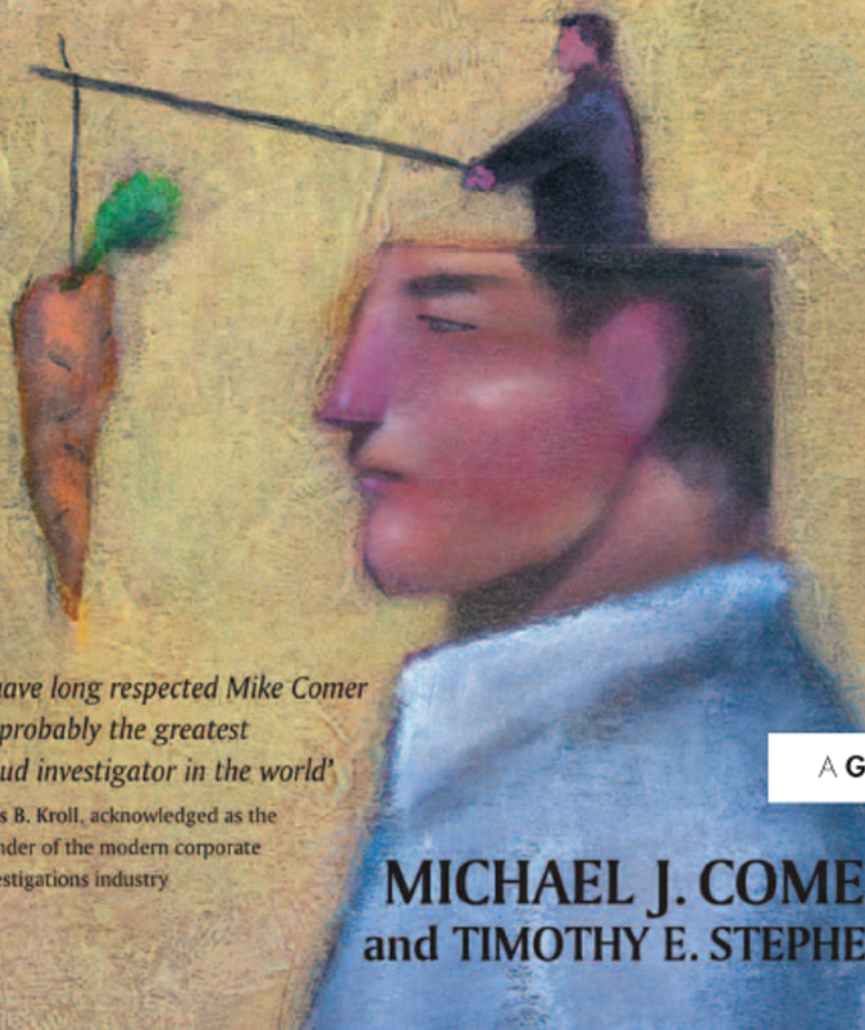


Bribery and Corruption

How to Be an Impeccable and Profitable Corporate Citizen



'I have long respected Mike Comer as probably the greatest fraud investigator in the world'

Jules B. Kroll, acknowledged as the founder of the modern corporate investigations industry

A **Gower** Book

MICHAEL J. COMER
and **TIMOTHY E. STEPHENS**

Bribery and Corruption

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Bribery and Corruption

How to Be an Impeccable and
Profitable Corporate Citizen

MICHAEL J. COMER and
TIMOTHY E. STEPHENS



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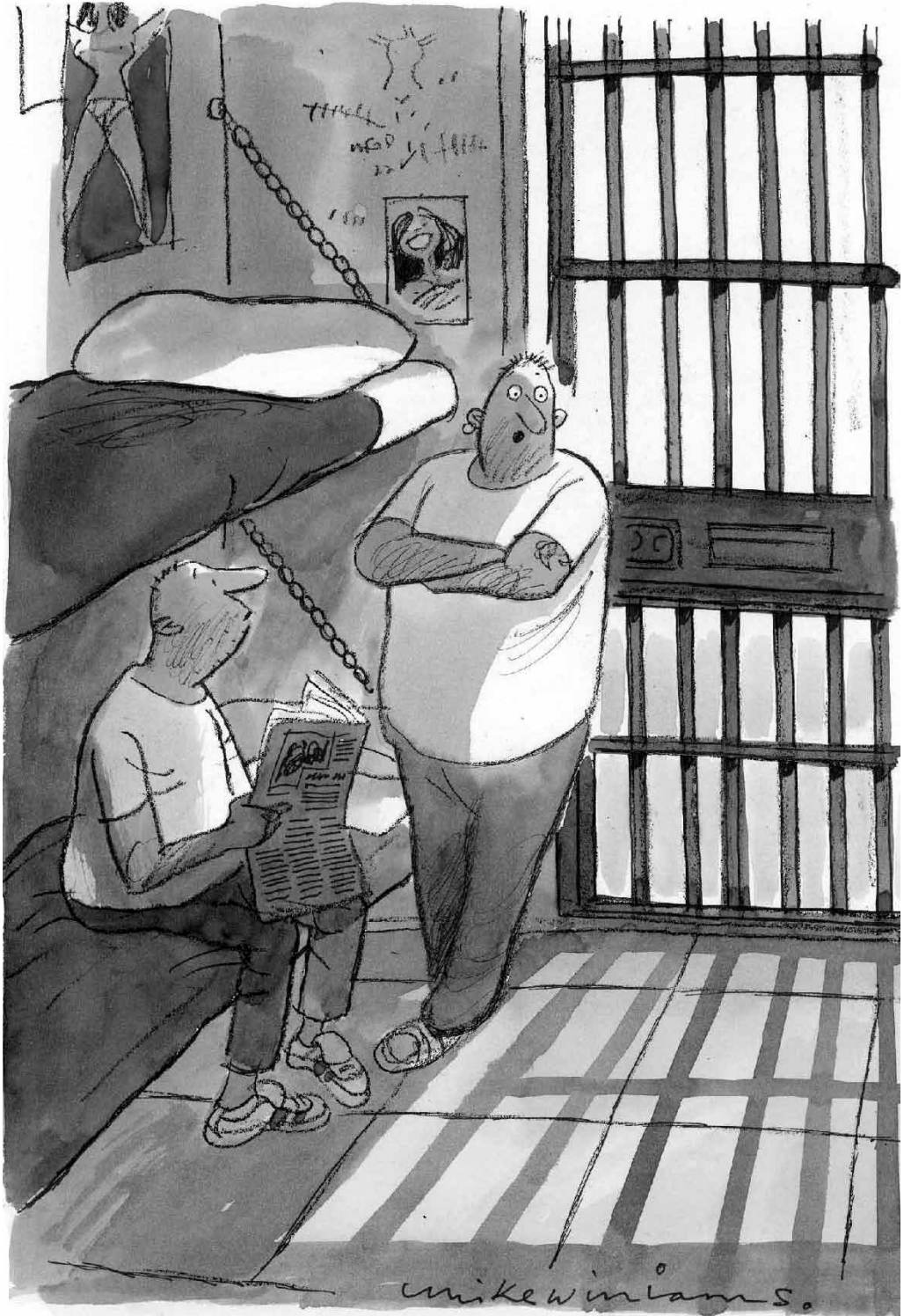
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'OK. Technically the orders I gave were illegal, but I expected my subordinates were honest and would refuse to carry them out'

*The royalties from this book are dedicated to 'Save the Children Fund'
in memory of Tim Stephens.*

*Originals of the cartoons are available from
<http://www.mikewilliamscartoons.co.uk/>*

Foreword

THE HONOURABLE KENNETH MUTT KC¹ (THE DOG)

A Sad Case

For readers of Mike Comer's previous eight books - or, more accurately, the same book regorged eight times: now nine - it is with sorrow that I report that my father Spot the Dog has expired and his spirit levitated to the great kennel in the sky. If you have dodged Mr Comer's previous rants, my father's name will mean nothing to you. That is a pity, because he was a good dog, wrote brilliant forewords to Mr Comer's falderalish books and was the canine referred to by auditors when exculpating that they were watchdogs and not bloodhounds every time they failed to spot skuldoggery, which was pretty often. In fact, Spot was a poodle, so it is not surprising that auditors bonded with him. I am a bit of a crossbreed; part poodle (obviously) but more Rottweiler with a tad of Alsatian, husky Dalmatian, spaniel and pit bull terrier thrown in.

Corruption is Wicked

Spot kept Mr Comer - more or less - on track and talked him out of publishing some of his more extreme views. I apologise that I don't have the same influence on the geriatric, pipe-smoking, politically scandalous ex-guru. He has got it into his head that corruption is wicked; that it is kicked off at the highest political and academic levels and that commercial bribery is a reaction. He has little confidence in the enforcement of anti-bribery laws and the fixation on overseas bribery while much worse corruption takes place under British noses but is ignored.

Cutting Out the Doggerel

On his death dog basket my father promised me the ex-guru would never again put pen to paper or, in his case, hairy fingers to a tobacco-stained keyboard and that I would be safe. But it seems that the old man has become so maddened over the Bribery Act, political, media and academic corruption that he's struggled onto his Zimmer, bought himself the latest version of Dragon NaturallySpeaking voice recognition software and is now dictating 100,000 words a day - albeit mostly incomprehensible, especially since he had his new National Health teeth fitted. So, in his favour - and there is not much of that

around - you can put any typos in this book down to his new gnashers, which are far too small and keep falling out.

Another ameliorating² factor on the ex-guru's bluster came from Tim Stephens, who was vaguely sensible in human terms. How on earth Mr Comer ever convinced Tim to associate his name with his is a mystery. The same is true of the long-suffering Mike Williams, whose cartoons are the highlight of the book, and Gower, which has yet again been conned into publishing something that is so far removed from good taste that it makes me think that bribes have been paid. The only counterfactual is that the ex-guru is so tight, that it is against his nature to pay for anything, even to get his books published. So, for once, I don't know.

Keeping it Short

I will keep this Foreword short. My father always told me this: 'always keep it short, Kenneth Mutt', he said and 'if you can do it in one bite, do it'. I was never exactly sure what he meant, but in doggy circles I am known for concision, lack of foreplay and premature termination. For these reasons my friends say I could have Scottish blood in me and it is true that I do have gingerish, spiky, hair, don't wear underpants and flatulate a lot, especially after meals, when I get excited, watch football or see my hero Nicholas Peter William Clegg on TV. So that is all I have to say: well except for four things.

