An Analysis of the Efficacy of the Bribery Act 2010

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Abstract

The UK Bribery Act (UKBA) 2010 represents the most radical revision to anti-corruption law in the UK in over one hundred years and arguably the toughest anti-bribery legislation in the world. Its practical effects however, have so far proved less exciting. Despite guidance from the Ministry of Justice and Serious Fraud Office (SFO) directors, there still remains significant uncertainty among businesses regarding interpretation, particularly relating to ‘foreign public officials,’ hospitality and facilitation payments, self-reporting, sentencing and fines, adequate procedures, and the meaning of ‘associated person’ and ‘relevant commercial organisation.’ It appears that the practical implications of the UKBA will turn upon how the SFO intends to apply its enforcement authority. Accordingly, in response to these highlighted uncertainties, it will be asserted that companies have no real choice but to enforce a stringent anti-corruption regime in order to minimise their risk of incurring criminal liability for corrupt behaviours under the UKBA.

1. Introduction

Bribery blights lives\(^1\) and is arguably the most widespread form of corruption. Corruption hinders economic development, prevents a free market operating for businesses and consumers, and further exploits already marginalised groups.\(^2\) The Serious Fraud Office (SFO) defines bribery as the ‘giving or receiving something of value to influence a transaction.’\(^3\) Bribery does not have to involve obtaining pecuniary advantages or actual payment of monies; it can take many other forms such as gifts, lavish hospitality or the performance of personal favours. In April 2010, the Bribery Act (UKBA) 2010\(^4\) came into force purporting to demonstrate the UK’s desire to take a lead in the international fight against bribery and corruption.

This article will conduct an analysis of the efficacy of this relatively new Act, based on references to guidance issued by various government bodies. Firstly, the reasons behind the Act’s implementation will be considered; highlighting the inadequacies of the previous body of law. It will be argued that the complete overhaul was undoubtedly a result of the intense criticism received from the

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\(^1\)Ministry of Justice (MoJ), ‘Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing (section 9 of the Bribery Act 2010)’ (March 2011).
\(^4\)Bribery Act 2010 c.23.
international community, specifically the Organisation for Economic Co-operation and Development (OECD) in light of scandals such as that involving BAE Systems Plc, which represented a ‘final blow’ for the Government. Secondly, the residual legal uncertainties within the new Act will be examined. These include: the uncertainty among businesses surrounding corporate hospitality and facilitation payments; the ambiguous ‘adequate procedures’ defence and doubts as to the meanings of ‘relevant commercial organisation’ and ‘associated person.’ This residual lack of legal certainty has imposed an onerous burden of unclear regulatory compliance upon businesses. Finally, some potential options for reform will be suggested and explored. At the time of writing, there have been no corporate convictions under the new Act, suggesting that it is possibly too early to consider review. A contrary view however, related to increased pressures upon the Government and SFO to secure their first conviction suggests that possible amendments to the UKBA 2010 might already be plausible. It is no surprise therefore, that there continues to exist a ‘cry for clarity’ regarding the Act within the UK business lobby.

1. Why Was the UKBA Necessary?

A. The Pre-existing UK Legal Framework

UK anti-bribery law prior to the UKBA 2010 consisted of the Public Bodies Corrupt Practices Act 1889, the Prevention of Corruption Act 1906, the Prevention of Corruption Act 1916 and the common law offence of bribery. This body of law was described as ‘inconsistent, anachronistic and inadequate’ in terms of its capacity to comply with modern international anti-corruption obligations. Bribery legislation reform in the UK was undeniably driven by the conclusions in the ‘Nolan Report’ produced by the Committee on Standards in Public Life in 1995. This report confirmed the inadequacy of the UK’s anti-corruption regime in force at the time, and as a result of its recommendations, the then UK Government urged the Law Commission to re-examine the regime. In December 1997, the UK Government signed the Organisation for Economic Cooperation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business


6 These were known collectively as the Prevention of Corruption Acts 1889 to 1916.


9 Dr Karen Harrison & Dr Nicholas Ryder, The Law Relating To Financial Crime In The UK (2013, Ashgate Publishing) 44.

10 See, in general, the recommendations of the Committee on Standards in Public Life, ‘First Report of the Committee on Standards in Public Life’ (Cm 2850-I, May 1995) 7. The Committee was chaired by Lord Nolan.

