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**BRISTOL**

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# **‘The Legal Mechanisms to control Bribery and Corruption’**

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## **Introduction**

Bribery and corruption have received a great deal of coverage since the introduction and implementation of the Bribery Act 2010 and the extension of the remit of the Serious Fraud Office.<sup>1</sup> Bribery has been defined “giving or receiving [of] something of value to influence a transaction”.<sup>2</sup> It has also been argued that a can include “money ... other pecuniary advantages ... [and] non-pecuniary benefits.”<sup>3</sup> It has been suggested that bribery can be divided into two categories – direct and indirect.<sup>4</sup> The latter of which is normally conducted through an agent and arises where the respective parties agree to meet in an attempt to gain a competitive advantage. The agent is paid a commission from the additional revenue generated by the resultant work or trade.<sup>5</sup> Denning, citing Latymer, stated that bribery was regarded as “a princely kind of thieving”,<sup>6</sup> yet despite these simple definitions, it is still a very difficult term to define.<sup>7</sup> This is clearly illustrated by the wide range of statutory definitions offered by the Public Bodies Corrupt Practices Act 1889, the Prevention of Corruption Act 1906 and the Prevention of Corruption Act 1916. This uncertainty was clarified by the Bribery Act 2010. The chapter begins by outlining criminalisation of bribery by virtue of the Bribery Act 2010. It then identifies the United Kingdom’s bribery policy,<sup>8</sup>

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<sup>1</sup> Hereinafter ‘SFO’.

<sup>2</sup> Serious Fraud Office ‘Bribery and corruption’, n/d, available from <http://www.sfo.gov.uk/bribery--corruption/bribery--corruption.aspx>, accessed August 10 2014.

<sup>3</sup> Sanyal, R. and Samantha, S. ‘Trends in international bribe-giving: do anti-bribery laws matter?’ (2011) *Journal of International Trade Law & Policy*, 10(2), 151-164, 153.

<sup>4</sup> Beale, K. and Esposito, P. ‘Emergent international attitudes towards bribery, corruption and money laundering’ (2009) *Arbitration*, 75(3), 360-373, 362.

<sup>5</sup> *Ibid.*

<sup>6</sup> Denning, A. ‘Independence and Impartiality of the Judges’ (1954) *South African Law Journal*, 71, 345.

<sup>7</sup> The Law Commission *Reforming Bribery* (The Law Commission: London, 2008).

<sup>8</sup> Hereinafter ‘UK’.

which is administered by the Ministry of Justice and enforced by the SFO in conjunction with the Financial Conduct Authority.<sup>9</sup>

## **The extent of Bribery**

Bribery poses a significant threat to the UK. It has been suggested that it can undermine market integrity, business confidence and adversely affect society.<sup>10</sup> Any attempt to accurately measure the extent of bribery and corruption methodologically flawed. It has been estimated \$1tn is paid in bribes on a worldwide basis each year.<sup>11</sup> This is also backed up by the World Bank.<sup>12</sup> Furthermore, it has also been suggested that “\$1tn in bribes are paid each year out of a world economy of \$30tn – 3 per cent of the world’s economy”.<sup>13</sup> The introduction of the Bribery Act 2010 could be regarded as one of the “the single most important development” in combating white collar crime.<sup>14</sup> Its introduction has also in some observers arguing that it “provides the UK with some of the most draconian and far-reaching anti-corruption legislation in the world”.<sup>15</sup>

## **The Criminalisation of Bribery**

Prior to the Bribery Act 2010, the criminal offence of bribery was contained in the of the Public Bodies Corrupt Practices Act 1889, the Prevention of Corruption Acts 1906 and the Prevention of Corruption Act 1916. These legislative measures were unsatisfactory,<sup>16</sup> and required urgent amendments to ensure that the UK’s complied with its international

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<sup>9</sup> Hereinafter ‘FCA’

<sup>10</sup> Pope, T. and Webb, T. ‘Legislative Comment – the Bribery Act 2010’ (2010) *Journal of International Banking Law and Regulation*, 25(10), 480-483, 480.

<sup>11</sup> *Ibid.*

<sup>12</sup> William, C. ‘Trillion Dollar Bribery’ (2011) *New Law Journal* 161(7447), 25-26, 25.

<sup>13</sup> Sanyal and Samantha above, n 3 at 151.

<sup>14</sup> Benstead, J. ‘Biting the Bullet’ (2010) *New Law Journal*, 160(7434), 1291-1292, 1291.

<sup>15</sup> D. Aaronberg, and N. Higgins, ‘Legislative Comment The Bribery Act 2010: all bark and no bite...?’ (2010) *Archbold Review*, 5, 6-9, 6. However, it must be noted that other jurisdictions have introduced stringent legislation to tackle bribery and corruption such as the Foreign Corrupt Practices Act 1977. For a more detailed discussion see Rossbacher, H. and Young, R. ‘The Foreign Corrupt Practices Act within the American response to domestic corruption (1997) *Journal of Money Laundering Control*, 1(2), 125-137 and Maurer, V. ‘Uncharted boundaries of the US Foreign Corrupt Practices Act’ (2013) *Journal of Financial Crime*, 20(4), 355-364. However, it is important to note that since its introduction, several commentators have suggested that the Bribery Act 2010 is more effective than its US counterpart. See for example the interesting discussion by Breslin, B., Ezickson, D. and Kocoras, J. ‘The Bribery Act 2010: raising the bar above the US Foreign Corrupt Practices Act’ (2010) *Company Lawyer*, 31(11), 362-369 and Cropp, N. ‘The Bribery Act 2010: Part 4: a comparison with the Foreign Corrupt Practices Act: nuance v nous’ (2011) *Criminal Law Review*, 2, 122-141.