Corruption and Bribery Are Not the Same

The first is that this book is about corruption, which is a far wider and worse wickedness than bribery. Bribery is largely a commercial phenomenon, whereas corruption is primarily the preserve of politicians, academics, the media and others ungainfully employed in a monoculture that is as keen to stop skulduggery as Dracula is to illegalise blood-sucking. This is why the new Act (of 2010) - which supposedly replaces those on corruption - is called the Bribery Act. It has been reframed to avoid dealing with the stratospheric corruption discussed in Chapter 10.

The guileful change of framing tells you all you need to know: corruption and bribery are not the same thing and by cunningly avoiding the C-word politicians and fellow travellers can carry on as before but collect lots of lovely taxes from technical infringements that are only identified as crimes after prosecutorial discretion has been exercised. This is really cunning and allows betting on the race after it has been run.

Less than voluntary penalties from companies subject to prosecutorial discretion can then be remitted to China, India, Brazil and Russia, among others, to save our planet from global warming or, now it has been shown that for the past 14 years it has been stable, to prevent climate change. No doubt when further evidence emerges that it is all a scam, we will be faced with the problem of climate stagnation or some other reframing. It doesn't matter what it's called, so long as the Milibands, Gores and Huhnes support it as a noble cause, much as they do with anti-bribery initiatives, and so long as it can be taxed.

2 A great word for a dog: don't you think?

Scandals to Come in the Carbon World

The ex-guru was the one of the first to recognise the corruptive nature of global warming and emissions abatement. This noble cause is awash with corruption to maximise free allocation of carbon credits and to falsify baseline emissions; and bribes to get offset projects in foreign lands, trading exchanges, OTC (over-the-counter) transactions, green investments and corporate social responsibility programmes. The only benefit is that the green initiative raises yet more taxes. But the Carbon World creates entirely new financial systems that are perfection for paying and concealing bribes. There is no such thing as Suspicious Activity Reporting (SAR) in the Carbon World and virtually no regulatory oversight. In fact it would be much easier if rules came in that compelled reporting of carbon transactions that were **not** suspicious. It really is that bad but no one seems to care or even think. All they say to me is 'It's global warming, innit? Saving the planet; know what I mean, John?'

The word 'innit' appears to be the justification for everything along with Human Rights, health and safety, equality, privacy or multiculturalism³ all noble causes that herd the UK towards the cliff's edge. True: innit?

Not All Bribery is Equal

I suggested that the title of this book should be *The Corruption of Bribery*, which everyone except Gower and the Guru's wife thought was extremely clever and insightful. It exposes the fact that the word 'bribery' has been cynically perverted in the Act to imply that it is a replacement for previous legislation on 'corruption': which it is not. The Act makes a clear distinction between bribes paid and bribes received⁴ with the former being excoriated as much wickeder than the latter and therefore justifying the Section 7 corporate, essentially strict liability offence of failing to prevent bribery. This is dreadful spinning of the truth and another corruption of the word 'bribery', because Section 7 only relates to failure to prevent bribes being paid by corporates⁵ not to extortion or bribery generically.

The Dreaded Section 7

Section 7 of the Bribery Act 2010 is the equivalent - in the world of unwanted teenage pregnancies - of holding a boy's parents absolutely, corporately liable for their son's wanton fornication while absolving the girl's mother and father of all responsibility. Bribery, like more fulfilling forms of sex, involves two or more people, but the Act is far more concerned with giving than receiving, or supply rather than demand: of active rather than passive. You should ask yourself why this is.⁶

3 I never voted for this: did you?

4 Although both are referred to as 'bribery'.

5 I was taught that using an adjective as a noun is bad form and akin to flatulating in church.

6 It is because it is a serious revenue earner for the Government and a less-than-transparent source of funding for the Serious Fraud Office, which pockets a third of all recoveries and penalties.

Not All Animals Are Equal

The clever corruption of language - or, even more, reframing - results in governmental organisations, whose controls are so appalling that they are magnets for incoming bribery, not being held corporately liable unless the involvement of a senior manager can be proven, but even then absolution comes to the rescue under the Crown Body exclusion. It is one rule for corporates and another for officialdom, or as Kenneth Clarke,⁷ the ex-Justice Secretary, ex-Anti-bribery Champion and Hush Puppies' shuffling advert explains it, the initiative is 'business-led'. You can always tell something is utter bunkum when politicians describe it as an 'initiative'.

'Business-led' means that politicians and government departments need to do nothing except collect the cash and condemn evil corporates who pay their wages and, of course, unlimited Parliamentary expenses. Also, since government departments are not 'relevant commercial organisations' they are absolved from Section 7 corporate liability even if they **pay** bribes ... and please don't tell me that local and state government officials don't pay bribes or share them with their colluders, because they do. Have you noticed that under the old Corruption Acts, once an advantage was shown to have been given to, or received by, an official, the burden of proving that it was not corrupt shifted to the parties involved? The new Act removes this in yet another Animal Farm scam.

British politicians struggled long and hard, late into mid-mornings, sometimes at their second, third or fourth heavily subsidised and fortified homes, in the houses of other men's wives or, more likely, civil partners, in bingo halls, steam baths and at the Pink Pussy Cat Lap Dancing Club,⁸ to resolve the vile threat to parliamentary privilege which if removed by the new laws would make their prosecution for corruption much more likely.

After urgent agonising over some 20 years, Parliament decided not to decide but to defer the matter for further review: you guessed it, by yet another committee. And by cleverly framing the Act as 'bribery' they hoped no one would notice.

Bribery of Luigi Foreigner

In justifying the extraterritoriality of the Act, the Ministry of Justice claims that the provisions relating to bribery of foreign public officials (FPOs) harmonises international and domestic laws. This, I'm sorry to say, is another corruption of both the word 'bribery' and the truth. Prosecution for facilitation payments made to a UK official requires proof that the payer's intention was to get the official to perform improperly, whereas for Ahmed or Luigi Foreigner, FPO, simply proving influence is enough. The obvious presumption is that British officials can be trusted with being influenced without being corrupted, while those to the east of Dover and south of Land's End can't. How bloody superior and patronising is that? And might I ask what happens when our tartan-wearing, caber-tossing colleagues gain independence and become FPOs?

Section 6 of the Bribery Act makes it an offence, punishable in the UK, to pay bribes to an FPO, yet it absolves the sneaky no-goods, who extort them, of all responsibility

7 I have never liked him since I heard he wears Hush Puppies and is a Europhile.

8 The significance of this club will become clear later.

because there is little chance they will be prosecuted in their home countries. If politicians really wanted to stop FPOs being corrupted they could start by extending Section 6 to the receipt of bribes: extradite FPOs to the UK and incarcerate them here or, more seriously still, force them to take on British citizenship, pay our taxes and put up with unending political and other skulduggery. What is also amazing - in most if not all of the regulatory actions by the Department of Justice (DOJ), Securities & Exchange Commission (SEC) and the Serious Fraud Office (SFO) against companies - is that the names of official and other bribe extorters are never mentioned. In the Siemens case there must have been hundreds of extorters. But who were they? Are most still in position to extort bribes from others? I suspect they are. So much for the fight against global corruption and due diligence.

Now for another thing! Payments to foreign political parties, opposition politicians or candidates are permissible under the Act. The conspicuous opportunity for evil corporates and aid agencies is, of course, to corrupt foreign politicians before they get into power. This is a really smart ploy because it encourages democratic change, which is clearly another noble cause except for those whose change is outwardly directed, have to bribe their way back in, or pass through revolving doors into meaningful employment. But the good news for them is that when they are in opposition they can be bunged without limit to help get back into power. Isn't that a neat little political circuit: jobs for the boys and democracy at its very best?

The UK Leads the Way

The UK is the only country I can find that has extraterritorial laws to punish bribe payment and receipt in the overseas private sector. This supposedly gives UK firms a competitive advantage, although I must say I fail to follow the logic. UK politicians seem fixated on the view that if UK citizens self-flagellate and suffer enough - with draconian laws over such things as emission reduction, waste recycling, plastic bags, obesity, smoking, salt, sugar, alcohol, meat, fish, mushrooms, sunbeds, Polish potatoes and other noble cause initiatives - oinks of the world will be so inspired that they will follow suit and change their loathsome ways.

The informed opinion in the canine community is that this is crass stupidity. There is no way I am cutting back on my consumption of bones unless Chinese, Indian, Korean and Russian dogs do the same. And if they unilaterally cut back, that means more bones for me. That's how things are in real life, but politicians *bent* on noble causes don't want to understand this. The UK leads the way, they say, and it, matters not that it is over a cliff.

The End Game

If British companies decide they just cannot cope with the Act and pull out of supposedly corrupt markets, the Chinese and companies from other countries which don't have draconian laws will be in there like legs up a lamp post. They will be able to charge whatever prices they like and bribe without limitation. They will also cement relationships that secure and monopolise strategic resources like oil, copper, tin and, of course, bones and cement. So, rather than help the long-suffering poor in Less Developed Countries,

the Bribery Act will make things far worse, as is already the case with overseas development aid, much of which is trousered by the same kleptocrats who extort bribes and rob their citizens blind.

I sometimes say that humans are destined for extinction through a mix of stupidity apathy and noble causes but without the excuse of dinosaurs. They, at least, were hit by a meteorite. Now that's what you call an adequate defence.

The Dangers of Perception

Preventing corruption demands paying attention to detail based on facts; not perception, anecdotes, crystal balls, phases of the moon or patterns of tea leaves in cups. Recommending silly controls that don't work just encourages box-ticking and jobsworths. Branding entire countries as corrupt is another nonsense which is self-fulfilling and much like advertising that 'Bribes'R'Us' setting an expectation that skulduggery is the norm, if not positively encouraged. I agree with Mr Comer that corruption takes place in discrete contexts and that generalisation is a bad thing. It results in guards being dropped only because a country is 'perceived' to be safe.

Unquestionably, the Act will raise lots of taxes disguised as penalties, deflect corporates' attention from the supposedly export-led financial recovery, let politicians and government agencies off the hook and create lots of non-productive jobs for civil servants, NGOs, lawyers, consultants and investigators,⁹ all in pursuit of the noble cause.

The way the Act is to be enforced with 'civil disposals' and Deferred Prosecution Agreements - allowing crooks to pay their way out of trouble at a cost to honest competitors - subverts the criminal justice and economic systems. Where will it all stop? If the Yorkshire Ripper Version II were to make a self-disclosure and retain Price-Slaughterhouse-Coopers to investigate him on behalf of the police, would he be offered a 'civil disposal'?