11 Law Commission, Reforming Bribery (Law Com No 313, 2008).
Transactions (OECD Convention). This required signatories to enact domestic legislation that criminalised bribery relating to foreign government officials. The UK Government created the Anti-Terrorism, Crime and Security Act (ATCAS) 2001, Part Twelve and as a consequence believed that this addition to the UK’s domestic anti-bribery framework satisfied the OECD Convention’s requirement.

Nevertheless, this body of law received intense criticism from the international community; largely down to its limited impact in policing bribery and corruption within British companies. For example, in 2008, an OECD Working Group produced a report condemning the UK for its appalling failure in prohibiting bribes being paid by its companies in markets abroad, reporting that ‘[o]verall, the Group is disappointed and seriously concerned with the unsatisfactory implementation of the Convention by the UK.’ This statement clearly indicates the frustration felt by the Working Group relating to the inadequacies in the incumbent UK government’s approach and their ongoing delay in implementing the requirements of the Convention. The severe criticism undoubtedly was a major contributory factor towards instigating reform in this area of the law.

An example of the ineffective nature of the anti-bribery regime that prevailed in the UK prior to the UKBA, and the case that appears to have forced the UK Government to finally take definitive remedial action, was the bribery scandal that enveloped BAE Systems plc (BAE). In December 2004, a whistle-blower claimed that BAE (one of the largest defence contractors in the world) controlled and availed of a US$120 million bribery fund to facilitate the securing of defence contracts, a practice that had allegedly been undertaken for decades. The disclosure triggered a SFO investigation. BAE were alleged to have been bribing Saudi Arabian royalty and other Saudi Arabian officials in relation to attempting to secure a major defence contract, in what became known as the Al Yamamah transaction. Despite the severity of the allegations made against BAE Systems, in December 2006 the SFO announced the termination of their investigation on the basis that the UK’s national security was under threat. This conclusion (and the actual legality of the SFO Director’s hugely controversial decision) became subject to considerable scrutiny in

13 OECD Convention (n12) Article 1.
14 This was the Anti-Terrorism, Crime and Security Act (ATCAS) 2001. Sections 108-110 introduced provisions required by Article 1 of the OECD Convention.
16 Korkor and Ryznar (n7) 436.
17 The Al Yamamah transaction extended over several decades and involved BAE supplying military aircraft, air defence and other systems to the Kingdom of Saudi Arabia. It was described as the ‘biggest sale ever, of anything, to anyone.’ See, in general, Bruce Bean & Emma MacGuidwin, ‘Unscrewing the Inscrutable: The UK Bribery Act 2010’ (2012) 22 Indiana International and Comparative Law Review 63.
18 Korkor and Ryznar (n7) 436. The alleged bribes were said to be in the region of $1 billion to secure a defence contract worth $85 billion.
the UK courts. Initially, the High Court concluded that the SFO had wrongly terminated its investigation. However, following recourse to the then Appellate Committee of the House of Lords, the High Court’s decision was overruled in July 2008. This decision was criticised by the OECD working group and triggered the Law Commission in October 2008 to once again produce a report and propose a draft law that focused on bribery. The Ministry of Justice (MoJ) subsequently produced bribery draft legislation, which passed through both Houses of Parliament without controversy, the Bribery Act 2010 receiving Royal Assent on 8th April 2010. In line with section 9 of the new Act, the Ministry of Justice published guidance for organisations to adopt in order to ‘prevent persons associated with them from bribing’ and which focused on section 7, section 12 and section 6. This guidance was published in March 2011, with the Bribery Act finally implemented on 1st July 2011.

Bean and MacGuidwin describe this period between enactment and implementation as ‘deliberate delay’ and ‘procrastination’ from the UK Government. It is possible to agree with this statement and suggest that on one hand the Government wanted to ensure effective, clear legislation and guidance to prohibit bribery and corruption, but at the same time were wary of the risk of losing business. Whilst it was undoubtedly a question of balancing conflicting priorities for the UK Government, they ultimately had to respond to fierce international criticism and abide by the OECD Convention.