<sup>16</sup> Editorial ‘The Bribery Act 2010’ (2010) *Criminal Law Review*, 6, 439-440, 439.

requirements to tackle bribery.<sup>17</sup> It is therefore unsurprising that this body of legislation was often described as “inconsistent, anachronistic and inadequate”.<sup>18</sup> It has been suggested that the motivation to reform of the law of bribery was ignited by the recommendation of the Committee on Standards in Public Life.<sup>19</sup> This was followed by the publication of a series of proposals by the Law Commission in 1998.<sup>20</sup> Other bribery related statutory measures included the Anti-terrorism, Crime and Security Act 2001<sup>21</sup> and the Criminal Justice and Immigration Act 2008.<sup>22</sup> However, it wasn’t until the implementation of the Bribery Act on July 1<sup>st</sup> 2011 that the four current bribery offences were introduced.

It is a criminal offence if a person promises or gives a financial or other advantage to another person and the recipient intends the advantage to “to induce a person to perform improperly a relevant function or activity, or to reward a person for the improper performance of such a function or activity”.<sup>23</sup> Furthermore, a person is guilty of an offence if a person “promises or gives a financial or other advantage to another person”, and that the person “knows or believes that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity”.<sup>24</sup> Furthermore, the Bribery Act 2010 criminalises conduct where a person ‘(R)’ commits an offence if the circumstances apply. Case 3 is where R requests, agrees to receive or accepts a financial or other advantage intending that, in consequence, a relevant function or activity should be performed improperly (whether by R or another person).<sup>25</sup> Case 4 is where R requests, agrees to receive or accepts a financial or other advantage, and the request, agreement or acceptance itself constitutes the improper performance by R of a relevant function or activity.<sup>26</sup> Furthermore, case 5 is where R requests, agrees to receive or accepts a financial or other advantage as a reward for the improper performance of a relevant function or activity.<sup>27</sup> Finally, case 6 is

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<sup>17</sup> *Ibid.*

<sup>18</sup> Aaronberg and Higgins above, n 15 at 6.

<sup>19</sup> Committee on Standards in Public Life, *First Report ‘Standards in Public Life’* (Cm 2850-1, 1995) 43.

<sup>20</sup> Law Commission, *Legislating the Criminal Code: Corruption No. 248* (Law Commission 1998). For an interesting commentary on these proposals see Sullivan, G. ‘Proscribing corruption - some comments on the Law Commission's report’ (1998) *Criminal Law Review*, August, 547-555.

<sup>21</sup> Anti-terrorism, Crime and Security Act 2001, ss. 108-110. For an interesting discussion of this legislation see Black-Branch, J. ‘Powers of detention of suspected international terrorists under the United Kingdom Anti-terrorism, Crime and Security Act 2001: dismantling the cornerstones of a civil society’ (2002) *European Law Review*, 27, 19-32.

<sup>22</sup> Criminal Justice and Immigration Act 2008, s. 59.

<sup>23</sup> Bribery Act 2010, s. 1(2).

<sup>24</sup> Bribery Act 2010, s. 1(3).

<sup>25</sup> Bribery Act 2010, s. 2(2).

<sup>26</sup> Bribery Act 2010, s. 2(3).

<sup>27</sup> Bribery Act 2010, s. 2(4).

where, in anticipation of or in consequence of R requesting, agreeing to receive or accepting a financial or other advantage, a relevant function or activity is performed improperly by R, or by another person at R's request or with R's assent or acquiescence.<sup>28</sup> Therefore, a person commits an offence if they wish, consents to, or accepts an advantage with the specific purpose that they will perform a relevant function or activity improperly either by himself or by another person, or as a reward for such a performance.<sup>29</sup> The mere request, agreement or acceptance of a benefit constitutes improper performance and it does not matter whether the advantage is received directly or through a third party nor whether the benefit is to those same parties or another.<sup>30</sup> This applies to instances where the improper performance has either been done or is yet to be done by the person or someone acting under his instruction or acquiescence. Furthermore, a person commits an offence of bribing a foreign public official if they intend to influence the official in their capacity as a foreign public official.<sup>31</sup> Additionally, the accused may "intend to obtain or retain business, or an advantage in the conduct of business".<sup>32</sup> Therefore, a person guilty of the offence if they seek to manipulate or induce the official in the performance of their role as a public official with the intention of obtaining or retaining business or a business advantage.<sup>33</sup>

Importantly, the Bribery Act 2010 introduces a new form of corporate criminal liability,<sup>34</sup> and now provides that a commercial entity is guilty of an offence if a person associated with the organisation bribes another, intending to obtain or retain business or a business advantage for that organisation.<sup>35</sup> However, in order for the commercial entity to be culpable, the organisation must be stipulated as a "relevant commercial organisation".<sup>36</sup> For the purpose of

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<sup>28</sup> Bribery Act 2010, s. 2(5).