So please do not fall for the spin that the Act will forestall or even reduce gross corruption. IT IS A STEALTH TAX on businesses and another Animal Farm initiative. That said, prevention of fraud, and incoming, outgoing, internal and competitive corruption is vital, so that economies can survive, companies flourish, and families have enough money to afford lots of juicy bones. To me, that's what corruption is all about; but for humans it could be even more important.

Finally, a humanoid that Mr Comer foolishly invited to review my Foreword asked me - with a sort of condescending smirk - 'If you are so clever how would you stop corruption?' The answer I gave was very simple: 'For a limited period, I would offer absolute immunity to every extorter who comes forward with evidence that convicts a coercer. When everything is done and dusted I would contrive a technical locution, apologise and then prosecute everyone'.

Yours aye
Kenneth Mutt KC

PS I started this Foreword with some sad news and I close in the same vein. Tim Stephens died on 7 April 2012 and will be sadly missed. He was the sensible one.

PPS I have just realised that despite their extensive verbiage, the authors have forgotten to define two important terms. So I will try to do so.¹⁰

COTTAGE INDUSTRY

This term was coined by Mike Koehler, known as the 'FCPA Professor' and one of Mr Comer's heroes. In this book it refers to a collection of politicians, regulators, academics, researchers, lawyers, consultants, journalists and even investigators who make lots of money and exert excessive influence by terrifying others into believing that the anti-bribery laws are even more important than bones. A great deal of reciprocation - 'scratch my back and I'll scratch yours' - takes place within the Cottage Industry.¹¹ This is not to suggest that there is anything dodgy going on, merely that companies should note when dealing with the Cottage Industry that the rule is: 'Never ask a barber if you need a haircut'.

ANIMAL FARM

This term - based on George Orwell's excellent, but almost canine-free book - is used when a member of the Cottage Industry insists on someone else doing something he has no intention of doing himself. It is the equivalent of 'do as I say, not as I do' and there is a lot of it about.

A LEGAL TERM

'Civil Disposal' is a term that is frequently used in cases involving corruption. It refers to the process where allegations of corruption are resolved by acceptance by the alleged bribe payer of a Civil Recover Order - under the Proceeds of Crime Act (POCA) - rather than a prosecution through the criminal courts. UK judges have generally not been in favour of civil disposals.

A FINAL WORD AND THANKS

When the authors locked themselves away in the coal shed to write this book, no one in their right minds could have imagined it resulting in the monster it now is. To be honest, I thought the two old boys were hiding from their wives to sniff Philosan. Gower was stunned at the book's length, but found it easier to capitulate - and publish something that is bigger than my first kennel - than to argue.

Despite its length, the reader will appreciate the excellent layout: organised by Emily Ruskell and Helen Varley for Gower and the great cartoons by Mike Williams. I don't expect anyone to read the entire book, but rather pick out bits that could be useful. I can't guarantee usefulness because I have not read it. However, I plan to see the film.

¹⁰ E&OE.

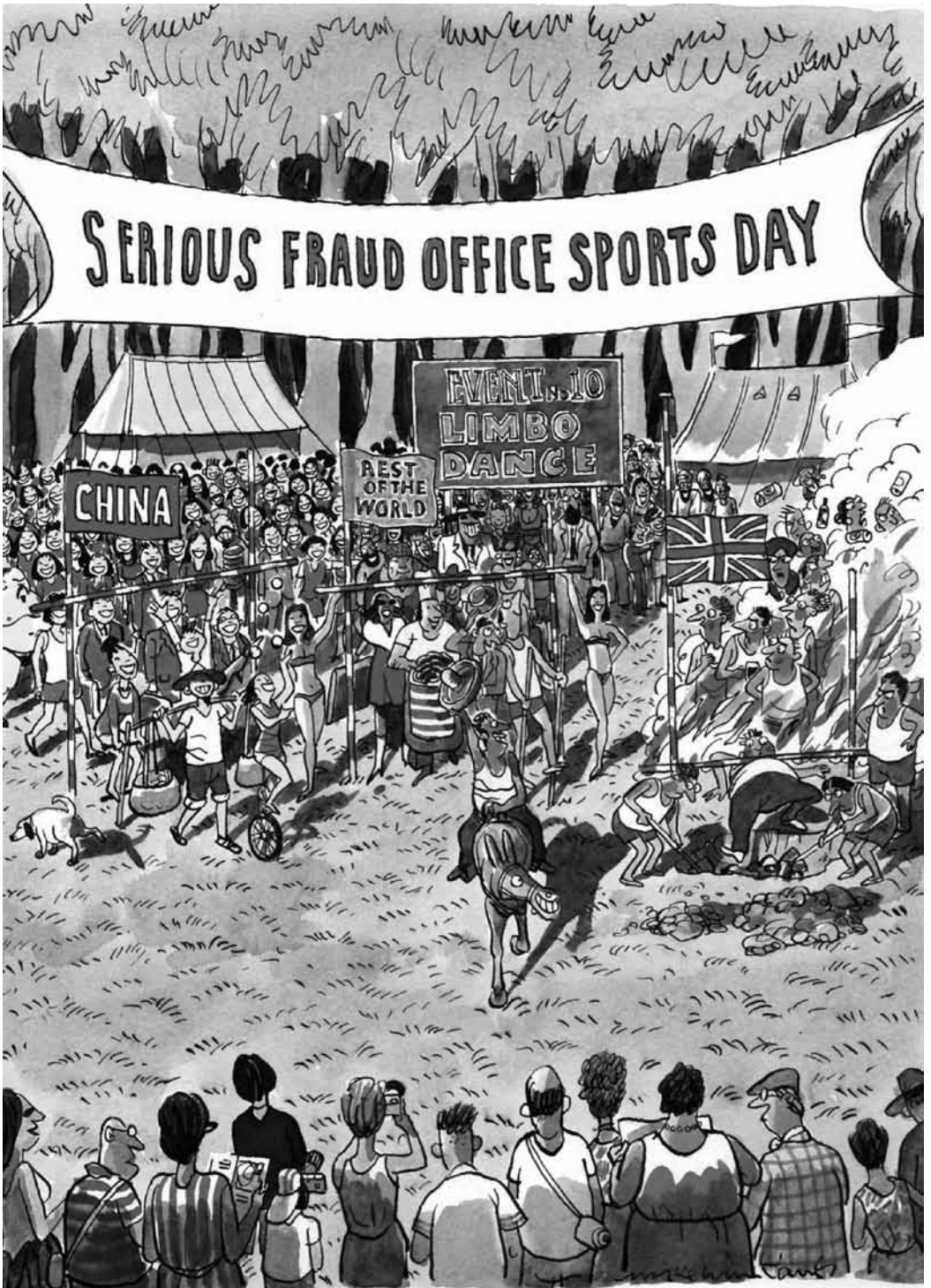
¹¹ It should be noted, however, that not all politicians, regulators, academics, etc., or even lawyers and investigators are in the Cottage Industry, nor is any impropriety alleged. However, 'never ask a Barber if you need a hair cut'.



'I'm telling you Comer, that dog is performing ser vices on your behalf'



'He's so pleased it's qualified as an offset project'



'Typical of the bloody Brits. Always have to make it more difficult than it is, hoping that others will follow Which of course they don't'

Introduction

This book, which is about corruption rather than just bribery, is unavoidably long, detailed and possibly disputatious because it takes an assertive, managerial - rather than a timorous legalistic - approach to both. It is based on the principle that regulators do not run businesses and is intended mainly for commercial managers who do. It contains more detail than ordinarily would be the case, to explain some of the things not emphasised by the Cottage Industry (see Foreword), but which are very important from a managerial perspective.

It is based on the principle that companies have both the right and the obligation to manage their affairs, effectively and honestly while putting compliance in context.

The balance – if not conflict – between compliance and entrepreneurship is typically represented in Figure 1.1.

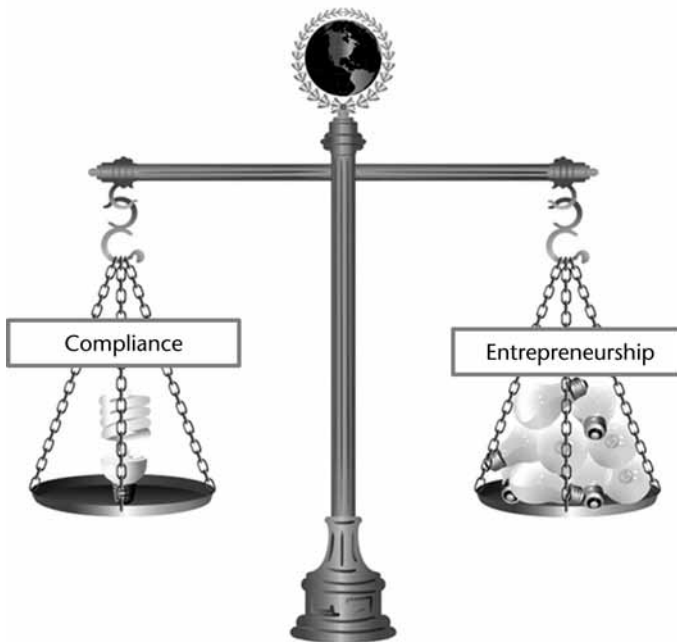


Figure 1.1 Typical Representation of the Balance between Entrepreneurship and Compliance

In fact, there is no conflict and the objectives of entrepreneurship and compliance should be fully aligned, as represented in Figure 1.2:

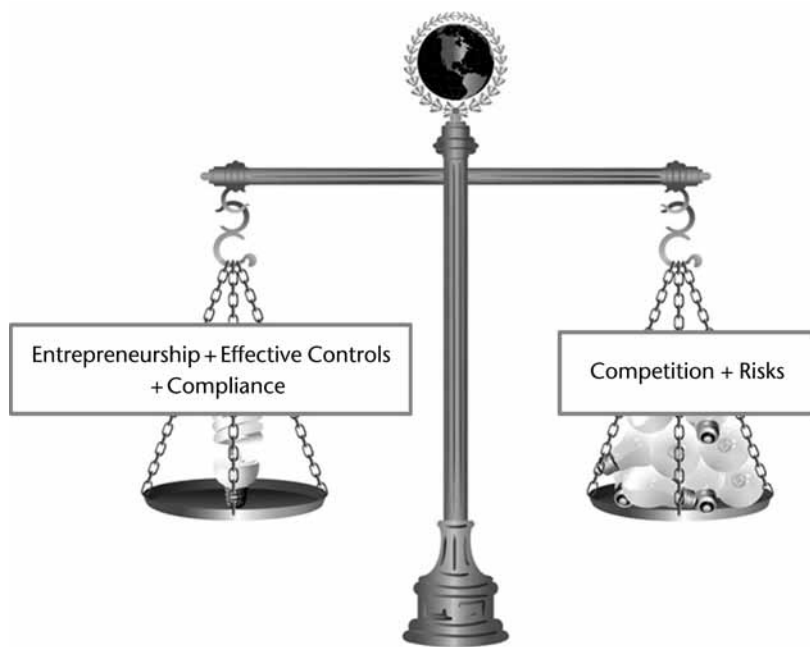


Figure 1.2 The True Relationship between Entrepreneurship and Compliance

Effective controls are not a brake on a company's performance but rather the essential equipment that empowers it to go faster and further in safety and to participate assuredly in markets perceived by others as too difficult. Effective controls provide opportunities and competitive advantages.

