the_Bribery_Act_2010.pdf. Accessed on 30 April 2017.

¹⁴ OECD Directorate for Financial and Enterprise Affairs, ‘United Kingdom: Phase 2bis Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1977 Recommendation on Combating Bribery in International Business Transactions’ (October 2008) <http://www.oecd.org/unitedkingdom/41515077.pdf>. Accessed on 30 April 2017.

¹⁵ Gordon Belch (n. 13) p. 13.

The development of anti-bribery laws becomes much important in recent years. A number of international legal instruments including the OECD Convention and the United Nation Convention against Corruption providing both preventive measure and the criminalization of a wide range of corrupt acts, including bribery.¹⁶

The existing law sometimes came from ‘foreign’ jurisdiction, which can be varied.¹⁷ The notion behind the OECD Convention is to establish a universal mechanism against the bribery and reducing the double standard of every jurisdiction, which can be different from each other.¹⁸ The amount of transnational bribery is enormous, leaving a small business operator as a vulnerable entity, which can be defeated easily by the wealth and power multinational corporation.¹⁹ Subsequently, there is a risk for a smaller state of being captured by the powerful business operation, as a ‘transnational criminal organisation’, across multiple borders.²⁰ Several risks of danger for such small state such as the corporation will try operating as if a rational market based on competition exist without, voluntarily²¹ or involuntarily,²² legitimate business running by the corporation in a corrupted jurisdiction.²³ The purpose of the convention is to provide a protection such risk and oblige all countries who signed the convention to have a domestic law in relation to give a protection, particularly from bribery.²⁴ OECD Convention member of state has moved rapidly in late 1990’s to construct a new international law in order to fight the bribery.²⁵ According to Abbot and Snidal, the main focus of the new law have to

¹⁶ Deborah Hardoon and Finn Heinrich, *Bribe Payers Index 2011* (Transparency International, 2011) p. 9.

¹⁷ Elizabeth K. Spahn (n. 3) p. 6

¹⁸ Ibid.

¹⁹ Ibid. p. 12.

²⁰ Kelly M. Greenhill, *Kleptocratic Interdependence: Trafficking, Corruption, and the Marriage of Politics and Illicit Profits*, in Robert I. Rotberg (ed.), *Corruption, Global Security, and World Order* (Brookings Institution Press, 2009) 99.

²¹ Andrew Brady Spalding, 'Unwitting Sanctions: Understanding Anti-Bribery Legislation as Economic Sanctions Against Emerging Markets' [2010] FLA. L. REV. 351, 355-356.

²² Nikolaus Schuttauf, 'Repeal Anti-Bribery Legislation? A Defense of Laws Promoting Clean Business and Transparent Government' [2012] NEW ENG. L. REV. 617, 617.

²³ Elizabeth Spahn, 'Nobody Gets Hurt?' [2010] GEO. J. INT'L L. 861, 900.

²⁴ Organization for Economic Co-operation and Development, 'Country Report on the Implementation of the OECD Anti-Bribery Convention'

<http://www.oecd.org/daf/anti-bribery/countryreportsonteimplementationoftheoecdanti-briberyconvention.htm>. accessed on 1 May 2017.

²⁵ Kenneth W. Abbott and Duncan Snidal, 'Values and Interest: International Legalization in the Fight Against Corruption' [2002] J. LEGAL STUD. 141, 144

relied on the flexibility of the law which can be changes over time rather than focusing on stable preferences.²⁶ According to Article 1(1) and 1(2) of the Convention, state that:²⁷

- 1) 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, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business;
- 2) Each party shall take any measures necessary to establish that complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official shall be a criminal offence. Attempt and conspiracy to bribe a foreign public official shall be criminal offence to the same extent as attempt and conspiracy to bribe a public official of that party.

Despite the good purpose of the convention, there are several issues regarding the application of the convention. In the first decade of the enforcement, many states are among of the ‘coalition of the unwilling’²⁸ dubbed by sceptics.²⁹ Many of the states appeared to respect the convention on paper but do not have any intention to enforce the convention as their law.³⁰

According to the Report on Enforcement of the OECD Convention from the Transparency International shows that:³¹

“Steady progress in enforcement efforts, the most recent Transparency International report concluded that globally, enforcement efforts are losing momentum and that lack of political will remains the primary obstacle to effective enforcement.”

In relation with this condition, according to Transparency International, the government need to increase their effort in order to apply the Convention in their domestic law. Ratification should be followed by a strong commitment to enforcing the convention including dedicating

²⁶ Kenneth W. Abbott and Duncan Snidal (n. 25) p. 144.

²⁷ OECD Convention (n. 4) Article 1(1) and 1(2).