<sup>29</sup> Bribery Act 2010, s.2.

<sup>30</sup> Bribery Act 2010, s.2(4-6)

<sup>31</sup> Bribery Act 2010, s. 6(1).

<sup>32</sup> Bribery Act 2010, s. 6(2).

<sup>33</sup> Bribery Act 2010, s.6.

<sup>34</sup> Bribery Act 2010, s. 7. For an excellent general discussion of corporate criminal liability see Stessens, G. 'Corporate criminal liability: a comparative perspective' (1994) *International & Comparative Law Quarterly*, 43(3), 493-520 and Jefferson, M. 'Corporate criminal liability: the problem of sanctions' (2001) *Journal of Criminal Law*, 65(3), 235-261, Clarkson, C. 'Kicking Corporate Bodies and Damning their Souls' (1996) *Modern Law Review*, 59 (1996) 557 and Ambasta, K. 'A leap of reasoning, but for special cases: an analysis of the "expiry" of the directing mind and will test in attribution of corporate liability' (2012) *Company Lawyer*, 33(8), 227

<sup>35</sup> Bribery Act 2010, s.7.

<sup>36</sup> This is defined as either a "a body which is incorporated under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere), any other body corporate (wherever incorporated) which carries on a business, or part of a business, in any part of the United Kingdom, a partnership which is formed under the law of any part of the United Kingdom and which carries on a business (whether there or

this criminal offence, an “associated person” is an individual who “performs services for or on behalf of” the organisation,<sup>37</sup> with the person being, for example, the organisation’s agent, subsidiary or employee”.<sup>38</sup> The extent of this criminal offence is wide and it seeks to include a wide range of people who may be committing bribery on behalf of a third party. However, to be an “associated person”, the accused “must be performing services for the organisation in question and must also intend to obtain or retain business or an advantage in the conduct of business for that organisation”.<sup>39</sup> The introduction of the corporate criminal liability provision is innovative and represents a new approach towards the law of bribery.<sup>40</sup> It is interesting to note that there is no requirement to prove that the activity was committed in the UK or elsewhere. Indeed, there is no need to even show a close connection to the UK as is needed for the other bribery offences under the Bribery Act 2010.<sup>41</sup> It is a defence to the corporate criminal liability provision if the entity is able to determine it had adequate procedures designed to prevent persons associated with the commercial organisation from bribing another person.<sup>42</sup> The Ministry of Justice has stated that liability will be determined on a balance of probabilities.<sup>43</sup> The Ministry of Justice has published six general principles of adequate procedures which include proportionality; top-level commitment to anti-bribery measures; risk assessment; due diligence; communication and monitoring and review.<sup>44</sup> If the commercial entity is able to demonstrate that they have adequate procedures, then no offence has been committed. This is a complete defence. Additionally, the Bribery Act 2010 provides a general defence for those charged under with breaching the Acts provisions. Section 13 of the Act provides that it is a defence for a person charged with a relevant bribery offence to prove that the person’s conduct was necessary for “the proper exercise of any function of an intelligence service, or the proper exercise of any function of the armed forces when engaged on active service.”<sup>45</sup> The purpose of the section 13 defence is to permit the intelligence services, or the armed forces to undertake legitimate functions which may “require the use of a financial or other advantage to accomplish the relevant function”.<sup>46</sup> It

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elsewhere), or any other partnership (wherever formed) which carries on a business, or part of a business, in any part of the United Kingdom”. See Bribery Act 2010, s. 7(5).

<sup>37</sup> Bribery Act 2010, s. 8(1).

<sup>38</sup> Bribery Act 2010, s. 8(3).

<sup>39</sup> Ministry of Justice *Bribery Act 2010, Circular 2011/05* (Ministry of Justice 2011) para. 23.

<sup>40</sup> Pope and Webb above, n 10 at 482.

<sup>41</sup> Ministry of Justice above, n 39 at para. 22.

<sup>42</sup> Bribery Act 2010, s.7.

<sup>43</sup> Ministry of Justice above, n 39 at para. 15.

<sup>44</sup> Ibid.

<sup>45</sup> Bribery Act 2010, s. 13(1).

<sup>46</sup> The Government’s Explanatory Notes to s.13 Bribery Act 2010.

has therefore been introduced to allow for operational necessities. To rely on the defence, the defendant needs to prove, on the balance of probabilities, that their conduct was necessary.

## Policy background

The UK's bribery strategy is based on the international legislative measures introduced by the United Nations,<sup>47</sup> the European Union<sup>48</sup> and the Organization for Economic Cooperation and Development.<sup>49</sup> In 1994, the OECD accepted a recommendation that required member states to "take effective measures to deter, prevent and combat the bribery of foreign public officials in connection with international business transactions".<sup>50</sup> This was strengthened by the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.<sup>51</sup> Additionally, the EU introduced its first bribery measure in its Convention of the European Union on the Fight against Corruption involving officials of the European Communities or officials of member states.<sup>52</sup> In 1997, it approved a Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States.<sup>53</sup> Furthermore, the UN introduced its Convention against Corruption in 2003. The OECD Convention, was signed by the UK in in 1997.<sup>54</sup> The UK's initial response to these conventions was the passing of the Anti-Terrorism, Crime and Security Act 2001. This was only ever meant to be a transient and temporary instrument until more

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<sup>47</sup> Hereinafter 'UN'.