This book suggests more effective and realistic solutions based on four axioms:

1. **Concentrate on discrete contexts** in which corrupt decisions are taken.
2. **'Perform on principle'**, assert the right to take decisions and defend them with determination. Aim for 'Inspired Integrity' and not just compliance,
3. **'Be the first to know'** that things might be going wrong and deal with them.
4. **'Be an impeccable and profitable corporate citizen'** and a very hard target.

The emphasis is on 'profitable'. It is central to the recommendations in this book and so is creating happy working environments in which prudent trust is nurtured.

Against this background, despite all of its limitations and associated political posturing, the Bribery Act 2010¹ should be manageable for good companies. That is, providing they do not sit frozen in the headlights waiting for honest decisions to be second-guessed.

¹ Available at: <http://www.legislation.gov.uk/ukpga/2010/23/contents> (accessed 7 November 2012).

Proving that intent was demonstrably innocent and decisions were honestly taken is one of the most important concepts in this book. It is the most solid and fail-safe defence to all offences under the Act and even more importantly it saves serious money

The Importance of Frames and Framing

Communication between people involves framing. Frames embody the social, ethical and other parameters in which dialogue takes place. In 2009 Jim A. Kuypers² published research which concluded 'framing is a process whereby communicators, consciously or unconsciously, act to construct a point of view that encourages the facts of a given situation to be interpreted by others in a particular manner'.

The War On Terror

The attacks on the New York, Twin Towers of 11 September 2001 were initially framed as crimes against humanity. This framing was quickly replaced and the reaction classified as a 'war on terror', thereby justifying a military response.

Global Warming

The hypothetical catastrophic deterioration of the planet's climate was framed as 'global warming' until it became obvious that there has been no increase in temperatures since 1995. Then the framing had to be switched³ to 'climate change' so that citizens would support emissions reductions measures and not question escalating energy costs.

Cash For Access

Regulators have made it clear that if a business pays to arrange a meeting with a foreign government official, it will be regarded as 'bribery'. Paying £50,000 for a dinner place with the Prime Minister at Conservative Central Office is framed as 'lobbying' and is therefore acceptable.

False framing is an essential element of both deception and politics. People tend to accept the frames presented to, or imposed upon them and this is certainly true of

² Associate Professor in the Department of Communications at Virginia Tech, Blacksburg, VA.

³ This should provoke the question: 'if global warming is not the cause of climate change: what is?' If you get a sensible answer, please contact wwwinfo@cobasco.com.

corruption and bribery. One of the most serious framing mistakes is the classification of countries based on Transparency International's Corruption Perceptions Index.⁴ It leads to inaccurate risk assessment, unjustified relaxation in contexts that are unsafe and, worse still, sets up an expectation that skulduggery is inevitable.

Framing of the UK Bribery Act

The Bribery Act 2010 was framed as essential to bring the UK's 'antiquated laws' (from 1889, 1906 and 1916) up to date, to comply with pressure from the Organisation for Economic Cooperation and Development (OECD) and to show that Britain - with its stereotypical stiff upper lip - sets an example for others to follow.

Digging the Same Hole Deeper

Political and regulatory posturing over the Act is at best dubious. Both the present and current Attorney Generals confirmed that the UK has always been compliant with its OECD obligations.

The reality is:

- UK anti-corruption laws were updated by the Anti-Terrorism Crime and Security Act 2001 and were thus not 'antiquated'. These complied with the OECD Convention on the Bribery of Foreign Public Officials in International Business Transactions.⁵
- Although the UK ratified the OECD Convention it was never incorporated into its statutes, meaning that there was, and still is, no obligation to comply.

Too Close for Comfort

In fact the UK specifically opted out of Article 15 of the Council of Europe Convention on Corruption because politicians did not like the idea of legislating against trading in influence, which would have severely constrained political skulduggery.

The fact that the new laws are framed around the word 'bribery' (when all previous legislation was about corruption) shows how the undoubted evil has been narrowed to

⁴ For a discussion of Transparency International see pages 229-32; for the Corruptions Perceptions Index, see <http://www.transparency.org/research/cpi/overview> (accessed 6 November 2012).

⁵ Routinely extended and reframed to become The OECD Convention on Corruption: which it is NOT

avoid dealing with controversies such as trading in influence, political funding, granting of honours and privileges and, of course, the old chestnut of parliamentary privilege.

Politicians Were the Laughing Stock

The way the Blair and Brown governments reacted to the British Aerospace (BAE) investigation and the release of the Lockerbie bomber (most likely in exchange for Libyan oil concessions) made the UK a laughing stock.

Most exclusions under the Bribery Act favour politicians and civil servants. This bias is referred to in this book as 'Animal Farm'.

Letting Civil Servants Off The Hook

Under the old Prevention of Corruption Act the burden fell on public officials to prove that any potentially questionable benefit they received was not corrupt. This very important tool in the fight against public corruption has disappeared from the Bribery Act.

The Blair-Brown Labour government in its last days before losing power rushed through the Bribery Act 2010 based on false framing.⁶ The offences were then narrowed even further so that the corporate bribe payer is to be punished far more severely than the organisation that did nothing to prevent extortion. Yet extortion is the driving force in most cases.

Just Like Unwanted Teenage Pregnancies

In the field of unwanted teenage pregnancies, the lopsided Section 7 offence of the UK Bribery Act is like holding the boy's parents corporately and absolutely liable for their son's bunga bunga while absolving the girl's mother and father entirely.

⁶ The government had the habit of 'buying the bad news' on corruption reform. ATCSA was buried in the post 9/11 horrors and framed an anti-terrorism measure. The Bribery Act was buried in the clamour of MPs to get back to their constituencies to fight the General Election.

The outcome is that government agencies – which are magnets for incoming corruption – are absolved from corporate liability even if their procedures are woefully inadequate and they condone or consent in bribe receipt.⁷

Another interesting point on the George Orwell⁸ front is the apparent lack of interest by the Serious Fraud Office (SFO) and other agencies in using their powers under the Proceeds of Crime Act (see page 185) to expose politicians, government and business extorters whose excessive personal wealth is a good indication of bribes receipt (see page 463) or other skulduggery. This is a great opportunity missed by regulators because each extorter who is exposed could identify multiple corporate bribe payers, leading to nifty Section 7 settlements. So why don't they do it?⁹

The Nature of Corruption

Bribe payment can be concealed in the books of the coercer in thousands of ways (see pages 299–300) but extorters hold two very visible and ugly babies. The first are the perverted decisions leading to improper performance; the second are signs of excessive wealth. If the SFO were to focus on these, using its powers under Part 5 of the Proceeds of Crime Act 2008, it would quickly expose extorters and thereby coercers. The rule in fraud and corruption is to 'follow the money'.

A really positive aspect of the Bribery Act, which has escaped the attention deserved, is that it potentially¹⁰ criminalises what is referred to in this book as 'internal corruption', in addition to the more conventional outgoing and incoming variety. The typical collusive relationship is between a coercer and an extorter, as shown in Figure 1.3.

From the coercer's position, the corruption is 'outgoing'. In return for an advantage he provides the extorter takes a perverted decision and thereby acts improperly. From the position of the organisation associated with the extorter the corruption is 'incoming'. With 'internal corruption' (Figure 1.4), the financial or other advantage, as well as the perverted decision and improper performance, are within the same organisation.

The following hypothetical case illustrates the nature of internal corruption and the possible offences against the Bribery Act:

7 However, if a directing mind is an active participant the organisation could be corporately liable under Section 2. But it is unlikely ever to be corporately prosecuted.

8 Author of *Animal Farm* for ignoramuses.

9 Because they do not want to chase after extorters, especially if they are politicians or government officials.

10 Whether it will be enforced is a different matter.

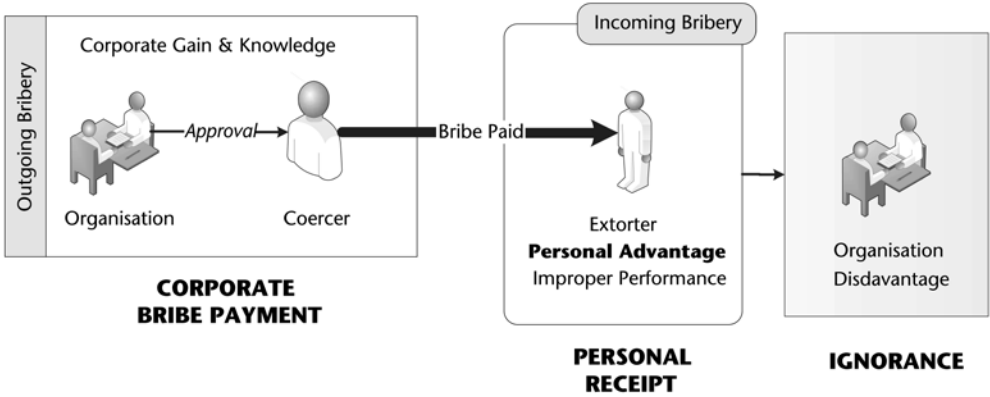


Figure 1.3 Typical Corrupt Relationship

In a typical corrupt transaction the bribe payer (or coercer) acts on behalf of an organisation, intending that it should gain. His dishonesty is usually organisationally condoned. The receiver (or extorter) is induced by a financial or other advantage to perform improperly. His dishonesty typically results in a disadvantage for the organisation he represents and is organisationally concealed.