B. A Brief Outline of the UKBA 2010

The Act creates four key offences: the general offence of bribing another person; an offence of being bribed; bribery of foreign public officials; and arguably the most ambiguous new offence wherein the failure of commercial organisations to prevent bribery is criminalised. Section 3 sets out the function or activity to which bribes can relate, and this now extends to the private, as well as public sectors. Section 5

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19 R. (on the application of Corner House Research) v Director of the Serious Fraud Office [2008] EWHC 714 (Admin).
20 Now the UK Supreme Court.
21 R (on the application of Corner House Research and others) v Director of the Serious Fraud Office (Criminal Appeal from Her Majesty’s High Court of Justice) [2008] UKHL 60.
22 OECD (n 15).
23 Law Commission, Reforming Bribery (Law Com No 313, 2008).
24 Ministry of Justice, Bribery Draft Legislation (Cm 7570, 2009).
25 Ministry of Justice (n 1).
26 ibid, relating to failure of commercial organisations to prevent bribery.
27 ibid, ‘bribing another person.’
28 ibid, ‘bribery of a foreign official.’
29 Bean & MacGuidwin (n 17) 70.
30 UKBA 2010, s1.
31 ibid s2.
32 ibid s6.
33 ibid s7.
34 ibid s3(2).
sets out the ‘expectation test.’\(^{35}\) As the Act extends extraterritorially, the enforcement language contained in its provisions may be considered controversial, as it does not take into consideration any other cultural expectations or local customs apart from those existing in the UK corporate environment. However, if the activity or function associated with a particular culture or its customs is explicitly provided for in any statute in a particular foreign jurisdiction, the expectation test can be disregarded.\(^{36}\) The Act awards the UK courts jurisdiction over bribery committed abroad when the person committing the offence is a British national, ordinarily resident in the UK, a body incorporated in the UK or a Scottish partnership.\(^{37}\) The extraterritorial reach of the Act is further expressed in section 7, which regulates companies that ‘carry on a business’\(^{38}\) in the UK and permits unlimited fines to be levied against them if ‘adequate procedures’\(^{39}\) to prevent bribery offences are not in place. The Act is not retrospective however; therefore the previous anti-bribery regime will continue to apply to bribery offences committed or attempted prior to 1st July 2011. As regards the investigation and prosecution of corruption, the SFO is the lead agency in England, Wales and Northern Ireland, while the Crown Office and Procurator Fiscal Service (COPFS) hold primary responsibility in Scotland.\(^{40}\) As both ‘public authorities’\(^{41}\) cooperate efficiently and produce almost identical guidance, further references to guidance herein will be to that issued by the SFO.

2. Bribery of Foreign Public Officials, Corporate Hospitality, and Facilitation Payments

Atkins describes the UKBA 2010 as “the toughest anti-corruption legislation in the world.”\(^{42}\) Harrison and Ryder have stated that the Act ‘provides the UK with some of the most draconian and far-reaching anti-corruption legislation in the world.’\(^{43}\) Despite the issue of MoJ guidance,\(^{44}\) and the subsequent reinforcement of it by SFO directors,\(^{45}\) there still remains significant uncertainty among businesses about how to interpret particular provisions and definitions within the Act. Three problematic areas are examined herein.

\(^{35}\) UKBA, s.5(1) ‘a test of what a reasonable person in the United Kingdom would expect in relation to the performance of the type of function or activity concerned.’

\(^{36}\) UKBA 2010, s5(2)-(3).

\(^{37}\) ibid s12.

\(^{38}\) ibid s7(5)(b) and (d).

\(^{39}\) ibid s7(2).


\(^{41}\) Within the meaning of the Human Rights Act 1998.

\(^{42}\) Atkins (n 8) 3.

\(^{43}\) Harrison & Ryder (n 9) 44.

\(^{44}\) Ministry of Justice (n 1).

A. ‘Foreign Public Official’

Section 6 of the Act outlines the offence of bribing a foreign public official in the course of business. The term ‘foreign public official’ is only broadly defined meaning that uncertainty among UK businesses regarding interpretation of this term remains. Monteith observes that ‘foreign public official’ can also include the senior management of companies which function only in the private sector, but whose shares are owned primarily by foreign governments. The degree of governmental control exercised will be the crucial factor in determining whether these companies are viewed as public enterprises. For example, if a particular state has major control (or an active interest) over a particular bank, the board of directors of such corporations would fall to be regarded as ‘foreign public officials’. Confusion exists 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.’ It is submitted that the SFO should provide further guidance in order to reduce the risk of UK companies incurring criminal liability and the associated legal costs. Lim makes a valid argument, supported by this author, that in response to the continuing confusion, UK businesses should be vigilant when dealing with companies in foreign countries, and perhaps err on the side of regarding them as State-owned enterprises employing ‘foreign public officials.’ This would reduce the risk of limitless fines and/or imprisonment.

