

How the Bribery Act brings the law of hidden consequences into play

When the Bribery Act is implemented in April, businessmen will be required to inform the Serious Organised Crime Agency (SOCA) on every occasion where a facilitation payment is made, no matter how small it is, or whether a criminal prosecution for corruption is most unlikely.



The last Government enacted bribery legislation in absolutist terms, admitting no or few exceptions Photo: Geoff Pugh

By Jonathan Fisher

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If SOCA is not told, the maker of the facilitation payment risks prosecution for money laundering, up to 14 years' imprisonment and an unlimited fine. No one will want to run these risks and SOCA will be swamped with reports of petty illegalities when it ought to be focusing on combating serious organised crime. Meanwhile, the regulatory burden on business is ratcheted up another degree.

This state of affairs has arisen because the last Government enacted legislation in absolutist terms, admitting no or few exceptions. The UK is the only country to place business under such stringent obligations. Although the US enforces its laws aggressively, its anti-bribery legislation is more proportionate.

Typically, a facilitation payment is made to a foreign official to ensure that bureaucratic requirements are satisfied when importing goods into a developing country. A classic example involves paying a "sweetener" for the timely issue of an import permit. But unlike a bribe, which is paid to obtain a contract, a facilitation payment merely expedites the performance of a function which an official is already obligated to perform.

US law recognises this and confers an exemption where a facilitation payment is made to encourage "routine governmental action".

The UK turned its back on this approach and from April a businessman can make a facilitation payment only where a government official is permitted or required to accept the payment under the law of his country. This criminalises facilitation payments in their entirety.

[Fears Bribery Act will harm UK plc \(http://www.telegraph.co.uk/finance/yourbusiness/bribery-act/8272140/Fears-Bribery-Act-will-harm-UK-plc.html\)](http://www.telegraph.co.uk/finance/yourbusiness/bribery-act/8272140/Fears-Bribery-Act-will-harm-UK-plc.html)

[Scottish Government to restrict Bribery Act legislation \(http://www.telegraph.co.uk/finance/yourbusiness/bribery-act/8272182/Scottish-Government-to-restrict-Bribery-Act-legislation.html\)](http://www.telegraph.co.uk/finance/yourbusiness/bribery-act/8272182/Scottish-Government-to-restrict-Bribery-Act-legislation.html)

[SFO sees UK courts as stumbling block to Bribery Act \(http://www.telegraph.co.uk/finance/yourbusiness/bribery-act/8269766/Bribery-Act-SFO-chief-Richard-Alderman-sees-UK-courts-as-a-stumbling-block.html\)](http://www.telegraph.co.uk/finance/yourbusiness/bribery-act/8269766/Bribery-Act-SFO-chief-Richard-Alderman-sees-UK-courts-as-a-stumbling-block.html)

[SFO urges companies to report corrupt rivals \(http://www.telegraph.co.uk/finance/yourbusiness/bribery-act/8262951/SFO-urges-companies-to-report-corrupt-rivals.html\)](http://www.telegraph.co.uk/finance/yourbusiness/bribery-act/8262951/SFO-urges-companies-to-report-corrupt-rivals.html)

[Bribery Act to be reviewed \(http://www.telegraph.co.uk/finance/yourbusiness/bribery-act/8258368/Bribery-Act-to-be-reviewed-after-business-fears.html\)](http://www.telegraph.co.uk/finance/yourbusiness/bribery-act/8258368/Bribery-Act-to-be-reviewed-after-business-fears.html)

[Bribery Act: Lord Goldsmith says look to the US \(http://www.telegraph.co.uk/finance/yourbusiness/8240662/Bribery-Act-Lord-Goldsmith-says-look-to-the-US.html\)](http://www.telegraph.co.uk/finance/yourbusiness/8240662/Bribery-Act-Lord-Goldsmith-says-look-to-the-US.html)

When the Bribery Bill was debated in the Commons, the Conservatives tried to incorporate a defence for facilitation payments, pointing out that an outright ban was impractical and businesses were worried about prosecutions for technical offences. A Parliamentary Committee reported the Bill would criminalise the sale of medical products to China, where small facilitation payments are made to healthcare practitioners who, for the most part, are state employees. The price of avoiding criminalisation is to be placed at a competitive disadvantage.

In response, Claire Ward, then the Parliamentary Under-Secretary of State for Justice, gave a strong steer that a minor offence would not be prosecuted where the scale of the payment was small or there were circumstances which amounted to extortion on the part of the receiver.

But, leaving aside hanging a businessman's fate on prosecutorial discretion, the last Government's determination to enact "gold-plated" legislation has hidden consequences of money-laundering legislation.

The Proceeds of Crime Act 2002 provides that a person commits an offence where he acquires, uses or possesses criminal property. If a company is involved, a director can become liable for aiding and abetting this offence. Criminal property refers to a person's benefit from criminal conduct and embraces benefit from any conduct constituting an offence in the UK, or where the conduct is committed abroad, any conduct which would constitute in the UK if it occurred there. However, in a trade-off to encourage reporting criminal activity, Parliament stipulated that no offence is committed where a person discloses to SOCA that he is acquiring, using or possessing criminal property.

Applying these laws, criminal conduct will have occurred when a facilitation payment is made, and unless the acquisition, use or possession of benefit flowing from the payment is reported to SOCA, a money-laundering offence will also be committed.

Foreshadowing the debate over the Bribery Bill, the Conservatives sought to amend the Proceeds of Crime Act by including a minimum threshold of £10,000 for reporting purposes. The Lords European Union Committee also concluded reporting to SOCA should have a minimum level.

The Lords Committee pointed out that businessmen should not have to rely on a prosecutor's decision. Greater certainty is required, and the law ought to be amended to ensure that minor transgressions, such as those involving facilitation payments, are not reported.

With the Conservatives as the Coalition's driving force, it remains to be seen whether it will implement the amendments it sought to introduce in Opposition.

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