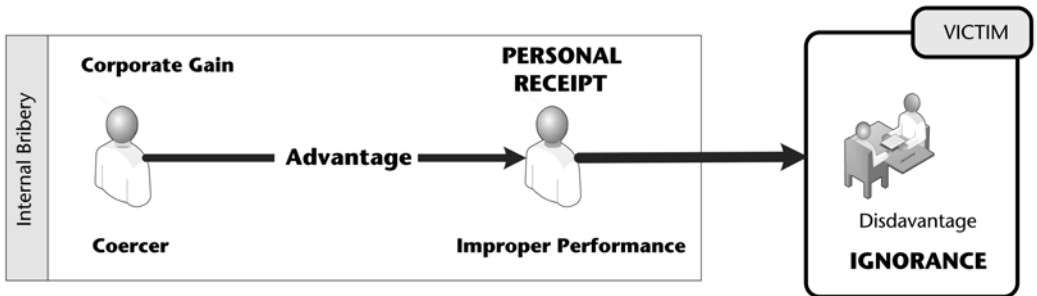


Figure 1.4 The Effect of Internal Corruption

In internal corruption one associate of an organisation offers an advantage to a decision-making or outward-facing colleague to perform improperly. This results in an innocent party (normally external but also possibly internal) being disadvantaged.

Leery Bank Inc.

Sam Slime is a Senior Vice President of Leery Bank Inc. He instructs his salesmen to mislead clients into buying shares in XYZ plc. which the bank knows are heading south and are being sold short by its investment arm. Gerald Good, one of the better salesmen, asks Sam whether doing this is ethical and Sam responds: 'If you want your bonus, get on with it and don't ask too many questions. If you sell this junk to pensioners they will be dead before they find out'. Gerald, laughs out loud and sells like there is no tomorrow.

Although it is unlikely that the skulduggery would amount to a criminal offence under the Fraud Act, there are potential breaches of the Bribery Act: Section 1 (by Sam: offering an advantage to induce Gerald's improper performance), Section 2 (by Gerald: performing improperly) and Section 7 (by the company: inadequate procedures to prevent a Section 1 offence).

Solutions to bribery¹¹ have been framed almost entirely in a legal context, especially the requirement to prove adequate procedures to defend a charge under Section 7 of the Act. The *legal* emphasis is on box-ticking paper trails to prove - after the event - that procedures should have been adequate to prevent bribe payment, rather than optimising *management* controls to anticipate and eliminate all forms of corruption. Figure 1.5 represents the difference:

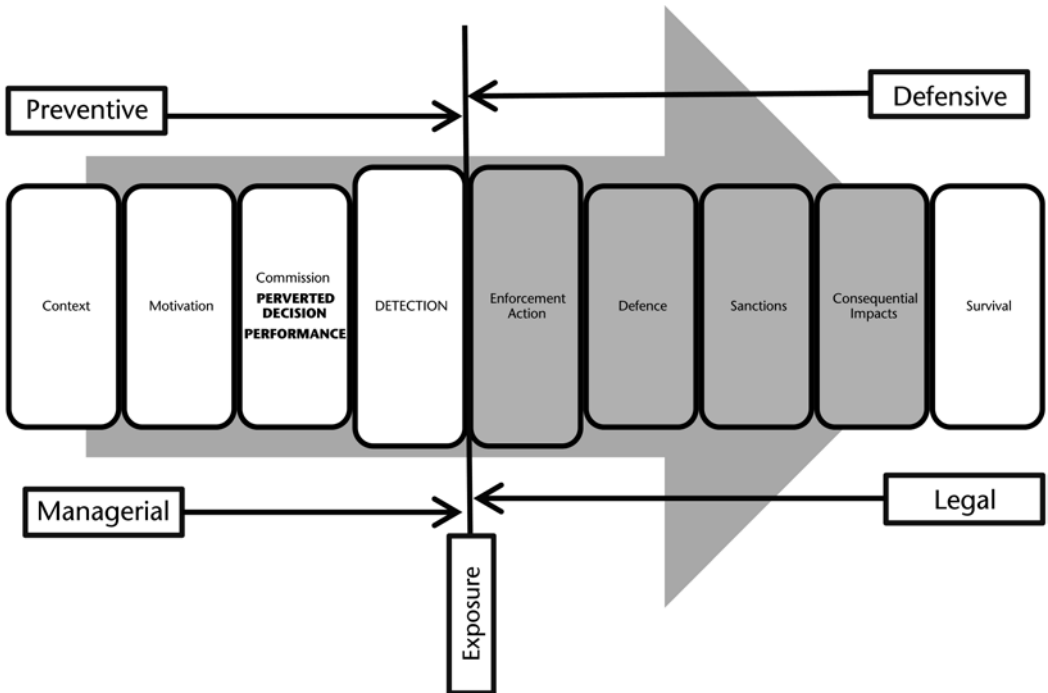


Figure 1.5 Reaction to the Bribery Act

The usual legal approach to the Bribery Act starts with the assumption that controls have failed and aims at constructing a defence of adequate procedures: it is essentially backward-looking. Managerial solutions should be inspirational and persuasive, preventative and forward-looking. There is a big difference.

¹¹ But not corruption.

Companies should plan for 'Inspired Integrity' involving controls that maximise profitability by eliminating or reducing fraud and incoming, internal, outgoing and competitive corruption. This is achieved through management and psychological tools rather than only through legal diktats and box-ticking, as discussed in Chapters 23-33.

The Blind Leading the Sighted

Compliance is a demeaning word, implying that someone has to be led by the nose by another who believes he knows better into doing something he would otherwise not do. It makes the false assumption that those doing the leading know more than those being led.

Putting Politicians in Charge

It is difficult to identify a single example of politicians having been put in charge of a commercially inclined project that has not failed through rampant fraud, corruption and abuse. Examples include the administration of the European Union (EU), the United Nations (UN) – including such projects as Oil for Food or the United Nations Framework Convention on Climate Change (UNFCCC) – and overseas development aid.

Few political leaders, regulators and commentators have ever had to manage a Balance Sheet and, as a consequence, they misunderstand the nature of business. Please consider how many of the immediate past Labour Government or the current coalition has ever held down a job in the real world. How many have ever had to confront extortion by a foreign public official (FPO) or try and sell into a market where bribes are demanded? It is no different from Trappist monks advising on better orgasms: it is all theoretical and up in the air.

About This Book

OBJECTIVES

The recommendations made in this book should help companies:

- Maximise their profitability and entrepreneurial flexibility while surpassing compliance standards through a campaign of inspired integrity;
- Maintain effective controls, based on more accurate risk evaluation, empowering them to operate safely in high-risk contexts and thereby gain a competitive advantage;

- Prevent and recover losses and minimise regulatory exposures from outgoing, incoming, internal and competitive corruption;
- Enjoy life and be happy.¹²

The word ‘compliance’ is used sparingly throughout. It is replaced by ‘integrity’ and ‘assurance’: two alternatives that reflect the principle that most managers do not need to be led, treated like idiots or coerced into submission. Similarly, the word ‘corruption’ is used to frame real-world problems, while the word ‘bribery’ is used to refer to the much narrower political and regulatory focus. Watch how often politicians use the two words interchangeably. They are not the same, as Kenneth Mutt explained in the Foreword, but are confused to allow the laws to be expansively interpreted.

A Convention That Doesn’t Exist

At a conference in the spring of 2012 the author asked delegates who were aware of the ‘OECD Convention on Corruption’ to put up their hands and virtually all did. It was a trick question, because there is no such thing. The OECD Convention is on the ‘Prevention of Bribery of Foreign Public Officials in International Business Transactions’, which is a much narrower frame. Yet people repeatedly run ahead of a noble cause and expansively interpret.

This book frames controls as they should be, positively

STRUCTURE OF THE BOOK

Chapters 2-4 attempt to set out the background to the Act and what it means in working terms. It is based on a chronological forensic linguistic analysis – indexing and lemmatising – of around two million words in the Act itself, official and other guidance, Law Commission and Joint Parliamentary reports, speeches by the SFO, Ministry of Justice and others.¹³

Chapters 10-13 analyse the taxonomy of corruption in mature and developing economies. Recommendations in Chapters 21-37 are intended to help companies deal with incoming, outgoing and competitive corruption, based on what happens in the real world rather than on political dogma, academic perceptions or reframing of corruption as bribery to suit the narrow political agenda of throwing the entire burden on businesses.

Most chapters include a number of principles, surrounded by practitioner level detail. For convenience, the masculine pronouns ‘he’, ‘him’ and ‘his’ have been used throughout. Hopefully this will not shock too many people, but if it does an electronic version can be made available so that those offended by such things can globally replace politically horrifying pronouns with alternatives that give them more pleasure.

¹² Not words normally associated with compliance, but a valid objective and achievable (see Chapter 23).

¹³ A CD containing this analysis is available from wwwinfo@cobasco.com.

Misconceptions

AN EARLY POINT

The book discusses - and gives examples of - many contexts where politicians and regulators have misunderstood the taxonomy of corruption and the consequences of their doing so. There is one that is so fundamental that it should be mentioned at an early stage, to set the frame. It is the fixation on bribery by companies from developed countries in foreign lands.

This problem has been hyperbolised as rapacious companies from developed nations exploiting innocent - if not near-saintly - indigens and has been overstated well beyond its importance. This results in risks that are much closer to home being ignored, box-ticking on due diligence based on perceived country risks, unwarranted stigmatisation and genuine commercial opportunities being disregarded.

Political Skills

One of the greatest political skills is to be able to claim credit for a noble cause while making sure someone else has to do the work. This is one reason why foreign corruption is a British political priority and why Kenneth Clarke was the Anti-bribery champion, but only for overseas.

Repeatedly in the corruption field, politicians and regulators endorse generalisations, stereotypes, not to mention red flags, that on one hand oversimplify the problem and on the other allow sweeping conclusions to be drawn over controls that are supposedly effective, but which are mostly cosmetic. The outcome is that country or sectorial risks, culture and tone from the top are all officially promoted as determinative, which they are not. Corruption appears in specific contexts: one size does not fit all and it takes place right under our noses. What's more, the division between public and private sector corruption is meaningless and the greatest risks arise when their interests collide.

NOT JUST LESS DEVELOPED COUNTRIES

Corruption is not confined to those Less Developed Countries (LDCs) that are perceived to be the most crooked; and there are no such things as 'demand-side' or 'supply-side' countries, nor is there active and passive bribery. The reality is that every country is both the victim and perpetrator of corruption and extorters and coerers are equally at fault.

It is highly unlikely that corruption in the UK, France, the USA, Italy and the EU is any less than in countries such as Nigeria, Indonesia or Mexico. It is just different.

Is the UK a Supply-side Country?

The UK is classified by Transparency International (see pages 2–9 and 58–9) and its followers as a supply-side country. But the fact is that, like all other countries, it is both demand and supply. The misclassification results in extortion of British politicians, academics, and businessmen dropping off the regulatory radar.