B. Corporate Hospitality

The UKBA provisions regarding corporate hospitality have also received a significant amount of criticism. Bean and MacGuidwin found that ‘the Bribery Act’s 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. Lavish or disproportionate hospitality may be

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46 UKBA 2010, s6(1)-6(4).
47 UKBA 2010, s6(5) “Foreign public official” means an individual who — (a) holds a legislative, administrative or judicial position of any kind, whether appointed or elected, of a country or territory outside the UK (or any subdivision of such a country or territory), (b) exercises a public function — for or on behalf of a country or territory outside the UK (or any subdivision of such a country or territory), or for any public agency or public enterprise of that country or territory (or subdivision), or (c) is an official or agent of a public international organisation.
48 Ren-En Lim, (Legislative Comment) ‘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) 25(1) International Company and Commercial Law Review 1.
49 ibid.
50 ibid.
51 ibid.
52 ibid.
53 Bean & MacGuidwin ‘Unscrewing the Inscrutable’ (n 17) 62.
considered as a bribe in the eyes of the SFO,\textsuperscript{54} although a company may argue that the hospitality was provided in order to establish cordial relations.\textsuperscript{55} Ambiguity persists surrounding the question of where the SFO and the courts will draw the line between criminal and legitimate hospitality. It seems from the examples provided in the SFO guidance that whether or not hospitality is legal depends heavily on the prevailing context.\textsuperscript{56} Consequently, in practice, the SFO will determine whether the hospitality was ‘reasonable’ and ‘proportionate’ to a business in the particular surrounding circumstances. Former SFO director Richard Alderman believed the matter to be one of common sense.\textsuperscript{57} It is this author’s view that UK businesses merit a more thorough definition of what constitutes tolerable corporate hospitality in order to minimise their risk of criminal sanction. A contrary view however, might be that such a narrower, more technical definition might undermine the purpose of the legislation via the creation of loopholes that could be exploited by the legal profession and enable guilty companies to evade liability.

C. Facilitation Payments

Facilitation payments, or ‘grease payments’\textsuperscript{58} are another area of the UKBA giving cause for concern, as the Act makes it an offence for any payment falling within this description to be made in the UK or abroad.\textsuperscript{59} Again however, there has been an outcry from businesses, some of whom have claimed that this was too stringent an approach, as in some countries (e.g. Brazil and China) such payments are customary and transacted on a daily basis. One lawyer has described the UKBA provisions attempting to proscribe facilitation payments as being part of ‘a fascinating period of transition as both corporations and governments begin to address deeply embedded cultural practices which may not be viewed as wrong in some countries.’\textsuperscript{60} Facilitation payments are ultimately an additional burden on British industry and should not have to be paid. The UK is therefore correct in taking a tough line and is sending a clear message to the rest of the world that it will not tolerate any form of bribery and corruption.

3. Section 7: Failure of Commercial Organisations to Prevent Bribery

A. Relevant Commercial Organisation.

\textsuperscript{55} Lim (n 48) 3.
\textsuperscript{56} Ministry of Justice  (n 1).
\textsuperscript{57} Lim (n 48) 3.
\textsuperscript{58} Unofficial payments made to public officials in order to secure or expedite the performance of a routine or necessary action. They are sometimes called ‘grease payments’ or ‘speed money.’
The failure of commercial organisations to prevent bribery is arguably the most problematic section of the UKBA 2010. The definition of ‘relevant commercial organisation’ (RCO) potentially includes (depending on any particular judge’s interpretation) virtually all major multinational corporations, as a majority of these operate their business from within the UK, or have at least a presence there. By way of example, a Dutch business with retail outlets in the UK, which pays bribes in France could in theory face prosecution in the UK.

