

**SPEECH TO THE FSI SEMINAR ON ETHICS AND ANTI-CORRUPTION, OSLO,
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I am most grateful to FSI for inviting me to speak in the beautiful city of Oslo, which is always a great pleasure to visit. Obviously having heard that the UK has slipped to Number 20 in the TI perception index I have to defend the UK's honour!

My subject today is the UK Bribery Act, which was passed by the British Parliament in April 2010 with the full support of all the three main UK political parties, and which came into force on 1 July this summer.

I should start by explaining that I am not a lawyer; I have no legal training so I clearly won't be giving you a legal interpretation of the Act. Actually there are quite a few of those available on the internet already from the many legal firms who are vying to provide advice to companies on the Act. My presentation will concentrate on the practical issues for companies that arise from a trade association viewpoint.

There is one major book on the Act by the respected commentator Eoin O'Shea of Lawrence Graham, already on the market. The book is called "The Bribery Act 2010, a Practical Guide" and I note that the author expresses the view that the Act "is one of the strictest pieces of this sort of legislation in the world".

But, of course that opinion is an academic one thus far because the experience of the Bribery Act working in practice is very limited: in fact, to one minor case involving a court official. It's early days. So you might think I will be making a very short speech today but, the implications for business of the Act coming into force are considerable, and were much discussed between business and the UK authorities before the Act came into force. So I would like to review with you the main issues that came up in the discussion and, perhaps, allow myself to speculate a little on what might happen over the next few years.

A starting point might be to ask why the UK decided to have a new law to combat corruption in the first place. Well TI gave the answer in describing the UK's position on the perception index. It has to be seen in the context of a long period of criticism of the UK for its record in tackling bribery. Now I don't believe anyone in the UK asserts that our country has a current and fundamental problem with corruption. There is no evidence that this is a major issue in our society. I think most people would see it as a problem in dealing with certain export markets and perhaps certain products. But, despite this, it is a fact that corruption has been a front page issue in the British newspapers for many years and that it has been the defence industry which has been the subject of most of the stories.

The UK authorities have always maintained that UK law has been adequate to prosecute corruption cases and UK industry has argued that it has not infringed the law. But, as our friends at Transparency International, make very clear perception matters enormously in this area, and in the area of perception the UK has had a problem. So it was a unanimous view in the aerospace and defence sector of UK industry that a new law was needed to remove any doubt that the British Government had all the tools it needed to deter corruption and prosecute wrongdoers. I believe the new Act has achieved that goal fully.

If we look for a moment at what tools the Government has taken in this new Act we find that it contains a number of new elements, at least as far as the UK is concerned. There are three offences that may be committed by either an individual or a company. These are:

Bribing another person;
Being bribed;
Bribing a foreign public official

These offences are certainly not new, but as we will see in a moment there are a number of extensions of scope over previous legislation, notably the US Foreign Corrupt Practices Act, which need to be looked at carefully.

Finally there is a fourth offence that is much more innovative. That is the failure of a corporate body to prevent bribery. Where a bribe is paid by someone within an organisation, or on its behalf, that body will be guilty of the offence of failure to prevent bribery unless it can show that it has in place adequate procedures to prevent bribery. But the Act does not define what “adequate procedures” are, so we have another interesting issue to debate.

Now, as I said, I am not a lawyer but from my perspective I can see a number of areas arising from the Act that are new and which should be drawn to the attention of ADS members and other companies involved in any way in the UK market.

First, UK law now contains a specific criminal offence of bribing a foreign official. But unlike in the US FCPA there is no exemption for so-called facilitation payments; or, to put it another way, there is no bribe that is regarded as “too small” not to be considered a bribe. Indeed, the Authorities have indicated that they are very interested in finding out about routine solicitation of small payments e.g. by customs officials at parts, to see if collective action can be taken against it.

Second, there is no exemption for hospitality and promotional expenditure. There is clear guidance from the UK authorities that expenditure of this sort which is “reasonable, proportionate and made in good faith” will not be penalised. But by implication “lavish”

hospitality may be considered as a bribe. How one should define “lavish” is another subject of debate e.g. if you need to entertain a royal prince. But our advice to companies is clearly don’t close down your hospitality function, normal business entertaining should continue.

Third, the jurisdiction of the UK authorities in offences committed outside UK has been widened. It is clear that the authorities will be looking closely for offences committed by agents abroad on behalf of UK companies. They will also be looking very carefully at foreign corporations with a business presence in the UK which have become involved in corruption in another country. If it can be shown this has had an impact on UK business then the UK authorities have warned that they will seek to prosecute. And the definition of “business presence” in the UK may be broad.