<sup>48</sup> Hereinafter 'EU'.

<sup>49</sup> Hereinafter 'OECD'.

<sup>50</sup> Sheikh, S. 'The Bribery Act 2010: commercial organisations beware!' (2011) *International Company and Commercial Law Review*, 22(1), 1-16, 3. See Organization for Economic Cooperation and Development 'OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions', n/d, available from [http://www.oecd.org/daf/anti-bribery/ConvCombatBribery\\_ENG.pdf](http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf), accessed August 11, 2014. For an excellent discussion of the implementation of this Convention in the United Kingdom see Organization for Economic Cooperation and Development 'Steps taken to implement and enforce the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transaction', March 14 2014, available from [http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/UnitedKingdom\\_StepsTaken\\_March2014.pdf](http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/UnitedKingdom_StepsTaken_March2014.pdf), accessed August 11 2013.

<sup>51</sup> See G. Sacerdoti, 'The 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions' (1999) *International Business Law Journal* 1, 3-18.

<sup>52</sup> Sheikh above, n 52 at 3. See Council Act of 26 May 1997 drawing up, on the basis of Art.K.3(2)(c) of the TEU, the convention on the fight against corruption involving officials of the European Communities or officials of EU member States (1997) O.J. C195/1. This has also been referred to as the EU Anti-Corruption Convention. See Van den Wyngaert, C. and Stessens, G. 'The international non bis in idem principle: resolving some of the unanswered questions' (1999) *International & Comparative Law Quarterly*, 48(4), 779-804, at 793.

<sup>53</sup> Convention on the Fight Against Corruption involving Officials of the European Communities or Officials of Member States, done at Brussels, 26 May 1997, 37 I.L.M. 12; OJ 1997 C 195.

<sup>54</sup> OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 1997, <<http://www.oecd.org/dataoecd/4/18/38028044.pdf>> accessed 13 December 2011.

comprehensive corruption legislation could be introduced.<sup>55</sup> The UKs reform of its bribery laws began with the publication of a Law Commission Report in 1998.<sup>56</sup> The Law Commission recommended that “the common law offence of bribery and the statutory offences of corruption should be replaced by a modern statute”.<sup>57</sup> The government responded by publishing a Corruption Bill, which was rejected and resulted in a revised version being published in 2005.<sup>58</sup> This was followed by another consultation exercise in 2007,<sup>59</sup> which led to the publication of its 2008 Report.<sup>60</sup> The Report was followed by the publication of a White Paper that resulted in the enactment of the Bribery Act 2010.<sup>61</sup> The introduction of the Bribery Act 2010 has received a mixture of responses from commentators. For example, it has been suggested that the provisions “go too far and fear [that] the new ‘gold standard’ legislation poses a threat to UK competitiveness”.<sup>62</sup> Other concerns relate to the increased prosecutorial powers under the Act and the compliance costs which firms in the UK are expected to meet.<sup>63</sup> Conversely, it has also been described as a “major piece of legislation, of immense practical importance to the conduct of business, whether in the public or private sphere”.<sup>64</sup> In many respects it is still too early to determine who is correct; although it should go without saying that the Bribery Act 2010 is significantly better than the UKs previous legislation.

## Law Enforcement and Regulatory Agencies

The Bribery Act 2010 is enforced by the SFO and the FCA, the latter of which replaced the Financial Services Authority in 2013.<sup>65</sup> In addition to these agencies, the City of London Police investigates allegations of bribery and corruption.<sup>66</sup> As part of its efforts to reduce this

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<sup>55</sup> Raphael, M *Blackstone’s Guide to the Bribery Act 2010* (Oxford University Press: Oxford, 2010) at 116.

<sup>56</sup> Law Commission above, n 7.

<sup>57</sup> Sheikh above, n 52 at 4.

<sup>58</sup> Home Office *Reform of the Prevention of Corruption Acts and SFO Powers in Cases of Bribery Against Foreign Officials* (Home Office: London, 2005).

<sup>59</sup> Law Commission *Reforming Bribery: A Consultation* (Law Commission 2007).

<sup>60</sup> *Ibid.*

<sup>61</sup> The Ministry of Justice *Bribery: Draft Legislation* (The Stationery Office: London, 2009).

<sup>62</sup> Pope and Webb above, n 10 at 480.

<sup>63</sup> *Ibid.*

<sup>64</sup> Editorial ‘The Bribery Act 2010’ (2010) *Criminal Law Review*, 6, 439-440, 439.

<sup>65</sup> Hereinafter ‘FSA’. The transfer of functions from the FSA to the FCA were concluded by the enactment of the Financial Services Act 2012. For a brief comment on this process see Kokkinis, A. ‘The Financial Services Act 2012: the recent overhaul of the UK’s financial regulatory structure’ (2013) *International Company and Commercial Law Review*, 24(9), 325-328.