B. ‘Associated Person’

Furthermore, ‘associated person’ is defined as ‘a person (A) who performs services for, or on behalf of a company.’ This is a very wide definition and could potentially include any other contractual counterparties such as joint venture partners, distributors, consultants and professionals advising the relevant company. Further difficulty arises as there is no guidance as to what degree of connection is sufficient to establish the necessary association for the purpose of section 7, meaning that, as regards the financial markets, considerable ambiguity is generated for investors, as the degree of investment required to trigger the investor company as being ‘associated’ with the investee company is uncertain. It is suggested that thorough guidance should be produced that clearly details the degree of liability each class of shareholder is liable to become subject to. ‘Associated person’ evidently represents one of the most significant areas of vulnerability for companies. It is therefore essential that correct due diligence is initiated and complete records are kept on any ‘associated person’ engaged by the company. As stressed previously however, the practical implications of this part of the UKBA will rest on how the SFO intends to interpret ‘associated person’ and apply its enforcement authority.

C. ‘Adequate Procedures’

Section 7(2) however, provides a defence if a commercial organisation (‘C’) can prove that it had in place ‘adequate procedures’ designed to prevent a person associated with ‘C’ from undertaking such conduct. The section 7 offence means that a company can be prosecuted for a bribery offence even if managers were completely unaware that bribery had occurred, and even if the bribery was

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61 UKBA 2010, s7.
62 UKBA 2010, s7(5).
63 Lim (n 48) 6.
64 UKBA 2010, s8.
65 Financial Markets 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) [2.11].
67 Bribery Act 2010, s7(2).
committed by a third party. In essence, it formulates an additional ‘direct’ (rather than alternative vicarious) liability, when section 1 or section 6 of the bribery offence is activated on behalf of a corporation.\textsuperscript{68} The risk-based processes and procedures must be viewed as an integral and vigorous part of the daily business of the corporation, and not merely a corporate policy that ‘gathers dust.’\textsuperscript{69} It is submitted that the straightforward part is writing a set of procedures. The demanding aspect however, will be for businesses to implement such procedures and make them a reality.

Moreover, the jurisdiction for this offence is very wide as it has no territorial limits.\textsuperscript{70} If the company is incorporated in the UK, or that the organisation carries out its business or part of its business in the UK, courts will have jurisdiction, irrespective of where in the world the acts or omissions which form part of the offence may be committed.\textsuperscript{71}

5. Enforcement

Upon conviction for offences under sections 1, 2 or 6 of the UKBA, offenders face up to ten years imprisonment and/or an unlimited fine\textsuperscript{72} and if found guilty for an offence under section 7, the maximum penalty is an unlimited fine.\textsuperscript{73}

In November 2011, the UK saw its first conviction for offences contravening the UKBA. Munir Patel,\textsuperscript{74} a court clerk, was found guilty of taking bribes (contrary to the UKBA 2010, section 2) to alter driving offence records. Mr Patel was sentenced to six years imprisonment,\textsuperscript{75} which was later reduced to four on appeal.\textsuperscript{76} The second conviction involved a Mr. Mawia Mushtaq attempting to bribe a mini cab licensing officer (section 1 offence). He was sentenced to two months imprisonment, suspended for twelve months, with a two month curfew.\textsuperscript{77} A third prosecution saw Bath University student Yang Li convicted of attempting to bribe his tutor with

\textsuperscript{68} Harrison & Ryder (n 9) 140.
\textsuperscript{70} UKBA 2010, s12(5) ‘An offence is committed under section 7 irrespective of whether the acts or omissions which form part of the offence take place in the United Kingdom or elsewhere’
\textsuperscript{72} Bribery Act 2010, s11, for offences tried on indictment.
\textsuperscript{73} ibid, s7(3).
\textsuperscript{74} R v Patel (Munir Yakub) [2012] EWCA Crim 1243.
\textsuperscript{75} Three years for a single UKBA 2010, s2 offence and a further three for misconduct in public office.
£5,000 to ensure passing his course work. He was sentenced to twelve months’ imprisonment for his crime. Evidently from these three initial cases, the attitude being adopted towards the new bribery offences is very strict, meaning that following a successful prosecution, a custodial sentence appears inevitable.