Finally, the new offence of “failure to prevent bribery” and the availability of the defence of “adequate procedures” creates a new basis for interaction between the authorities and corporations about whether they are doing the right things to prevent corruption. We have already seen the Serious Fraud Office in the UK offering to have a dialogue with companies whose intent is to prevent bribery taking place throughout their organisations. The SFO say that the real target for the authorities is individuals and companies that intend to use bribery to gain advantage in the market place; they want to help companies that, on the other hand, have a clear intent to combat corruption but who face problems through solicitation from potential customers or through employees or agents going off the rails and disregarding company policy. There is an encouragement being offered for companies to come forward and talk about problem areas.

Now, ADS, as the trade body for the aerospace, defence and security industries in UK supported the new legislation throughout its passage through Parliament and appeared before Ministers and Parliamentary committees on several occasions to confirm this. Our duty therefore is to ensure that as far as possible our members are not adversely affected by the new law, and that they take the right steps to comply with it.

This may not be as complicated as first seems to be the case or as is implied by some comment in the media about the Act. UK officials have often said that if your company had in place good policies and practices to combat corruption before the Act was passed then the chances are that the new law will not require you to do anything more. Though a health check on those policies and procedures might well be worthwhile. The speaker from the Norwegian Ministry of Defence advocated “keeping it simple” in establishing the principles on which to base anti-corruption policies and practices and ADS, with its large SME membership, strongly supports that view.

It is also the case that after extensive exchanges between Government and industry at the beginning of this year, relatively clear guidance is available from the UK Ministry of Justice and from the Serious Fraud Office on how companies should respond to the Act. It is well worth examining this guidance, which is available on the websites of the two organisations. The six principles to govern anti-bribery procedures set out the MoJ's guidance seem to me very sound and entirely consistent with the advice industry itself has developed.

This rather practical, positive approach from the UK authorities should hopefully encourage companies to accept that adopting policies and practices to combat corruption is simply part of the necessary management of risks that a modern company has to undertake. The UK Minister responsible for the Act, Secretary of State for Justice Ken Clarke made this point in launching the government's guidance earlier in the year. He said: "I hope this guidance shows that combating the risks of bribery is largely about common sense, not burdensome procedures. Without changing the substance of the Act, this guidance should save organisations of all sizes from the fears sometimes aroused by the compliance industry that millions of pounds must be spent on new systems that, in my opinion, no honest business will require in response to the commencement of this Act. Some have asked whether business can afford this legislation – especially at a time of economic recovery. But the choice is a false one. We don't have to decide between tackling corruption and supporting growth. Addressing bribery is good for business because it creates the conditions for free markets to flourish".

I have quoted Ken Clarke's speech at length because, as a trade association, we support strongly this balanced approach. We are trying to help our members, especially small companies, to increase exports, and in particular to new, emerging markets. There is an inevitable increase in the risk of corruption and we want to assist firms in managing that risk successfully, and sustaining their export effort. The work that has been done through ASD, our European association, as described by Dominique Lamoureux, Chair of the ASD Business Ethics Committee before lunch, to create basic principles for anti-corruption and provide templates for use by small companies who don't normally have compliance departments or ethics officers are the essential tools to achieve our goals. In the UK we have used the ASD Common Industry Standards to create a booklet designed to help SMEs which sets out the standards, provides models for company policy statements, clauses to use in contracts with agents, etc. It also provides signposts to sources of further advice for those who need it. This booklet, which we are currently updating, is available on the ADS website. SMEs have said they particularly value the downloadable templates that they can quickly put into use.

Our objective, as a trade association, is to encourage our members to take the necessary steps to deal with corruption risk effectively but not to cause an overreaction to the new Action and unnecessary expenditure. That balance is not easy to strike and our main approach is to

get companies to talk to each other about what works for them and what services are really useful. So we have a national best practice forum for discussing business ethics in the aerospace and defence sectors, very much like this meeting, which meets two or three times a year to exchange views and hear the opinions of experts. We also have an electronic network of interested members to whom we distribute information.