Political and Official Corruption

Entrepreneurial leaders in LDCs generally want their cash immediately or even up front, whereas their more sophisticated brethren delay collecting their rewards until they revolve out. It is the difference between President Mubarak and Prime Minister Blair or Al Gore.

The higher the level politicians can reach and the longer they can stay in power, the more marketable they become in the afterlife. For some, preparation means grabbing and retaining power at all costs, forming alliances and taking decisions with longer-term personal objectives in mind. It is difficult to see any significant difference between the more blatant shenanigans by leaders in LDCs and the subtlety in developed nations. Both pervert the governmental process and enrich politicians. The only real difference is in timing.

Similarly, an official's importance in service as well as his revolving door marketability depends on how significant his portfolio is perceived to be. The more dramatic and important he can make it, the more funding is allocated and the more attractive he becomes when he passes through the revolving door. These are powerful incentives for politicians and officials to empire-build and – as Ali G would say – to 'big it up' and to build relationships that can be rewarded later.¹⁴

Some, if not many, readers will dispute the suggestion of equality of corruption levels in developed countries and LDCs and this is understandable because it conflicts with accepted framing. But the suggestion may prompt fresh thinking and the conclusion that:

- Corruption in LDCs is principally internal (Figure 1.6) and is one of a number of other much more serious evils.

¹⁴ In fairness, it must be said that there are also many (maybe even the majority) of officials and regulators who behave impeccably and to whom the above comments do not apply

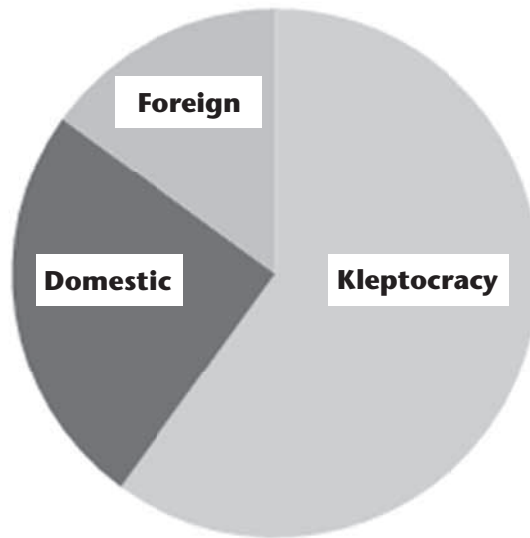


Figure 1.6 Putting Supply-side Corruption into Context¹⁵

The most devastating problem in LDCs is not corruption by companies from developed nations. The risks discussed on pages 247 et seq are far more withering, but are not dealt with because they cannot be ‘punished’ by a stealth tax on businesses.

- If companies from developed countries were to withdraw from markets perceived to be corrupt the floodgates would open for even more skulduggery; corrupt local companies, as well as those from countries that don’t give a hoot about ethics, would have a free run.
- Corruption is a minor contributor to financial and social devastation in LDCs. It vaporises into insignificance against the evils of overpopulation, kleptocracy, looting, expropriation, rent-seeking, civil wars, tribal and religious conflict, natural disasters, ethnic cleansing, electoral fraud, extortion and theft of foreign aid. Of course, none of these can be blamed on rapacious Western companies and thus fall off the regulatory radar.
- Corruption in developed economies is just as bad; just more subtle.

Figure 1.7 represents the position suggested. A senior marketing manager commented on the difference between LDC and the UK as follows:

In some countries you may succeed with a few transactions by being – let’s say – flexible. In the UK it is almost impossible to break into the closed shop because relationships are permanent. What with cronyism, patronage, freemasonry, old boy’s networks, revolving doors, referral fees, political influence and whatever we have no chance. If you are not part of the ‘in crowd’, you are in the ‘out crowd’. In most cases, now, we don’t even bother bidding for business with UK government or large companies and the EU is even worse.

¹⁵ Based on the authors’ best guess but with 40 years of experience!

Africa's Bane: Tax Havens, Capital Flight and The Corruption Interface¹⁷

This brilliant 2009 report by John Christensen, for Real Instituto Elcano, continues in a similar vein: 'it is disturbing, to put it mildly, that the prevailing corruption discourse remains largely focused on pointing fingers at petty officials and ruling kleptomaniacs':

Regrettably, Transparency International, despite its commendable role in putting corruption on the political agenda, has undermined the efforts of reformers through its publication of the Corruption Perception Index, which reinforces stereotypical perceptions about the geography of corruption.... A more critical examination of the index reveals that over half of the countries identified by the CPI in 2007 as 'least corrupt' are tax havens, including major centres such as Singapore, The Netherlands, Switzerland, the UK Luxembourg and Hong Kong.

CORRUPTION IS A COMPLEX WEB

Corruption is a complex web involving primarily:

- International politicians and organisations such as the UN, the EU, the World Bank and its correspondents;
- National politicians in developed and LDCs;
- Civil servants;
- Non-governmental organisations and charities;
- Academics and research establishments;
- Businesses.

Each group has its own agenda and, within specific contexts, may be an extorter or a coerced. Table 1.1 is the authors' best guess ¹⁸ of the relative seriousness of the web of *corruption* on the baseline of 100 for *bribery* by companies from developed countries into foreign markets.

¹⁷ Available online at: http://www.realinstitutoelcano.org/wps/portal/rielcano_eng/Content?WCM_GLOBAL_CONTEXT=/Elcano_in/Zonas_in/Sub-Saharan+Africa/DT1-2009 (accessed 14 October 2012).

¹⁸ Abridged to fit into one table.

Table 1.1 Best Guess of the Web of International Corruption

COERCERS Bribe Payers ↓↓ ↓ ↓ ↓ ↓ ↓ ↓		EXTORTERS								
		International organisations	Politicians developed countries	Politicians LDC	Officials in developed countries	Officials in LDCs	NGOs and charities	Academic and research	Businesses in developed countries	Businesses in LDCs
COERCERS	International organisations, etc.		80	100	80	100	80	120	50	100
	Politicians in developed countries	80	80	120	120	120	100	120	50	50
	Politicians in LDCs	120	80	120	50	150	150	100	100	150
	Officials in developed countries		50	60	80	100	100	120	100	100
	Officials in LDCs	60	80	100	100	150	120	100	200	200
	NGOs and charities	80	80	120	80	120		100		
	Academics and research	80	100	100	120	120	100	150	80	80
	Businesses in developed countries →	80	150	100§	120	100§	50	100	120	100§
	Businesses in LDCs	100	80	200	100	300	20	50	200	300

Table 1.1 is based on over 40 years' experience of working inside government agencies and companies in developed countries and LDCs, but is not proposed other than as a best guess. It highlights the complex web,¹⁹ suggesting that corruption in LDCs is largely indigenous. It also suggests that for some companies, corruption in their home markets is no better than overseas. Finally, it indicates that government officials are the most prevalent extorters, both in developed countries and LDCs.

CULTURE AND TONE FROM THE TOP

There should be no serious dispute that different historical, cultural, ethical and other factors are influential (though far from determinative) in the levels of corruption in a country, region or, more accurately a context, but it is quite wrong to attach - as Transparency International does - supposedly precise indices to them.²⁰

19 And the over-simplification of demand and supply sides or active and passive bribery.

20 As is the case with Transparency International's Corruption Perceptions Index (see Note 3).

Different Ethical Standards

Countries in some Gulf states take a more relaxed position to commissions and conflicts of interest than in the West. They are also usually against investigations, litigation and prosecution. That is their tradition and who are we to say it is wrong? The problem crystallises when Western companies open businesses there, because cultures conflict and must be reconciled internally – and in specific contexts – to ensure that controls are maintained.²¹

Stereotyping is also unfair and probably self-fulfilling, because expectations may be created that corruption is the norm.

Bribes'R'Us

Some countries might consider putting a positive spin on the Corruption Perceptions Index by advertising that 'Bribes'R'Us' because that is what the index implies.

Corruption usually takes place at a personal, secret level and is negotiated through a one-to-one dialogue, often initiated by the extorter or endemic in the specific context concerned.

Examples of Extortion and Innocent Indigens

As soon as an expat manager arrived to take up a position in a foreign country, the priority of local subordinates was to, as they laughed, 'bed him in'. This meant compromising him sexually, financially or otherwise, so that he was malleable. So much for corruption being an evil imported into LDCs!

In developed countries blatant extortion is accepted as the norm. For example, what is the difference between the London Underground drivers threatening to go on strike – for contrived reasons – during the Olympics (unless they are paid a bonus) and a corrupt FPO extorting a bribe? Extortion is also a factor in many Employment Tribunal cases, based on concocted allegations of racial or other discrimination. In developed countries extortion is decriminalised, if not the norm, and what's more, we accept it.

²¹ Chapter 23 makes suggestions on this point.



Figure 1.8 Initiation of Corrupt Relationships

Figure 1.8 represents the authors' best guess and suggests that extortion is the most important driver of corruption.

The examples confirm that extortion is the driving force in most perverted decisions, but there are subtle differences between the way the wickedness appears in developed countries and LDCs. In the latter, extortion seems to be more individualistic: such as the bent customs officer wanting cash for himself to remove an obstacle he has contrived to detain a cargo. In fact, as explained in Chapter 31, this is seldom the case but it is essentially institutional, possibly backed by organised crime, but covert. In developed countries the extortion is more often overt and justified by a 'Dodgy Dossier'²² or some other plausible justification. It is organisational, with payment being made to a collective.

It is also usual²³ that in cases of *gross bribery*, the extorter's share of the spoils in LDCs is proportionately higher and in the case of kleptocratic politicians may be 80–95 per cent of the loss-gain in the transaction concerned. In developed countries the extorter's share tends to be proportionately less and is typically in the range of 5 per cent to 15 per cent.

In any event, corruption is context-dependent rather than nationally dependent. At the specific point of collusion, cultural, traditional and other factors do not enter into the equation, although one of two conditions may apply. The first is deep personal integrity, inner values and principles. Because of these values, corruption is rejected by one or both parties. It is the perfect solution and occurs far more often than regulators might imagine. However, honesty cannot be taken for granted and is situational: meaning it depends on the context.

²² More about these on page 244.

²³ In the authors' experience of working inside and outside overseas revenue and other agencies.

Values and Principles

These mean that honest behaviour is assured even when no one is looking,²⁴ or where there is no chance of exposure. It is the difference between stroking Granny's cat when she is watching and kicking its ass when her back is turned.