In relation to corporate offences, the SFO announced it has charged four individuals connected with Sustainable Agroenergy Plc and Sustainable Wealth Investments UK Ltd under the UKBA. This case relates to the first corporate charge under the UKBA 2010, and will be very interesting for UK businesses and practitioners, in that they will finally be able to gauge its practical effects. The case will require the Court to consider the more controversial elements of the legislation, which should result in greater clarity. The SFO has come under significant criticism in the media for its perceived failure to achieve more convictions under the UKBA. However critics fail to realise the inherent difficulties in investigating bribery and corruption, where complex documentary evidence can run into thousands of pages and inflict monumental resource costs. When considering the Agroenergy prosecution, the SFO investigation commenced in November 2011 and charges were not brought until August 2013. It can be argued that investigations under the new Act are only now beginning to lead to prosecutions; emphasising the complexity and volume of evidence required to secure a conviction.

Moreover, as part of the SFO’s strategy to fight bribery, they have urged businesses to self-report cases to them. Self-reporting is accompanied with an incentive, including a reduction in fines and confiscation, and a potential of a negotiated civil settlement under the Proceeds of Crime Act 2002 (POCA). However, there has recently been a change of initiative on the part of the SFO as regards encouraging businesses to self-report. SFO Director, David Green, has stated there is no presumption that a criminal prosecution will not follow.

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78 Additionally, as Li was leaving the Tutor’s office a pistol fell from his jacket pocket which added six months to his sentence (18 month sentence in total).
83 ibid.
However, the newly created Deferred Prosecution Agreement (DPA) offers prosecutors and courts an alternative to the current choice between civil recovery orders and no criminal action. However, it must be noted that DPA’s are only available in England and Wales under section 45 and Schedule 17 of the Crime and Courts Act 2013. Currently, there are no plans to bring DPAs to Scotland. A DPA is a voluntary agreement between a prosecutor and a company whereby, in return for complying with a number of strict conditions, the prosecutor will suspend a prosecution. A DPA may be appropriate where the public interest is not best served through a prosecution. Importantly, DPAs will be allowed for conduct predating the implementation of the UKBA. As explained by the MoJ, the objective of the DPA is that it will allow prosecutors to hold offending organisations to account for their wrongdoing in a focused way without the uncertainty, expense, complexity, or length of a criminal trial. It can be argued that the following the introduction of DPAs, there will be an increase in the number of cases investigated by the SFO. Enforcement of the UKBA 2010 becomes more practical, as there is an agreement between prosecutor and the relevant commercial organisation, a situation which is cheaper than that of going to trial. This is a critical and beneficial factor for the SFO, whose capability to investigate economic crime has in the past been compromised by lack of resources.

6. Review or Clearer Guidance?

A. Review

It has barely been three years since the UKBA 2010 came into force; however the current UK Government have signalled a possible extension to the controversial section 7 offence to include a failure to prevent acts of fraud by employees. This encompasses a reduction of the ‘controlling mind test’ which could prove a useful solution to the SFO to doctor their damaged reputation after the collapse of several

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85Lim (n 48) 9.
86 DPAs only apply to organisations in cases of economic crime and not to individuals and became available on 24 February 2014.
87 Such as paying financial penalties, paying compensation to victims of the alleged offence, donating money to charities or third parties, disgorging any profits made from the offence, implementing a compliance programme or making changes to an existing compliance programme and co-operating with future prosecutions of individuals; SFO and CPS, Deferred Prosecution Agreements Code of Practice: Crime and Courts Act 2013 (2013) <www.sfo.gov.uk/media/264623/deferred%20prosecution%20agreements%20cop.pdf7>accessed 7 October 2014.
88 ibid.
89 Crime and Courts Act 2013, Schedule 17 (30).
90 Ministry of Justice, Deferred Prosecution Agreements, Government response to the consultation on a new enforcement tool to deal with economic crime committed by commercial organisations (Cm 8463, 2012) 4
cases. Therefore it can be said that the SFO are already undertaking a degree of review of the Act.

Various corporate crime advisers have taken a rather unenthusiastic stance towards a review of the UKBA. Barry Vitou has stated that, given there have been no corporate convictions under the Act so far, it seems fairly early to consider a review of it. Vitou suggests that some advisers have engaged in ‘scaremongering’ to create work and have consequently exaggerated the issue. He also mentions the confusion surrounding corporate hospitality and explains that UK companies who complain that clients cannot be taken out for lunch are ‘plain silly.’ His views are plausible but it is suggested that he fails to consider the more complicated issues surrounding hospitality, such as where the distinction should be made between proportionate and illegitimate hospitality. Roger Best is equally unimpressed with the notion of review of the law, suggesting that it is peculiar for the Government to say they will set the highest standards and impose them internationally and then only two years later, begin to re-examine them before obtaining a conviction.