²⁸ Karryn Miller, ‘Walking the Fine Line between Entertaining and Bribery’ (Japan Today, 13 October 2008) <https://japantoday.com/category/features/opinions/walking-the-fine-line-between-entertaining-guests-and-bribery>. Accessed on 1 May 2017. According to Karryn, the part of coalition of unwilling including Japan, Canada, and the United Kingdom.

²⁹ Elizabeth K. Spahn (n. 3) p. 20

³⁰ Ibid.

³¹ Fritz Heimann, Gillian Dell, and Kelly McCarthy, *Progress Report 2011: Enforcement of the OECD Anti-Bribery Convention* (Transparency International, 2011) p. 5.

appropriate resources in order to investigate any bribery cases, and a strong will to prosecute the bribery.³²

However, nowadays, there are more than thirty-nine states such as Japan, Korea, Netherland, Turkey, United Kingdom, and the United States are parties to the Convention³³ who have adopted the Convention into their legal system regardless the distinction of each system of law in each state.³⁴ Moreover, according to the Transparency International, there are top 10 sectors, which often engaged in bribery in international levels, such as:³⁵

Table 3. Top 10 Sectors which often Engage with the Bribery in International Level

RANK	SECTOR
1.	Agriculture
2.	Light manufacturing
3.	Civilian aerospace
4.	Information technology
5.	Banking and finance
6.	Forestry
7.	Consumer services
8.	Telecommunications
9.	Transportation and storage
10.	Arms, defence, and military

The bribery practices in those sectors are formed in a various form. However, mostly bribes were paid to public officials in order to speed up an administrative process, or such unofficial payment was made to secure the performance of a necessary action, which the payer has legal or any or any other form of entitlement.³⁶ This condition makes it necessary to consider that anti-bribery law should be developed into reasonably hard law, multilateral and global enforcement regime in order to reduce the practice of bribery in international level.³⁷

³² Deborah Hardoon and Fein Heinrich (n. 16) p. 9

³³ Alvaro Cuervo Cazurra (n. 1) p. 637.

³⁴ Elizabeth K. Spahn (n. 3) p. 49

³⁵ Deborah Hardoon and Fein Heinrich (n. 16) p. 15.

³⁶ Ibid. p. 19.

³⁷ Elizabeth K. Spahn (n. 3) p. 52.

2. Attempt to Fight the Bribery in the United Kingdom

The United Kingdom has been struggling to fight the bribery since the 19th century. According to the case law, bribery can be defined as:³⁸

“Bribery or attempted bribery occurs when a bribe is given or offered to someone who holds a public office in order to influence him to act in a way that is not in accordance with his public duty.”

However, in fact, the ambit of the bribery in common law is vague, and most cases are pursued under statutory provisions.³⁹ Prior to the regime of the Bribery Act 2010, the United Kingdom does not have any uniform system in order to prevent bribery and relied on a combination of common and statutory law.⁴⁰ Before the existence of the Bribery Act 2010, a person who committed bribery will be prosecuted under the existing law, which consists of:⁴¹

- 1) The Public Bodies Corrupt Practices Act 1889; introducing the very basic concept of bribery, which consist of paying a bribe to public officials is a criminal offence (to exclude in government departments or the crown⁴²).
- 2) The Prevention of Corruption Act 1906; the Act state that bribing other public official and commercial agents is a criminal offence. However, there is an overlap with the 1889 Act which covers agents employed by public authorities.⁴³
- 3) The Prevention of Corruption Act 1916; which introduced the presumption of corruption, which can be used into particular sector of contracts; and
- 4) The Anti-Terrorism Crime and Security Act 2001, which amend the 1889 and 1906 Act, by introducing the extra-territorial scope. This Act was designed in order to respect the obligation of the United Kingdom to the OECD Convention.

³⁸ *R v Whitaker* (1914) 3 KB 1283.

³⁹ Karen Stephenson, 'Legislative Comment on Bribery Legislation' [2011] *Education Law Journal* 1, 2

⁴⁰ David Lorello, Sprange, and Irwin, 'UK Modernizing Anti-Bribery Law and Gearing up Enforcement Efforts' [2009] *INT'L GOV'T CONTRACTOR* 1, 1

⁴¹ *Ibid.*

⁴² *R v Natji* [2002] *EWCA Crim* 271.

⁴³ Abdul Gofur, 'A Panoptic Study of Corruption' (Online Paper from University Collage London, September 2006) <http://www.ucl.ac.uk/opticon1826/archive/issue1/corruption.pdf>. Accessed on 1 May 2017.