<sup>66</sup> Duthie, T. and Lawler, D. ‘Legislative Comment The United Kingdom Bribery Bill’ (2010) *Construction Law Journal*, 26(2), 146-152, 147.



type of financial crime, the SFO has placed “huge emphasis on raising awareness, education, persuasion, and ultimately prevention”.<sup>67</sup> The FSA was given a statutory objective to reduce financial crime under the Financial Services and Markets Act 2000.<sup>68</sup> Clearly, bribery falls within the definition of financial crime under this statutory objective, with bribery also being relevant to its then secondary statutory objective of maintaining market confidence.<sup>69</sup> Bribery affects the latter statutory aim because it can adversely affect the City of London’s reputation.<sup>70</sup> Therefore, the FSA identified the threat posed by bribery and stated that “the risk that firms could come under pressure to pay bribes, especially if they are operating in jurisdictions where paying bribes is widely expected. In addition, financial services firms may launder the proceeds of corruption or be used to transmit bribes”.<sup>71</sup> However, it is essential to note that the transition from the FSA to the FCA resulted in a significant amendment to the statutory objectives. Whereas the FSA had four uniform statutory objectives,<sup>72</sup> the FCA has been allocated a single wider objective to “ensure that markets function well”.<sup>73</sup> This is supported by three operational objectives: consumer protection, the integrity objective and competition.<sup>74</sup> Of particular relevance to this chapter is the integrity objective which includes “protecting and enhancing the integrity of the UK financial system”<sup>75</sup> and that the financial system must “not being used for a purpose connected with *financial crime*”.<sup>76</sup>

Neither the FSA or FCA enforce the provisions of the Bribery Act 2010, with its role only applying where “authorised firms fail adequately to address corruption and bribery risk,

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<sup>67</sup> Monteity, C. ‘The Bribery Act 2010: Part 3: enforcement’ (2011) *Criminal Law Review*, 2, 111-121, 114.

<sup>68</sup> Financial Service and Markets Act 2000, s.6(3). For a more detailed commentary on this statutory objective see Ryder, N. ‘The financial services authority and money laundering – a game of cat and mouse’ (2008) *Cambridge Law Journal*, 67(3), 635-653.

<sup>69</sup> For a more detailed discussion of the definition of financial crime see Harrison, K. and Ryder, N. *The law relating to financial crime in the United Kingdom* (Ashgate: Farnham, 2013) at 11-13.

<sup>70</sup> Financial Services Authority *Financial Services Authority Anti-bribery and corruption in commercial insurance broking Reducing the risk of illicit payments or inducements to third parties* (Financial Services Authority: London, 2010) at 6.

<sup>71</sup> Financial Services Authority *Financial Risk Outlook 2008* (Financial Services Authority: London, 2008) at 35.

<sup>72</sup> For a more detailed discussion of the statutory objectives of the FSA see Ryder, N. ‘Two Plus Two Equals Financial Education - The Financial Services Authority and Consumer Education’ (2001) *The Law Teacher*, 35(2), 216-232.

<sup>73</sup> HM Treasury. ‘A new approach to financial regulation: transferring consumer credit regulation to the Financial Conduct Authority’, January 16 2014, available from <https://www.gov.uk/government/consultations/a-new-approach-to-financial-regulation-transferring-consumer-credit-regulation-to-the-financial-conduct-authority>, accessed August 13 2014.

<sup>74</sup> Financial Services Act 2012 s.1B(3).

<sup>75</sup> Financial Services Act 2012 s.1D(1).

<sup>76</sup> Financial Services Act 2012 s.1D(2)(b).

including where these risks arise in relation to third parties acting on behalf of the firm”. The regulators argued that it “does not need to obtain evidence of corrupt conduct to take regulatory action against a firm”.<sup>77</sup> Therefore, authorised firms are bound to comply with the FCA’s anti-bribery policies processes to prevent bribery and corruption and to make sure that the conduct their business with integrity. These measures are contained in the FCA Hand Book.<sup>78</sup> Of particular relevance to this chapter is Systems and Controls, or SYSC part of the Hand Book and Principle 1 of its Principles for Businesses. Rule 3.2.6R states that firms are required to “establish and maintain effective systems and controls... for countering the risk that the firm might be used to further financial crime”.<sup>79</sup> This means that firms have the responsibility to assess the risks of becoming involved in, or facilitating, bribery and corruption and are obliged to take all reasonable steps in preventing such risks from crystallising. Authorised firms, therefore have an additional, regulatory, obligation. This makes them responsible for putting in place and maintaining relevant policies and processes which can be utilised in preventing corruption and bribery and thus allows them to conduct their businesses with integrity.<sup>80</sup> Rule 6.1.1R stated that “a firm must establish, implement and maintain adequate policies and procedures sufficient to ensure compliance of the firm including its managers, employees and appointed representatives with its obligations under the regulatory system and for countering the risk that the firm might be used to further financial crime”.<sup>81</sup>

## **Enforcement**

A person found guilty of any of the offences contained in sections 1, 2 and 6 of the Bribery Act 2010 is liable to a maximum custodial sentence of 10 years imprisonment and/or an unlimited fine. For the offence found in section 7, the maximum penalty is an unlimited fine.<sup>82</sup> If a person is convicted under the Bribery Act 2010, the maximum sentence that can be imposed by the court is a ten year custodial sentence. As outlined at the start of this

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<sup>77</sup> Financial Services Authority ‘One-minute guide - Anti-bribery and corruption in commercial insurance broking’ n/d, available from [http://www.fsa.gov.uk/smallfirms/resources/one\\_minute\\_guides/insurance\\_intermed/anti\\_bribery.shtml](http://www.fsa.gov.uk/smallfirms/resources/one_minute_guides/insurance_intermed/anti_bribery.shtml), accessed August 10 2014.