Our discussion with the industry over the last two year has highlighted a number of issues of concern about how the Act will operate in practice. Some of those we have already touched on, notably hospitality and facilitator payments. But there was also a good deal of concern about the scope of a company's liability if a person associated with it bribes someone. There seemed to be a risk that this would effectively require companies to undertake due diligence on every other company in their supply chain. There were fears that an unreasonable new cost burden would arise. The guidance issued by the Government is helpful in this area in making it clear that an organisation will normally be judged only to be exercising control over another organisation where it has a direct contractual relationship. So worries about small companies being forced to undertake due diligence on a whole supply chain are hopefully unfounded, though supply chains working together to improve ethical behaviour is a good thing. But as with many aspects of the Act, we will need to monitor how the Courts interpret the law. One of our main concerns while the Act was being passed into law was that our members especially SMEs should have as much certainty as possible about what the law requires, and what they need to do to be compliant. As we have noted several times in this talk, there a number of areas that I have mentioned: "adequate procedures"; "corporate hospitality", "due diligence" where the requirements on companies may well need further definition and be affected by case law as it emerges. But for the time being we have to make the best use of the advice available from the authorities and take a common sense approach based on our own assessment of the risks we face as businesses. I should add that ADS itself, as the organisers of the Farnborough Air Show, and with two offices operating in India, faces its own reputational risk issues. So we have to take the medicine as well as advising our members to do so.

In doing our own risk assessments we need to strike this balance I have referred to, avoiding an overreaction to the new law, but also not becoming complacent about policies and procedures which do need to be regularly refreshed. We should be under no illusion that the UK authorities will be keen to show that the new Act is being properly enforced. The authorities are also looking for ways to improve their intelligence gathering about what is going on as regards bribery and corruption. One aspect is increased co-operation between national authorities on defecating wrongdoing; we have especially noted that the US and UK authorities are increasingly exchanging information on cases they are investigating and intelligence they have received. Also in the last few days we have heard that the UK Serious Fraud Office has set up a whistleblowers line. This obviously means that companies may find

their own employees encouraged to report possible breaches of the law directly to the authorities rather than seeing them handled through internal company procedures.

If we look to the future I believe we can predict that the Bribery Act will lead to much more interaction particularly between large corporations and the authorities about corruption risk.

The penalties involved for companies and individual directors in a major corruption case are now very severe. Indeed the vital nature of company reputation means that a major case could threaten the continued existence of a company found not to have “adequate procedures”. It could also severely damage the careers of Directors found to be personally liable in such cases. If you look at the speeches of Richard Alderman, who runs the UK Serious Fraud Office, you can detect encouragement for companies to come and talk about problems. There has been some suggestion that the UK may therefore be moving to a “plea-bargaining” culture similar to that of the US, with cases rarely reaching the courts. It remains to be seen if the UK judiciary will tolerate the widespread use of civil penalties to resolve bribery cases. But what is very clear, if it was not so before, is that the UK authorities have in the UK Bribery Act a very effective deterrent to companies seeking to win business unfairly through corruption, and that they intend to use their powers not just to pursue wrongdoing by UK companies but also that of foreign companies affecting UK interests.

This is part of wider international trend, supported by the G20, with a number of governments tightening up their legal frameworks to combat bribery. The UK is one of many. This trend must be welcome for business for whom the costs of corruption are an unwelcome additional overhead at a time of economic downturn when legitimate costs are all under the severest scrutiny. But I believe we do need some further action by governments if we are to eradicate these unwelcome practices. As Dominique Lamoureux described earlier, industry, especially here in Europe and the USA, has done a great deal to combat corruption through individual company action and collectively. The supply side is doing its bit. But we want to see a clampdown on the demand side too. Customer governments need to control their own officials and ensure they are not putting pressure on companies to bribe. In recessionary times the demand for a bribe is an especially offensive act. The money has to come from somewhere. Most likely it will be paid at the cost of cutting jobs and services at home. It is high time that tolerance of bribery and corruption in all societies across the globe was put under greater scrutiny and certainly not accepted as “the way things are done over there”. The UK Bribery Act is undoubtedly an important step forward in creating a climate of lower tolerance of corruption and in this respect very welcome but it bears heavily on the suppliers covered by the Act. I am sure that they are very willing to respond to its demands but they also ask for global level playing field. Many of us have detected a stronger demand from Governments for more ethical exporting stimulated by the Arab Spring. This may go beyond

combating corruption to companies being expected to move beyond compliance with export licensing rules to make wider decisions on where it is ethical to do business.

I hope the next years will see a great deal more attention on the demand side to behave ethically too.

ADS welcomes the efforts that have been described today for governments to improve their control of ethical, in particular the work of Transparency International with NATO. But a lot more needs to be done before we can feel comfortable that corruption is on the wane.

Thank you for your attention.

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