According to Stefan Zeume, the previous Act before the coming of Bribery Act 2010 divided the bribery practice into 2 main forms. Active bribery which consists of promising, giving, or offering of gifts, loans, fees, rewards, or advantages to members, officers, or servants of any public body in order to influence decisions within their power.⁴⁴ While, on the other hand, passive bribery can be defined as receiving the gift, loans, fees, rewards, or advantages by members, officers, or servants of any public bodies.⁴⁵ In a common law system, there are two distinct opinions regarding the bribery offence. According to Abdul Gofur, the debates relating to the position of bribery in a United Kingdom common law system is whether it is a general offence or whether it is consist of a number of a distinct offence of bribery,⁴⁶ such as bribery of a privy councillor,⁴⁷ bribery of a coroner,⁴⁸ embracery,⁴⁹ and bribing the police⁵⁰. However, there is a universal agreement regarding the definition of bribery under the common law according to the *Russell on Crime*,⁵¹ which changes the view of the bribery under the common law and considers the bribery is concerned with anyone who exercise public rather than private functions, excluding a corruption in the private sector.⁵²

However, there are several issues regarding the previous law before the application of the new Bribery Act 2010. The international community has brutally criticised the anti-bribery legislation in the United Kingdom because of its limited impact in policing bribery and corruption in British companies.⁵³ According to Richard Lloyd, “it is very difficult for prosecutors to bring an effective case against a company for alleged bribery offences.”⁵⁴ Moreover, according to the Consultation Paper, there is a specific failure regarding the previous law, such as a person is often charged under the wrong statute, the scope of the respective statutes, and inconsistency of the terminology, in particular, the terminology of ‘agent’ and

⁴⁴ Stefan Zeume, ‘Bribes and Firm Value’ (Online Paper from London School of Economy and Politics, 26 September 2013) <https://www.lse.ac.uk/collections/law/projects/lef/Bribes%20and%20Firm%20Value.pdf>. Accessed on 1 May 2017. p. 7.

⁴⁵ Stefan Zeume (n. 44) p. 7.

⁴⁶ Abdul Gofur (n. 43) p. 2.

⁴⁷ *R v Vaughan* (1796) 4 Burr 2494

⁴⁸ *R v Harrison* (1800) 1 East PC 382

⁴⁹ *Pomfriet v Brownsal* (1600) Cro Eliz 736

⁵⁰ *R v Richardson* 111 Cent Crim Ct Sess Pap 612.

⁵¹ See. Note 9 above.

⁵² Abdul Gofur (n. 43) p. 1.

⁵³ Ashish S. Joshi, *Britain’s Fight Against the “Silver Lance”: A Radical Overhaul of the United Kingdom Bribery Laws* (Champion, 2009) p. 38-39.

⁵⁴ Margaret Ryznar and Samer Korkor, 'Anti-Bribery Legislation in the United States and United Kingdom: A Comparative analysis of Scope and Sentencing' [2011] Mo. L. Rev. 415, 435-436

‘corruptly’.⁵⁵ According to the OECD, the main criticism of the legislation is confusing and unwieldy.⁵⁶ The OECD Working Group describes the United Kingdom anti-bribery legislation as “characterised by complexity and uncertainty”.⁵⁷

Another critique of the previous legislation came from the OECD Progress Report 2009. The report states that there had been little to no enforcement in the context of foreign bribery.⁵⁸ According to Transparency International in its 2009 Progress Report, describe the enforcement of the anti-bribery law in the United Kingdom as ‘moderate’⁵⁹ which means that during the period covered by previous legislation, the United Kingdom only initiated four foreign bribery cases, in comparison with Germany with 110 cases and 120 cases in the United States.⁶⁰ Moreover, the Transparency International states that there is confusion over the definition of foreign bribery offence as a huge factor of lack enforcement in the United Kingdom.⁶¹ Regarding the condition, the Nolan Report main recommendation state that:⁶²

“The bribery statutes should be consolidated in a single Act, that the public/private distinction and the presumption of corruption should be scrapped, and (echoing the Salmon Commission) that the law concerning receipt of a bribe by an MP be clarified. The offence of bribery should be brought under the criminal law and its definition extended to include the actions of agents, and to include acting corruptly in the ‘hope’ or ‘expectation’ of a bribe, even when no such bribe had been agreed.”

In order to reform the bad situation regarding the bribery legislation, the Government of the United Kingdom in 2008 published its final report, which gives recommendations in order to reform the existing legislation:⁶³

⁵⁵ Law Commission (n. 10) para 1.19 – 1.23.

⁵⁶ Jacqueline L. Bonneau, 'Combating Foreign Bribery: Legislative Reform in the United Kingdom and Prospects for Increased Global Enforcement' [2011] Colum. J. Transnat'l L. 366, 372

⁵⁷ OECD Directorate for Financial and Enterprise Affairs, *United Kingdom: Phase 2: Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendations on Combating Bribery in International Business Transactions* (17 March 2005) <https://www.oecd.org/daf/anti-bribery/anti-briberyconvention/34599062.pdf>. Accessed on 1 May 2017

⁵⁸ Fritz Heinman, Gillian Dell, and Kelly McCarthy (n. 31) p. 8

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ Ibid. p. 52.