<sup>78</sup> For a more detailed discussion see Financial Services Authority *Financial crime: a guide for firms* (Financial Services Authority: London, 2011) at 43-49.

<sup>79</sup> Financial Services Authority *The Full Handbook – SYSC Senior Management Arrangements, Systems and Controls* (Financial Services Authority 2011) at Rule SYSC 3.2.6R.

<sup>80</sup> Financial Services Authority above, n 77.

<sup>81</sup> Financial Services Authority above, n 79 at 6.1.1R.

<sup>82</sup> Bribery Act 2010, s. 11(3).

chapter, the SFO is the lead enforcement agency for criminal offences created by Bribery Act 2010, who, it is fair to note, have attracted a great deal of criticism for its record of fraud related prosecutions.<sup>83</sup> At the time of writing this chapter, there have been very few bribery related prosecutions instigated under the Bribery Act 2010. It is interesting to note that the first two bribery convictions did not fall within the responsibility of the SFO. The first person to be convicted under the Bribery Act was Munir Yakub Patel, who pleaded guilty for accepting a £500 bribe not to register penalty points on the courts traffic offences database.<sup>84</sup> The second conviction under the Bribery Act 2010 was Mawia Mushtaq, who after failing to pass a driving test for a private hire taxi licence, attempted to bribe the licensing officer in Oldham Council.<sup>85</sup> The third person to be convicted under the Bribery Act 2010 was Yang Li, who sought to bribe a professor at the University of Bath £5,000 for increasing his grade for a failed written piece of work. In this case, the accused was found guilty and sentenced to 12 months imprisonment.<sup>86</sup> Clearly, it is too early to determine if the Bribery Act 2010 will result in criminal prosecutions for bribery and corruption. In May 2014 the Sentencing Council published its “definitive guideline on fraud, bribery and money laundering offences”.<sup>87</sup> It is hoped that the guidance from the Sentencing Council will be able to provide more clarity on the appropriate sentences for the criminal offences created by the Bribery Act 2010.<sup>88</sup>

The other option available is under FSMA 2000, where the financial regulator has been given a plethora of investigative and enforcement powers and a series of preventative measures which should have ensured that it was well placed to tackle bribery and corruption in the financial services sector. For example, the FSA was a prosecuting authority for both money

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<sup>83</sup> See for example Ryder, N. *The financial crisis and white collar crime – the perfect storm?* (Edward Elgar: Cheltenham, 2014) at 207-209.

<sup>84</sup> *R. v Patel (Munir Yakub)* [2012] EWCA Crim 1243.

<sup>85</sup> See Newman, C. and Macaulay, M. ‘Placebos or panaceas: Anglo-New Zealand experiences of legislative approaches to combatting bribery’ (2013) *Journal of Criminal Law*, 77(6), 482-496, at 490.

<sup>86</sup> See BBC News ‘University of Bath student jailed over tutor bribe bid’, 23 April 2013, available from <http://www.bbc.co.uk/news/uk-england-somerset-22269573>, accessed August 13 2014.

<sup>87</sup> Sentencing Council ‘Fraud, bribery and money laundering’, May 23 2014, available from <http://sentencingcouncil.judiciary.gov.uk/about/Fraud-bribery-and-money-laundering.htm>, accessed August 13 2014. Also see Sentencing Council *Fraud, Bribery and Money Laundering Offences – Definitive Guideline* (Sentencing Council: London, 2014) at 41-53. For a brief comment see Scott, C. ‘Sentencing guidelines for fraud, bribery and money laundering offences’ (2014) *Butterworths Journal of International Banking and Financial Law*, 29(4), 267-268.

<sup>88</sup> For an illustration of two cases that offered some light into the possible sentences that could be imposed before the Bribery Act 2010 was implemented see *R v Anderson (Malcolm John)* [2003] 2 Cr. App. R. (S.) 28 and *R v Francis Hurrell* [2004] 2 Cr. App. R. (S.) 23.

laundering and a limited number of fraud related offences. It also had the power to impose financial sanctions where it had established that there had been a contravention by an authorised person of any of its requirements.<sup>89</sup> Furthermore, the FCA has the power to ban authorised persons and firms from undertaking any regulated activity.<sup>90</sup> The FSA and the FCA has favoured imposing financial sanctions on firms and individuals as opposed to instigating criminal proceedings, as part of its ‘credible deterrence’ policy.<sup>91</sup> This was summarised by Peat and Mason, who stated:

“The FSA’s policy of credible deterrence in enforcement cases involves bringing action not just against firms, but also against individuals. The normal sanction imposed on a firm is a financial penalty; the firm pays the fine and then carries on with its normal business. In contrast a sanction imposed on an individual may have longer-lasting consequences”.<sup>92</sup>

Teasdale stated that the “credible deterrence agenda has relied upon not only securing meaningful convictions, judgments and regulatory decisions, but also upon clearly advertising them; to the regulated community to dissuade similar behaviour, and to the wider world to engender consumer and market confidence”.<sup>93</sup> Lewis *et al* stated that the regulator has FSA “levied large fines and, at worst, bans, on firms and relevant approved individuals who breached its rules – sometimes regardless of whether the breach has resulted in actual harm to customers”.<sup>94</sup> This point is clearly illustrated by the significant increase in the use of

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<sup>89</sup> Financial Services and Markets Act 2000, s. 206(1). For a general discussion see Travers Smith Regulatory Investigations Group ‘FSA enforcement action: themes and trends’ (2011) Compliance Officer Bulletin, June, 87, 1–35.