The second condition is where a person refuses to participate in a corrupt transaction, usually because he:

- Does not trust the potential collaborator: possibly because he fears he is walking into a trap;²⁵
- Wants a larger share of the benefits;
- Fears the dishonesty will be exposed.

Experience suggests that fraudsters and corrupters - at the point of colluding - are not normally deterred by thoughts of punishment²⁶ There is virtually no deterrent for extorters or their associated organisations (usually government agencies) whose controls are so poor and managers so disconnected that corruption is encouraged. But again, it is all about context.

Things That Are KNOWN about Corruption

NO ONE REALLY KNOWS

No one knows how bad corruption is today; although the authors' best guess is that in the UK and equivalent economies it costs at least 10 per cent of Gross National Product (GNP), primarily through procurement overcharged or dishonestly diverted in pursuit of a noble cause.

Some things are known about corruption with reasonable certainty:

- The majority of corruption cases are not reported and are therefore excluded from official statistics.
- It is not the large spectacular cases that are the problem, but rather the relentless erosion of profits and integrity on a daily basis.
- There is no correlation between the size of an improper advantage given and the resulting profit and loss. Small bribes may result in massive losses and vice versa.

²⁴ Known as the 'Hawthorne bias'.

²⁵ This is one reason why pretext and undercover investigations (see Chapter 9) are important.

²⁶ However fear of detection should be emphasised and is one reason why audit and similar programmes should be given a high profile (see Chapter 18 et seq).

- Corruption is most often originated by extorters. They are honeypots to multiple coercers.²⁷
- The most persistent and costly extorters are politicians and officials.
- Some companies are much more submissive in the face of extortion than others and are equally as corrupt in their home markets as they are overseas: for this reason the mandatory and permanent debarment of offenders should be enforced; subject only to the precondition that the extorter is also brought to justice.²⁸ Offenders should not be able to buy their way out of trouble.
- Gross corruption is normally associated with a noble cause, with skulduggery extending from top to bottom.
- For every corrupt gain there is an equal loss: for every winner there is a loser and for every coerced an extorter. To this extent corruption is a zero sum game.
- In every case of corruption there is a perverted decision.
- Perverted decisions result from misunderstanding, error, fraud or corruption: best guessed as shown in Figure 1.9.

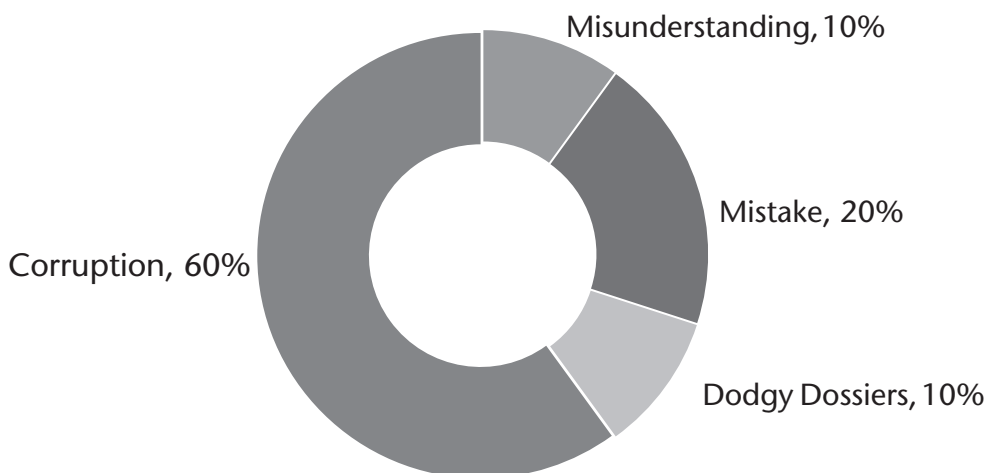


Figure 1.9 Causes of Perverted Decisions

Figure 1.9 suggests that the main cause of perverted decisions (that result in obscene profits or exceptional losses) is corruption and that around 10 per cent of cases are supported by a dodgy dossier, which may itself have been improperly influenced or financed.

- The more bureaucratic a decision-making process is, the more likely it is to be attacked by corruption: thus excessive bureaucracy incites collusion.
- Perverted decisions in sophisticated contexts are usually supported by supposedly convincing evidence; such as dodgy dossiers on a noble cause.

²⁷ This is another reason why more attention should be paid to supply-side countries.

²⁸ This approach would be a powerful deterrent and a powerful incentive for the SFO to ensure that extorters were prosecuted.

Given the above, it is possible to get a fair idea of the scale of corruption in developed countries from:

- Exceptional losses;
- Obscene profits;
- Pursuit of a noble cause.

In LDCs, also, exceptional losses and obscene profits are also a common indicator of corruption and are often further reinforced by displays of excessive personal wealth by political and governmental leaders. Leaders in developed countries are usually more careful.²⁹

SOURCES OF ADDITIONAL AND RELIABLE INFORMATION

Reports by Transparency International, the US Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) are useful background but they are limited because they only relate to overseas bribery of FPOs. There are no consolidated references on corruption in the private sector

However, one of the most reliable and extensive sources of corporate skulduggery³⁰ in developed economies is the Tax Payers Against Fraud (TAF) website³¹ which collates all DOJ sanctions under the Fair Claims Act (FCA). This Act is meant to deter and punish overcharging on US Government procurement contracts and has been very successful, mainly because it pays whistle-blowers (called 'relators') an average of 17 per cent of all recoveries made and penalties paid. The largest single reward - paid to an individual and his lawyers - is believed to be in excess of \$100 million!³² Unsurprisingly such bounties have prompted law firms to pursue claims on contingency fees, thereby making the FCA probably the most powerfully enforced anti-fraud law in the world. Its limitation is that it applies only to skulduggery against the US Federal Government by public companies.

Another very important source of information is the Federal Contractor Misconduct Database,³³ which sets out massive procurement overcharging, again by federal contractors.

EXCEPTIONAL LOSSES IN THE USA

The TAF website sets out details of hundreds of cases over the past years and in 2011 alone 105 separate enforcement actions were concluded, including the blue-chip companies named in Table 1.2.

²⁹ Although few can resist spiffy shoes (see page 426, footnote 20).

³⁰ But not referenced by corruption academics.

³¹ See <http://www.taf.org> (accessed 6 November 2012).

³² So much for whistle-blowers having a hard time.

³³ See POGO (Project on Government Oversight; available at: <http://www.contractormisconduct.org/> (accessed 14 October 2012)).

Table 1.2 FCA Penalties in 2011. These are all leading companies!!

No.	Company	Penalty US\$	Nature of Fraud
1	GlaxoSmithKline	600,000,000	Adulterated drugs: quality
2	Abbot Laboratories Inc.	421,000,000	Price inflation
4	Quest Diagnostics	241,000,000	Price inflation
9	Verizon Communications	93,525,411	Overcharge on voice and data services
11	Fresenius Medical Care	82,600,000	Fraudulent overbilling
14	AstraZeneca Pharmaceuticals	68,500,000	Off-label marketing
15	Sandoz Inc.	66,000,000	Over charges to Medicaid
17	Accenture LLP	63,675,000	Overcharging on IT contracts
21	Oracle America Inc.	46,000,000	Violations of the Anti-kickback Act on referral fees
24	GlaxoSmithKline	40,750,000	Failure to comply with manufacturing guidelines
30	Blue Cross Blue Shield (Illinois)	25,000,000	Fraudulently accounted for Medicaid programmes
36	BP Amoco (ex-Amoco)	20,500,000	And the payment of royalties on gas extractions
42	Hewlett Packard Corp.	16,250,000	Violated competitive bidding rules
54	Securitas GmbH	9,100,000	Charged for guarding hours not worked
57	Fed Ex	8,000,000	Misused security delay codes
74	Flour Hanford Inc.	4,000,000	False claims and kickbacks (radioactive waste)
91	Shell Oil Company	2,200,000	Underpaid royalties on natural gas extractions

Almost all of the pharmaceutical cases related to overcharging Medicare and Medicaid.³⁴

By March 2012 there was a further \$9 billion worth of claims in the pipeline, including one of \$70 million against New York City for overcharging the US Federal Government; an \$830 million claim against Allied Home Mortgage Capital Corporation in relation to false insurance claims and defaulting home loans; \$1 billion against Bank of America; and another of \$2 million against Oracle for alleged price-gauging.

The five largest claims over the past few years are shown in Table 1.3.

³⁴ Medicare is a national social insurance programme, federally administered, that guarantees access to health insurance for citizens over 65 years of age and to younger people with disabilities. The budget for Medicare was reported at \$523 billion in 2010. Medicaid is a means-tested programme for low-income families and is jointly funded by federal and state authorities.

Table 1.3 Top Five Claims Under Fair Claims Act

No.	Company	Penalty US\$	Nature of Fraud
1	Pfizer	2,300,000,000	Off-label marketing
2	Tenet Healthcare	900,000,000	Kickbacks and overcharging
3	The Healthcare Company	731,400,000	Unlawful billing practices
4	Merck	650,000,000	Kickbacks and pricing
5	The Healthcare Company	631,000,000	False claims to Medicare

There are some important points to note about all of the above cases:

- The companies are regarded as ethical, with impressive business integrity policies, heavyweight compliance and legal departments: most were regulated by the SEC.
- The number of repeat offenders suggests that lessons are not quickly learned and that dishonesty is deeply ingrained.
- Every case involved collusion and internal corruption.
- The companies were clearly willing to defraud the federal government in one of the most regulated economies in the world.

The above raises two questions. The first is to ask what the offenders might do in commercial markets that are not so well regulated. The second is why none of the employees in the government organisations who were involved in or condoned fraud or who were negligent were as far as is known not prosecuted.

EXCEPTIONAL LOSSES IN DEVELOPED COUNTRIES

Procurement overcharging

The UK has no similar process to the US False Claims Act. The Metropolitan Police apparently keep a central record of 'official corruption', although it should be noted that in the past ten years there has³⁵ not been one prosecution of a civil servant for corruption. This is incredible given the following background of overcharging:

- A report by the National Audit Office estimated waste in the Civil Service between 2009 and 2011 at £31 billion.
- Fifteen of the largest Ministry of Defence contracts are currently £6.1 billion over budget.
- The massively expensive IT system for the National Health Service (around £12 billion) was abandoned as a failure.³⁶
- The starting budget for the Scottish Parliament building was estimated at between £10 and £40 million. The final cost exceeded £440 million.

³⁵ Apparently

³⁶ Although the consultants are still being paid.