⁶² The Nolan Report Recommendations 1995.

⁶³ Law Commission (n. 10) para 1.33.

- 1) Repealing the existing common law and statute concerning bribery, and replacing them with two bribery offenses; offering and receiving bribes;
- 2) Introducing a new offense of bribing foreign public officials;
- 3) Creating a new offence to catch companies who negligently failed to prevent bribery by those acting on their behalf;
- 4) Including a supplementary provision regarding jurisdiction, parliamentary privilege, the attorney-general and the special powers of the security services.

Subsequently, the new Bribery Act was introduced in 2010 in order to respond the criticism from the international community to struggle against bribery in both domestic and international level. According to the guidance of the Bribery Act, the new Act was described as:⁶⁴

“In updating our rules, the United Kingdom wants to play a leading role in stamping out corruption and supporting trade-led international development. Afterward, the Act is directly beneficial for business because it creates clarity and a level playing field.”

With the new Act, the United Kingdom intend to give an example how to address the bribery, as they have designed one of the strongest anti-bribery legislation in the world and creating a fair business environment.⁶⁵

3. The Beginning of a New Regime: The Bribery Act 2010

The Bribery Act comes into force as a respond to the need to reform the old law in order to comply with the OECD Convention in order to reduce the practice of bribery in international level. Under the new Act, both demand-sides (anyone who asking for an illegal payment) and supply-side (anyone who providing a bribe) will be prosecuted.⁶⁶ Since there is a difference under the previous law in order to define bribery, in the new Act, there is only one terminology of bribery:⁶⁷

⁶⁴ 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 (2011) <https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>. Accessed on 1 May 2017.

⁶⁵ Bribery Act Guidance (n. 64)

⁶⁶ Nick Kochan and Robin Goodyear (n. 7) p. 74-75

⁶⁷ Ibid. p. 85.

“A bribe is defined as the offer, promise, or giving of any financial or other advantage which is intended to induce or reward the improper performance of a public function or business activity (or is done in the knowledge or belief that acceptance of the advantage itself constitutes the improper performance of a public function or business activity)”

Under this new Act, the United Kingdom has successfully complied with the obligation as a party to OECD Convention. According to the Convention, under Article 4(1) point out the territorial jurisdiction of the legislation which state that “Each party shall take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in a whole or in a part in its territory.”⁶⁸ This compliance is set out under Section 12 and Section 6 of the Bribery Act 2010.⁶⁹ According to Aisha Anwar, under Section 6 of the Act, a person will be guilty if he/she intentionally give a foreign public official a promise, offering a financial advantage, or giving any reward, directly or through a third party, which is not legitimately due.⁷⁰ In particular, the Act has four important sections.⁷¹

Table 4. Important Section under the Bribery Act 2010

Section	Title	Description
Section 1	“Offence of bribing another person”	According to the guidance, this section will address the active bribery which intent to triggered or reward of any improper performance through a bribery practice by “offering, promising, or giving a bribe” ⁷²
Section 2	“Offences relating to being bribed”	This section will address the passive bribery which include “requesting, agreeing to receive, or accepting” a bribe with an exchange of any performance committed by the official or a any person. ⁷³

⁶⁸ OECD Convention (n. 4) Article 4(1).

⁶⁹ The Bribery Act 2010 Section 12.

⁷⁰ Aisha Anwar and Gavin Deeprose, 'Legislative Comment on The Bribery Act 2010' [2010] Scots L. Times 1, 2

⁷¹ Julia Lippman, 'Business Without Bribery: Analyzing The Future of Enforcement for The United Kingdom Bribery Act' [2013] Pub. Cont. L.J. 649, 654

⁷² Bribery Act Guidance (n. 64) p. 8

⁷³ Ibid.

Section 6	“Bribery of foreign public officials”	Bribing foreign official with the intention to get any advantage. ⁷⁴
Section 7	“Failure of commercial organizations in order to prevent bribery”	Explaining about Corporate failure to prevent bribery on behalf of a commercial organisation. ⁷⁵ Furthermore, this section also gives an explanation about how to prevent and protect a Corporate from a bribery practice. ⁷⁶

Under the new Act, will catch any person who committed any incident of bribery as well as the corporation who committed bribery. Because of the new Act, organisations need to be aware of the danger and they should make their entire officer, including the senior aware of the risk that could pose.⁷⁷ Furthermore, the company should also review their anti-bribery law mechanism and ensure that they have responsibility and put an effective risk management system into the company.⁷⁸ However, the Act is not only providing the kind of offence of bribery but also providing the defence under Section 13 of the Act.⁷⁹ Moreover, Aisha Anwar state that:⁸⁰

“The Section 13 provides a defence when a conduct is necessary for the proper exercise of any function of the intelligence service or the armed forces when engaged in active service. Although it is not explicit on the Act, in accordance with established case law, the standard of proof that the accused would need to discharge in order to prove the defence is the balance of probabilities.”