<sup>90</sup> Financial Services and Markets Act 2000, s. 56.

<sup>91</sup> Financial Services Authority ‘Delivering credible deterrence’, speech by Margaret Cole, Director of Enforcement, FSA, Annual Financial Crime Conference, 27 April 2009, available from [http://www.fsa.gov.uk/library/communication/speeches/2009/0427\\_mc.shtml](http://www.fsa.gov.uk/library/communication/speeches/2009/0427_mc.shtml), accessed 8 March 2013.

<sup>92</sup> Peat, R. and Mason, I. ‘Credible deterrence in action: the FSA brings a series of cases against traders’ (2009) *Company Lawyer*, 30(9), 278–279, at 278.

<sup>93</sup> Teasdale, S. ‘FSA to FCA: recent trends in UK financial conduct regulation’ (2011) *Journal of International Banking Law and Regulation*, 26(12), 583–586, at 585.

<sup>94</sup> Lewis, A., Pretorius, R. and Radmore, E. ‘Outsourcing in the financial services sector’ (2013) *Compliance Officer Bulletin*, May, 106, 1–34, at 3.

financial sanctions by the regulator.<sup>95</sup> For example, in 2007 the regulatory agency imposed a total of £5.3m in financial sanctions.<sup>96</sup> A year later, the FSA reported that the figure had increased to £22.7m.<sup>97</sup> In 2009 the amount of financial sanctions increased to £35m.<sup>98</sup> The figures for 2010 and 2011 illustrated an increase to £89.1m<sup>99</sup> and a decrease to £66.1m.<sup>100</sup> However, in 2012 the FSA imposed financial sanctions that amounted to £311.5m,<sup>101</sup> a majority of which were associated with the LIBOR scandal. As of April 2013, the FSA had imposed financial sanctions totalling £143.1m.<sup>102</sup> From then, the FCA imposed financial penalties of approximately £250m.<sup>103</sup> Martin Wheatley stated that between 2012 and 2013 regulatory agencies “handed out a record £312m in fines, more than triple the previous high number of £89m”.<sup>104</sup> Teasdale described these decisions as an example of “an increase in the FSA’s readiness to take decisive action”.<sup>105</sup> Additionally, the FCA has the power to impose civil fines under FSMA 2000.<sup>106</sup> For example, in July 2011, when the FSA fined Willis Limited £6.895m for weaknesses in its anti-bribery and corruption systems and controls.<sup>107</sup> Here the FSA concluded that the company had failed to guarantee that it established and

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<sup>95</sup> For a more detailed commentary on the approach adopted by the Financial Services Authority towards imposing financial sanctions see Financial Services Authority *Financial services firms’ approach to UK financial sanctions* (Financial Services Authority: London, 2009).

<sup>96</sup> Financial Services Authority ‘FSA fines table 2007’, n/d, available from <http://www.fsa.gov.uk/about/press/facts/fines/2007> accessed 8 March 2013.

<sup>97</sup> Financial Services Authority ‘FSA fines table 2008’, n/d, available from <http://www.fsa.gov.uk/about/press/facts/fines/2008>, accessed 8 March 2013.

<sup>98</sup> Financial Services Authority ‘FSA fines table 2009’, n/d, available from <http://www.fsa.gov.uk/about/press/facts/fines/2009>, accessed 8 March 2013.

<sup>99</sup> Financial Services Authority ‘FSA fines table 2010’, n/d, available from <http://www.fsa.gov.uk/about/press/facts/fines/2010>, accessed 8 March 2013.

<sup>100</sup> Financial Services Authority ‘FSA fines table 2011’, n/d, available from <http://www.fsa.gov.uk/about/press/facts/fines/2011>, accessed 8 March 2013.

<sup>101</sup> Financial Services Authority ‘FSA fines table 2012’, n/d, available from <http://www.fsa.gov.uk/about/press/facts/fines/2012>, accessed 8 March 2013.

<sup>102</sup> Financial Conduct Authority ‘Fines table 2013’, 1 October 2013, available from <http://www.fca.org.uk/firms/being-regulated/enforcement/fines>, accessed 7 October 2013.

<sup>103</sup> Financial Conduct Authority ‘Fines table 2014’, August 7 2014, available from <http://www.fca.org.uk/firms/being-regulated/enforcement/fines>, accessed August 13 2014.

<sup>104</sup> Financial Conduct Authority ‘The changing face of financial crime’, 1 July 2013, available from <http://www.fca.org.uk/news/speeches/the-changing-face-of-financial-crime>, accessed 8 July 2013.

<sup>105</sup> Teasdale above, n 93, at 584.

<sup>106</sup> Financial Services and Markets Act 2000, s. 206(1).