The recent embarrassment surrounding the collapse of the £40m bribery trial against Victor Dahdaleh received intense criticism from the media, and a judge even accused the SFO of ‘mismanagement.’ It can be argued that the reason David Green is suggesting an extension of the corporate offence is because both he and the Government are aware of the difficulty of proving criminal corporate liability via the ‘controlling mind’ test. With the current government and SFO operating in an environment of austerity, pressure is mounting for the securing of a first corporate conviction under the Act. Consequently, amendments to make it easier to bring successful fraud prosecutions are more likely to be considered. Green notes that the comparable American legislation, the Foreign Corrupt Practices Act (FCPA) 1977, was similarly slow in gaining effect; prosecutions based on it did not hit their stride until well into this century. However the UK public will ultimately be disappointed with the UKBA if it takes thirty years before achieving a corporate conviction. It is submitted that the possible extension of the corporate offence will come as a relief to the overstretched and under resourced SFO and such a measure has the potential to bring more successful corporate prosecutions. It is also however,

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93 Partner, Corporate Crime & Internal Investigations, Pinsent Masons.
95 ibid.
96 ibid.
97 Partner, Regulatory enforcement, Clifford Chance.
98 Fanshawe, (n 92).
99 Alistair Osborne (n81).
101 David Green (n 45).
submitted that there is a need among the UK business lobby for clearer UKBA guidance.

B. Clearer Guidance

As previously mentioned, several significant uncertainties still exist within the business community as to aspects of the UKBA 2010. These uncertainties are of significant concern to not only company members, but also to investors. The government has placed particular attention on easing the compliance burden on small and medium sized enterprise (SMEs). Roger Best¹⁰² argues that for typical SMEs, compliance will not be too arduous, as there are plenty of sources of free guidance in circulation.¹⁰³ Whilst it is possible to agree with his assertion, it is suggested that such guidance falls short of being adequate as it fails to clarify the specific legal issues previously highlighted herein. At the time of writing, there have been no indications from government officials regarding the possibility of revisiting any of the current anti-bribery guidance. The residual uncertainties will therefore fall to be clarified by judges in the courtroom.

8. Conclusion

It has been shown that the radical overhaul of the law the UKBA 2010 represents was undoubtedly a result of fierce international criticism and UK Government embarrassment regarding the BAE scandal. Despite the Act’s implementation, and even after the Government’s issue of various pieces of guidance, significant concerns still exist within the business community regarding the lack of legal certainty surrounding the Act’s interpretation of corporate hospitality, facilitation payments, the ‘adequate procedures’ defence, and the meaning of ‘associated person’ and ‘relevant commercial organisation.’ It has been asserted that, as regards enforcement of the new Act, UK courts are exhibiting a ‘zero-tolerance’ attitude, with all prosecutions to date experiencing custodial sentences. The new DPA’s have been examined, and it thought that these should increase the number of cases investigated by the SFO and will provide a significantly more resource-efficient prosecution tool as compared to arguing a case at trial. Finally, review, or potential reforms to the Act were briefly examined, with the idea that an extension to section 7 could potentially increase the number of corporate prosecutions and repair the SFO’s somewhat battered reputation. On the other hand, commentators such as Vitou and Best see review of the UKBA as premature. It was additionally submitted that more attention should be focused upon

¹⁰² Fanshawe (n92).
improving the guidance available to reduce the financial and compliance burden upon SMEs and to increase legal certainty.

The UKBA 2010 does indeed have enormous potential, but its practical effects have yet to be exemplified. It is plainly apparent that the UK is taking rigorous action against corruption by implementing a zero-tolerance approach on white-collar crime, however Parliament’s aspiration of ending bribery in the UK will take time. Without greater global harmonisation of anti-bribery law and enforcement, ambiguities will remain, as ‘one man’s bribe is another man’s gift’. In response to the uncertainties posed throughout this paper, companies have no real choice but to enforce a stringent anti-corruption regime in order to minimise their risk of conviction.

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104 Dan Hyde, ‘In Practice: Practice Points: “Grease” is the word’ (17 June 2013) 22 Law Society Gazette.