In order to ensure that everyone can know how to apply the Act properly, the government provide a Guidance, which gives an explanation of how to interpret the Act. The purpose of the guidance is to save organisations of all sizes from the fears of losing money in order to create a new system in order to comply with the Act without changing the substance of the Act.⁸¹ According to the Guidance:⁸²

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ The Bribery Act Section 7(2).

⁷⁷ Neil Hodge, 'Bribery Bill' [2009] In-House Persp. 17, 18

⁷⁸ Ibid. p. 19.

⁷⁹ The Bribery Act Section 13.

⁸⁰ Aisha Anwar and Gavin Deeprise (n. 70) p. 2.

⁸¹ Karen Stephenson (n. 39) p. 9.

⁸² Bribery Act Guidance (n. 64) p. 2-3

“There are certainly tough rules, but readers should understand too that they are directed at making life difficult for the mavericks, not unduly burdening the vast majority of decent, law-abiding firms. Combating the risk of Bribery is largely about common sense.”

There are six important principles under the Guidance of the Act including proportionate procedures,⁸³ top-level commitment,⁸⁴ risk assessment process,⁸⁵ due diligence,⁸⁶ communication (including training),⁸⁷ and monitoring and review.⁸⁸ However, despite the comprehensiveness of the Act and the guidance, there are several critical issues related to application of the Act.

4. Critical Issues in Relation with the Application of the Bribery Act 2010

According to Matt Atkins, he describes that the Bribery Act 2010 as “the toughest anti-corruption legislation in the world”.⁸⁹ Moreover, according to Harrison and Ryder state that “the new Bribery Act 2010 provides the United Kingdom with some of the most draconian and far-reaching anti-corruption legislation in the world”.⁹⁰ However, despite the comprehensiveness of the new Act and the issue of the guidance from the Act, there is still remains major uncertainty in relation to the business sector about how to interpret several definitions in the Bribery Act. According to Gordon Belch:⁹¹

“There is a residual legal uncertainty within the new Act. These include the uncertainty among businesses surrounding corporate hospitality and foreign public officials; the ambiguous about ‘adequate procedures’ defence and doubts as to the meanings of ‘relevant commercial organisations’ and ‘associated person’. This residual lack of legal certainty has imposed an onerous burden of unclear regulatory compliance upon businesses.”

⁸³ Ibid. p. 21.

⁸⁴ Ibid. p. 23.

⁸⁵ Ibid. p. 25.

⁸⁶ Ibid. p. 27

⁸⁷ Ibid. p. 29

⁸⁸ Ibid. p. 31.

⁸⁹ Matt Atkins, 'Introduction to the UK Bribery Act' [2011] *Financier Worldwide* 2, 5

⁹⁰ Karen Harrison and Nicholas Ryder, *The Law Relating to Financial Crime in The UK* (Ashgate Publishing, 2013) p. 44

⁹¹ Gordon Belch (n. 13) p. 2

Subsequently, this essay will also examine any issues related with the application of the Bribery Act 2010.

a. Foreign Public Officials

Under the new Bribery Act, Section 6 of the Act governs bribing foreign public officials.⁹² However, the terminology of foreign public officials is vague, leaving uncertainty for the business sector in the United Kingdom. According to Ren, foreign public officials can include anyone who serves as a senior management company, which have a function only in a private sector, but whose shares the owned primarily with the foreign governments.⁹³ The position of a foreign public official in this context will be very crucial in order to decide whether someone can be prosecuted under the Act.⁹⁴ Moreover, according to Ren:

“Confusion exist in relation to the SFO’s guidance regarding foreign public officials, as it fails to provide the exact degree of control that must be exercised by the state’s representatives over the company’s affairs to qualify those representatives as foreign public officials”

In fact, there is a considerable overlap between Section 6 and Section 1 of the Act, which makes it difficult to see which activity fall under section 6 will would not also be covered by the general section 1 of the bribery offence.⁹⁵

b. Corporate Hospitality

The issue relating with corporate hospitality have also received an attention and critique. Even though the guidance has already explained a definition of what is the correct hospitality, unfortunately, the explanation is not enough. According to Bean and MacGuidwin:⁹⁶

⁹² The Bribery Act 2010 Section 6(1) – 6(4)

⁹³ Ren-En Lim, 'Parting The Fog of the UK Bribery Act 2010: A Critical Discussion Of What We Do Know About the Act and Why it is in the Company's Interests to Comply with its Provisions' [2014] ICCLR 1, 4-5

⁹⁴ Ibid.