<sup>107</sup> Financial Services Authority ‘FSA fines Willis Limited 6.895m for anti-bribery and corruption systems and controls failings’, July 21 2011, available from <http://www.fsa.gov.uk/pages/Library/Communication/PR/2011/066.shtml>, accessed 24 July 2011.

recorded an adequate commercial rationale to support its payments to overseas third parties; ensure that adequate due diligence was carried out on overseas third parties to evaluate the risk involved in doing business with them and adequately review its relationships on a regular basis to confirm whether it was still necessary and appropriate for Willis Limited to continue with the relationship.<sup>108</sup> Furthermore, the FSA fined Aon Limited £5.25m million for “failing to take reasonable care to establish and maintain effective systems and controls to counter the risks of bribery and corruption associated with making payments to overseas firms and individuals”. Here, the FSA determined that Aon Ltd had “failed to properly assess the risks involved in its dealings with overseas firms and individuals who helped it win business and failed to implement effective controls to mitigate those risks”.<sup>109</sup> In December 2013, the FCA fined JLT Specialty Limited £1.8m “for failing to have in place appropriate checks and controls to guard against the risk of bribery or corruption when making payments to overseas third parties”.<sup>110</sup> The FCA stated that:

“These failings are unacceptable given JLTSL actually had the checks in place to manage risk, but didn’t use them effectively, despite being warned by the FCA that they needed to up their game. Businesses can be profitable but firms must ensure that they take the necessary steps to control the risks in that business. Bribery and corruption from overseas payments is an issue we expect all firms to do everything they can to tackle. Firms cannot be complacent about their controls – when we take enforcement action we expect the industry to sit up and take notice”.<sup>111</sup>

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<sup>108</sup> Ibid.

<sup>109</sup> Financial Services Authority above, n 107.

<sup>110</sup> Financial Conduct Authority ‘Firm fined £1.8million for "unacceptable" approach to bribery & corruption risks from overseas payments’, December 19 2013, available from <http://www.fca.org.uk/news/firm-fined-18million-for-unacceptable-approach-to-bribery-corruption-risks-from-overseas-payments>, accessed August 13 2014.

<sup>111</sup> Ibid.

Additionally, the FCA has fined Besso Ltd £315,000 for failing to take reasonable care to establish and maintain effective systems and controls for countering the threat posed by bribery.<sup>112</sup> The FCA stated:

“Despite receiving two visits from us, and numerous industry wide warnings, Besso failed to ensure that they had proper systems and controls in place to counter the risks of bribery and corruption in their business activities. Firms must play their part in preserving the integrity of the UK financial system, including taking all steps necessary to prevent financial crime. Where we find firms failing to do so, we will take action”.<sup>113</sup>

It is extremely likely that the FCA will continue to impose financial sanctions on firms who do not have adequate anti-bribery and corruption systems as part of their obligations under its Hand Book. As for criminal prosecutions under the Bribery Act 2010, the three successful prosecutions that have been instigated have not been brought by the SFO. Needless to say, the SFO has recently secured the successful conviction for conspiracy to commit corruption.<sup>114</sup>

## **Conclusion**

The prevention of bribery has recently gained significant political attention by virtue of the introduction of the Bribery Act 2010. It is accepted that this legislation represented a significant improvement on the existing offences under the Public Bodies Corrupt Practices Act 1889, the Prevention of Corruption Act 1906 and the Prevention of Corruption Act 1916. Interestingly, the Bribery Act 2010 requires companies to have in place adequate procedures to prevent people associated with them from being bribed. If a commercial entity failed to prevent an associated person from committing bribery on their behalf, it has committed an

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<sup>112</sup> Financial Conduct Authority ‘Besso Limited fined for anti-bribery and corruption systems failings’, March 19 2014, available from <http://www.fca.org.uk/news/press-releases/besso-limited-fined-for-antibribery-and-corruption-systems-failings>, accessed August 13 2014.

<sup>113</sup> Ibid.

<sup>114</sup> Serious Fraud Office ‘Four sentenced for role in Innospec corruption’, August 4 2014, available from <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2014/four-sentenced-for-role-in-innospec-corruption.aspx>, accessed August 13 2014.

offence.<sup>115</sup> However, provided the commercial entity is able to demonstrate that it has in place “adequate procedures to prevent persons associated with the commercial entity from undertaking such conduct”.<sup>116</sup> It is clear that this is an extension of the anti-money laundering system used by the FCA to incorporate bribery and corruption. Importantly, the Bribery Act 2010 extended the remit of the SFO to prosecute allegations of bribery, which is also a welcome development. However, the effectiveness of the SFO will depend on it being granted the appropriate levels of funding by the UK government. However, since the 2010 General Election, the SFO has had its budget cut as part of a glut of extensive austerity measures. For example, the annual budget of the SFO in 2008/2009 was £53.2m, £32.1m in 2013/2014 and £30.8m in 2014/2015.<sup>117</sup> The decision to reduce the budget of the SFO, at a time when instances of financial crime has increased and the duties of the SFO have been expanded to incorporate the enforcement of the Bribery Act 2010, must be questioned and criticised.

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<sup>115</sup> Bribery Act 2010, s. 7(1).

<sup>116</sup> Bribery Act 2010, s. 7(2).

<sup>117</sup> Serious Fraud Office *Serious Fraud Office annual report and accounts 2011–2012* (Serious Fraud Office: London, 2012) at 7.