⁹⁵ Aisha Anwar and Gavin Deeprose (n. 70) p. 3

⁹⁶ Bruce Bean and Emma MacGuidwin, 'Unscrewing the Inscrutable: The UK Bribery Act 2010' [2012] Ind. Int'l & Comp. L. Rev 1, 6

“The Bribery Act operative provisions, particularly the strict liability provisions and the treatment of facilitation and hospitality payments, are unprecedented in their jurisdictional reach and cannot reasonably be enforced.”

According to the SFO, disproportionate corporate hospitality can be considered as bribery.⁹⁷ Unfortunately, there is no uniformity in terms of the terminology of bribery in the context of corporate hospitality. There is an ambiguity, particularly between the SFO and courts, about where they will draw the line between criminal and legitimate hospitality.⁹⁸ According to Richard Alderman, former SFO director, he believed that the matter is about common sense.⁹⁹ Moreover, according to Amy Bell:¹⁰⁰

“The emphasis is on reasonable proportionate hospitality and activities. The prosecution has to prove a connection between the financial or other advantage offered and the intention to bring about the improper performance of a relevant function or influence and secure a business advantage. The more lavish the entertaining, the easier this is to imply.”

Consequently, the SFO will consider whether a corporate hospitality can be considered as legitimate hospitality or a bribe will heavily depend on the context of the hospitality.

c. Relevant Commercial Organisations

The definition of ‘relevant commercial organisation’ (RCO) probably will include all major multinational corporations, as the majority of the corporation is also operated their business in the United Kingdom, or at least have a branch in the United Kingdom. Regarding this condition, there is a possibility that a company from any country, who have a branch in

⁹⁷ Serious Fraud Office, Bribery Act Guidance (October 2012) <https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/bribery-act-guidance/>. Accessed on 2 May 2017.

⁹⁸ Gordon Belch (n. 13) p. 7

⁹⁹ Ren-En Lim (n. 93) p. 3

¹⁰⁰ Amy Bell, 'The Bribery Act: What's all the fuss about?' [2011] Legal Information Management 1, 3

the United Kingdom, or any foreign corporation who pay a bribe from the United Kingdom or outside the United Kingdom can be prosecuted under the Bribery Act.¹⁰¹

d. Associated Person

Under the Section 8 of the Bribery Act, associated person can be defined as “a person (A) who performs services for, or on behalf of a company”.¹⁰² However, this terminology under the Act is very wide and vague. With such terminology under the Act, anyone could be considered as ‘associated person’ include contractual counterparties such as joint venture, partners, distributors, consultants, and professionals advisor who giving any advice for the company.¹⁰³ The difficulty with this concept is there is no guidance in order to determine what degree of connection is sufficiently enough to establish the necessary association for the purpose of Section 7 of the Bribery Act.¹⁰⁴ It means that in relation to financial sector, considerable ambiguity is affecting the sector because the investor will be automatically being ‘associated’ with the investee with all of their uncertain statuses.¹⁰⁵ Even though the company have already put the correct due diligence and have a good record of any ‘associated person’¹⁰⁶ however, in practice, the interpretation of ‘associated person’ will be relied on the SFO and they will apply their enforcement authority.¹⁰⁷

e. Adequate Procedures

Under the Section 7(2) of the Bribery Act, state that a commercial organisation can prove that they had already put an ‘adequate procedure’ in place in order to prevent any bribery conduct.¹⁰⁸ This means that a company can be prosecuted under Section 7 of the Act even if the employee of the company were unaware that bribery had already occurred, and even

¹⁰¹ Ren-En Lim (n. 93) p. 6

¹⁰² The Bribery Act 2010 Section 8

¹⁰³ Gordon Belch (n. 13) p. 8

¹⁰⁴ Financial Market Law Committee (FMLC), *Analysis of Uncertainty around the Bribery Act 2010: Ministry of Justice Consultation on Guidance about Commercial Organisations Preventing Bribery* (Issue 160, 1 November 2010) para 2.11

¹⁰⁵ Ibid

¹⁰⁶ Melanie Wadsworth, ‘One year on what has the bribery Act done for us?’ (Money Laundering Bulletin, 7 June 2012) <http://www.moneylaunderingbulletin.com/risksandcontrols/briberyandcorruption/one-year-on-what-has-the-bribery-act-done-for-us-56255.htm>. Accessed on 2 May 2017.

¹⁰⁷ Gordon Belch (n. 13) p. 8.

¹⁰⁸ The Bribery Act Section 7(2).

if such conduct is committed by a third party related to the company.¹⁰⁹ Furthermore, the jurisdiction for such offence is very wide and it does not have any territorial limit.¹¹⁰ According to the Director of the SFO and Director of Public Prosecutions:¹¹¹

“If the company is incorporated in the UK, or that the organisation carries out its business or part of its business in the UK, court will have jurisdiction, irrespective of where in the world the acts or omissions which form part of the offence may be committed.”

This uncertain condition clearly will give a major bad impact for business and financial sector for any corporation based in the United Kingdom or run their branch in the United Kingdom.

C. CONCLUSION

The United Kingdom has a long history in order to fight the bribery. Their participation in the OECD Convention has brought the position of the United Kingdom into a top-level state who struggle against such crime. Through the Convention, oblige the United Kingdom to change their old law into a newer law, which should have a compliance with the convention in order to fight the bribery not only at the domestic level but also at an international level. Through the Bribery Act 2010, the United Kingdom has taken a ‘zero-tolerance’ against any practice of the Bribery. Moreover, the new act is well known as one of the best anti-bribery legislation in the world.

Even though it is one of the best anti-bribery legislation, however, there are several issues regarding the new Act. The clarity of the terminology under the Act has brought some uncertainty for business and financial sector for a company who based in the United Kingdom or running their branch in the United Kingdom. This condition clearly has a major bad impact for these sectors. In order to respond to this issue, the government of the United Kingdom should give a clearer guidance in order to raise the level of clarity for anyone who can become a subject from the Act.

¹⁰⁹ Gordon Belch (n. 13) p. 8-9

¹¹⁰ Gordon Belch (n. 13) p. 8-9

¹¹¹ Director of the SFO and Director of Public Prosecutions, ‘*Bribery Act 2010: Joint Prosecutions Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions*’ (Serious Fraud Office, 2011) p. 10.

REFERENCES

CASES

- R v Whitaker* (1914) 3 KB 1283.
R v Natji [2002] EWCA Crim 271.
R v Vaughan (1796) 4 Burr 2494
R v Harrison (1800) 1 East PC 382
Pomfriet v Brownsal (1600) Cro Eliz 736
R v Richardson 111 Cent Crim Ct Sess Pap 612.

STATUTES AND STATUTORY INSTRUMENT

- The Bribery Act 2010
The Public Bodies Corrupt Practices Act 1889
The Prevention of Corruption Act 1906
The Prevention of Corruption Act 1916
The Anti-Terrorism Crime and Security Act 2001

Treaty Series

- Convention on Combating Bribery of Foreign Public Officials in International Business Transaction (OECD Convention), 17th December 1997.

Books

- Ashish S. Joshi, *Britain's Fight Against the "Silver Lance": A Radical Overhaul of the United Kingdom Bribery Laws* (Champion, 2009).
Deborah Hardoon and Finn Heinrich, *Bribe Payers Index 2011* (Transparency International, 2011).
Director of the SFO and Director of Public Prosecutions, '*Bribery Act 2010: Joint Prosecutions Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions*' (Serious Fraud Office, 2011).
Fritz Heimann, Gillian Dell, and Kelly McCarthy, *Progress Report 2011: Enforcement of the OECD Anti-Bribery Convention* (Transparency International, 2011).

JW Cecil Turner (ed.), *Russel on Crime*, (12th edn Stevens and Sons, 1964).

Karen Harrison and Nicholas Ryder, *The Law Relating to Financial Crime in The UK* (Ashgate Publishing, 2013).

Kelly M. Greenhill, *Kleptocratic Interdependence: Trafficking, Corruption, and the Marriage of Politics and Illicit Profits*, in Robert I. Rotberg (ed.), *Corruption, Global Security, and World Order* (Brookings Institution Press, 2009).

Law Commission, *Reforming Bribery A Consultation Paper*, (Consultation Paper No 185, 2008).

Nick Kochan and Robin Goodyear, *Corruption, The New Corporate Challenge* (Palgrave Macmillan, 2011).

Stuart H. Deming, *Anti-Bribery Laws in Common Law Jurisdictions* (OUP, 2014).

Journal Articles

Aisha Anwar and Gavin Deeprise, 'Legislative Comment on The Bribery Act 2010' [2010] Scots L. Times 1.

Alvaro Cuervo Cazorra, 'The Effectiveness of Laws against Bribery Abroad' [2008] J INT BUS STUD 634.

Amy Bell, 'The Bribery Act: What's all the fuss about?' [2011] Legal Information Management 1.

Andrew Brady Spalding , 'Unwitting Sanctions: Understanding Anti-Bribery Legislation as Economic Sanctions Against Emerging Markets' [2010] FLA. L. REV. 351.

Bruce Bean and Emma MacGuidwin, 'Unscrewing the Inscrutable: The UK Bribery Act 2010' [2012] Ind. Int'l & Comp. L. Rev 1.

David Lorello, Sprange, and Irwin, 'UK Modernizing Anti-Bribery Law and Gearing up Enforcement Efforts' [2009] INT'L GOV'T CONTRACTOR 1.

Elizabeth K. Spahn, 'Multijurisdictional Bribery Law Enforcement: The OECD Anti-Bribery Convention' [2012] VA J. Int. Law 1.

Elizabeth Spahn, 'Nobody Gets Hurt?' [2010] GEO. J. INT'L L. 861.

Jacqueline L. Bonneau, 'Combating Foreign Bribery: Legislative Reform in the United Kingdom and Prospects for Increased Global Enforcement' [2011] Colum. J. Transnat'l L. 366.

Julia Lippman, 'Business Without Bribery: Analyzing The Future of Enforcement for The United Kingdom Bribery Act' [2013] Pub. Cont. L.J. 649.

Karen Stephenson, 'Legislative Comment on Bribery Legislation' [2011] Education Law Journal 1.

Kenneth W. Abbott and Duncan Snidal, 'Values and Interest: International Legalization in the Fight Against Corruption' [2002] J. LEGAL STUD. 141.

Margaret Ryznar and Samer Korkor, 'Anti-Bribery Legislation in the United States and United Kingdom: A Comparative analysis of Scope and Sentencing' [2011] Mo. L. Rev. 415.

Matt Atkins, 'Introduction to the UK Bribery Act' [2011] Financier Worldwide 2.

Neil Hodge, 'Bribery Bill' [2009] In-House Persp. 17.

Nikolaus Schuttauf, 'Repeal Anti-Bribery Legislation? A Defense of Laws Promoting Clean Business and Transparent Government' [2012] NEW ENG. L. REV. 617.

Ren-En Lim, 'Parting The Fog of the UK Bribery Act 2010: A Critical Discussion Of What We Do Know About the Act and Why it is in the Company's Interests to Comply with its Provisions' [2014] ICCLR 1.

Robert O. Keohane and Joseph S. Nye, 'Transgovernmental Relations and International Organizations ' [1974] WORLD POL. 39.

Online Journal Articles

Gordon Belch, 'An Analysis of the Efficacy of the Bribery Act 2010' (2014) Aberdeen Student Law Review

https://www.abdn.ac.uk/law/documents/An_Analysis_of_the_Efficacy_of_the_Bribery_Act_2010.pdf. Accessed on 30 April 2017.

Other Sources

OECD Directorate for Financial and Enterprise Affairs, 'United Kingdom: Phase 2bis Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1977 Recommendation on Combating Bribery in International Business Transactions' (October 2008)

<http://www.oecd.org/unitedkingdom/41515077.pdf>. Accessed on 30 April 2017.

Organization for Economic Co-operation and Development, ‘Country Report on the Implementation of the OECD Anti-Bribery Convention’ <http://www.oecd.org/daf/anti-bribery/countryreports/ontheimplementationoftheoecdanti-briberyconvention.htm>. accessed on 1 May 2017.

Karryn Miller, ‘Walking the Fine Line between Entertaining and Bribery’ (Japan Today, 13 October 2008) <https://japantoday.com/category/features/opinions/walking-the-fine-line-between-entertaining-guests-and-bribery>. Accessed on 1 May 2017.

Abdul Gofur, ‘A Panoptic Study of Corruption’ (Online Paper from University Collage London, September 2006) <http://www.ucl.ac.uk/opticon1826/archive/issue1/corruption.pdf>. Accessed on 1 May 2017.

Stefan Zeume, ‘Bribes and Firm Value’ (Online Paper from London School of Economy and Politics, 26 September 2013) <https://www.lse.ac.uk/collections/law/projects/lef/Bribes%20and%20Firm%20Value.pdf>. Accessed on 1 May 2017.

OECD Directorate for Financial and Enterprise Affairs, *United Kingdom: Phase 2: Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendations on Combating Bribery in International Business Transactions* (17 March 2005) <https://www.oecd.org/daf/anti-bribery/anti-briberyconvention/34599062.pdf>. Accessed on 1 May 2017.

The Nolan Report Recommendations 1995.

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* (2011) <https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>. Accessed on 1 May 2017.

Serious Fraud Office, *Bribery Act Guidance* (October 2012) <https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/bribery-act-guidance/>. Accessed on 2 May 2017.

Financial Market Law Committee (FMLC), *Analysis of Uncertainty around the Bribery Act 2010: Ministry of Justice Consultation on Guidance about Commercial Organisations Preventing Bribery* (Issue 160, 1 November 2010).

Melanie Wadsworth, ‘One year on what has the bribery Act done for us?’ (Money Laundering Bulletin, 7 June 2012)

<http://www.moneylaunderingbulletin.com/risksandcontrols/briberyandcorruption/one-year-on-what-has-the-bribery-act-done-for-us-56255.htm>. Accessed on 2 May 2017.