- A new passport system, estimated at £80 million, was finally delivered at a cost of £365 million.
- The National Health Service, which has a budget of £100 billion (around a third of Medicare), has detected comparatively few cases of large-scale corruption.
- There are an estimated 700 projects under the Private Finance Initiative (PFI) worth £60 billion, but they have liabilities of £130 billion.³⁷ Under PFI there are examples of hospitals being charged £150 to fit a light bulb and £3,500 for a basic laptop computer.
- The Department of Work and Pensions outsourced £180 million worth of contracts, which were intended to get people back to work, to a private company A4e (Action for Employment). In March 2012 A4e came under investigation³⁸ for serious fraud and overcharging.

It is, of course, possible that some or all of these cases can be attributed to misunderstanding or negligence although corruption is the most likely explanation. It is hard to believe that innocent people could be that careless or so stupid.

Media, Police and Political Corruption

Operations Elveden and Weeting - the so-called 'Hackingate' investigation by the Metropolitan Police - have exposed a viper's nest of collusion in the UK between the media, politicians and police that would put even the most corrupt nation to shame. The cases are classic examples of stratospheric corruption and the corroding effects of reciprocity

Table 1.4 Examples of Potential Reciprocation

		Advantages Taken by		
		Media	Police	Politicians
Given By	Media	Key Drivers Competitive pressures for scoop stories and circulation figures	Cash Personal and corporate publicity	Donations Positive corporate and personal publicity Voter influence
	Police	Inside information Access	Key Drivers Crime statistics Disciplinary investigations Public relations	Political endorsement Voter influence
	Politicians	Inside information PR and other contracts Revolving door appointments Honours	Budgets Appointments Honours	Key Drivers Grabbing and retaining power Public relations

Table 1.4 suggests the key drivers of reciprocity in the contexts concerned. An interesting side note is that many participants generally considered themselves above the law

37 Suggesting gross price inflation: albeit in the noble cause of keeping the debt off the Government's Balance Sheet.

38 The director paid herself an annual dividend of £8.5 million.

Reciprocation, nepotism, fraternalism and their like are common characteristics of corruption in developed countries and range from informal links through to established cartels. They destroy fair competition and are difficult to expose.

Other Dodgy Dealing

Comparatively few cases of entirely private-sector corruption are prosecuted in either developed countries or LDCs, although a significant number are settled through the civil courts. A number of these are discussed on pages 182 and 802.

Formula One

In January 1997 Bernie Ecclestone, the head of Formula One, generously donated £1 million to Mr Blair's New Labour Party, but this was not disclosed at the time. In May 1997 the Labour Government came into power and announced that it would ban tobacco advertising at all sporting events. A few weeks later Labour fundraisers entered into secret talks with Mr Ecclestone and in October 1997 there was a personal meeting between him and Prime Minister Blair.

On 5 November 1997, the government announced it had exempted Formula One from the tobacco advertising ban. The shenanigans that followed are too numerous to describe here, although in November 1997 the Labour Party returned £1 million to Mr Ecclestone and the tobacco ban was enforced.

In 2001–2002 a 75 per cent interest in Formula One Racing was bought by the German company EM TV. Subsequently, as a result of bankruptcies and other manoeuvres, the interest was acquired by Bayern LB, JP Morgan and Lehman Brothers at a cost of \$1.6 billion. The investment was subsequently written down to a book value of \$650 million.

In 2006, with Mr Ecclestone's help, the banks' interest was sold to CVC Capital Partner's Fund for \$1.2 billion, ostensibly showing a profit over book value of \$328 million and a loss of \$400 million on acquisition costs. Then out of the blue, Gerhard Gribkowsky, Bayern's Risk Manager, was arrested by the German police for allegedly receiving a \$44 million bribe from Mr Ecclestone as a reward for undervaluing the bank's interest.

Mr Ecclestone was called to give evidence in a German civil action and admitted giving Mr Gribkowsky the \$44 million, but claimed he had done so only to suppress false allegations – involving the Ecclestone family trust – the German had threatened to make about him to HM Revenue and Customs.

There is no information in the public domain that throws further light on where the \$44 million came from or how it was paid. However, the case illustrates the point made on page 318 of the possibility that bribes may be funded from a wealthy owner's personal funds.

Political Funding (More of)

Political funding is probably the most corrupting force in developed countries. It perverts society from top to bottom.

French Scandals

It is alleged that Colonel Gaddafi gave Nicholas Sarkozy £42 million to fund his 2007 election campaign. Enquiries are continuing, as they are into the affairs of Dominic Strauss Kahn (DSK), the ex-Managing Director of the International Monetary Fund, one of the most powerful politicians in the world and a candidate for the French presidency. DSK (as well as the head of police and government officials) is said to have repeatedly participated in bacchanals where prostitutes were provided free of charge by a French construction group. DSK said he had not realised they were prostitutes because everyone had been naked at the time.

Another noteworthy thing about political corruption is the persistence of some to wilfully circumvent the rules. When outright donations were tightened up, the way round was to mis-describe contributions as loans. When this ruse was censured, donations continued but were reclassified as contributions to the 'Private Office of Mr X'.

Kleptocrats versus Greedy Bankers

The total plundered by kleptocrats³⁹ in LDCs - estimated to be around \$450 billion over the past 40 years - pales into insignificance against the \$11.9 trillion lost in the 2006-2010 banking crisis. Although the catastrophe has been attributed to incompetence, the real cause is more likely to have been fraud, internal and external corruption. This possibility was never comprehensively investigated and the scandal was simply explained as 'greedy bankers'. The fact is that many were crooks and that they escaped unpunished. In the stratosphere some people are too important to touch and some companies too big to fail.

³⁹ Ranging from President Marcus through to Colonel Gaddafi.

Internal Corruption and External Scams

Many other cases have come to light showing the level of corruption within supposedly reputable organisations. Payment Protection Insurance (PPI)⁴⁰ was a massive scam that cost the poorest in society many millions of pounds and largely succeeded because of internal collusion between senior managers and sales forces which were coerced into selling policies they knew to be worthless. The Lloyds Banking Group initially put aside £3.2 billion to cover PPI claims and then, in November 2012, a further £1 billion.

Other cases of internal corruption involved bankers urging customers to buy investment products such as subprime mortgage derivatives which they knew were worthless. Not only that, but bankers simultaneously short-sold the derivatives in their own portfolios.

European Union And United Nations Scams

International government agencies such as the UN and the EU, supposedly sophisticated representatives of developed societies, are riddled with inefficiency fraud and corruption. The evidence comes from such failings as the Oil-for-Food programme, the Reconstruction of Iraq and Afghanistan, and overseas development aid programmes. They also show a remarkable unwillingness by international officials to confront corruption when it takes place under their own noses.

European Union Skulduggery

A report titled 'Fight against Fraud'⁴¹ stated that irregular payments and fraud in the EU amounted to €1.3 billion a year and that 20 per cent of revenues were 'siphoned off by corrupt officials'.

Cash for Amendments

In 2011, four Members of the European Parliament were found to have taken cash to ensure that laws that that could disadvantage their sponsors were not enacted as intended. Parliamentary President Jerzy Buzek was unwilling to have the case investigated for suspected bribery stating: 'I cannot allow OLAF⁴² to enter into MEPs' offices and I urge the agency to fully respect the immunity of members...'

40 Sold to protect borrowers against the risks of unemployment. More than 80 per cent of claims were rejected mainly for technical reasons, making the policies worthless from the outset.

41 See the Europa website, available at: http://europa.eu/pol/fraud/index_en.htm (accessed 14 October 2012).

42 Office de Lutte Anti-Fraude – the EU's anti-fraud 'force'.

Over the years - stretching back to the days when Neil Kinnock was important - the EU has had an appalling record of dealing with whistle-blowers, although this has not prevented its leaders and officials pronouncing on the imperative for effective controls in companies. Such attitudes are referred to throughout this book as 'Animal Farm', meaning there is one standard for politicians and officials and another for businesses. There are far too many examples of this.

Obscene Profits

Obscene profits – by a commercial sector, company, or project – are another indicator of corruption in both developed countries and LDCs. The sectors normally singled out for comment (some unjustifiably) include:

- Aerospace and defence
- Alcohol
- Banking and financial services
- Computer hardware and software
- Construction
- Consultancy
- Drugs and biotechnology
- Health care
- Hedge funds
- Insurance
- Media
- Mining and Minerals
- Oil and gas
- Professional services
- Retail stores
- Telecommunications
- Tobacco
- Utilities.

Sectorial targeting is usually a meaningless generalisation because corruption takes place in specific contexts. There are contexts in what are regarded as ethical sectors where corruption is rampant, including religion and academia.

Specific, contextual indicators are much more significant, including:

- Disproportionate profits to those of competitors or to similar internal operations;⁴³
- Windfall profits on a specific project or transaction;
- Massive increases on year-to-year results;
- Ability to operate in a market closed to others;
- Consistently achieving or outperforming key performance targets.

⁴³ For example, one subsidiary or affiliate of a company outperforms its peers.

All of these outliers can be detected by the Critical Point Auditing (CPA) techniques discussed in Chapters 18–20.

Noble Cause Corruption

Among the most relentless drivers of fraud and corruption, especially in developed countries, are supposed noble causes, including:

- Corporate Social Responsibility programmes and environmental programmes;
- Deregulation and privatization;
- Equality;
- Foreign aid;
- Global warming;
- Health and safety;
- Human rights;
- Immigration and multiculturalism;
- Job creation;
- National Health Service;
- Private Finance Initiative;
- Welfare.

The characteristic of a noble cause is that it is framed as overwhelmingly for the public good: like saving humanity from the effects of global warming or making sure a golfer does not get his toes trapped in a hole on a putting green.⁴⁴ A noble cause seizes the moral high ground, discourages dissent and is often driven by a messianic zeal bordering on the maniacal. Most end up enriching bankers, hedge funds, other speculators or tax collectors and few serve any useful purpose.

There are many ways that companies can become involved in a noble cause: as winners, losers, unavoidable participants, observers or opponents. They can be providers or receivers of advantages or initiators or victims of improper performance. The combinations are too numerous to enumerate here⁴⁵ but the common pattern is that most are riddled with corruption from top to bottom, are distorted by political and academic skulduggery and fraudulent metrics and infiltrated by organised crime. Thus, companies⁴⁶ should take the greatest care whenever a noble cause appears on their radar and THINK:

- Is the framing of the noble cause valid?
- Is it supported by legitimate independent research, that is, is it genuinely peer and dissenter group reviewed?
- Is the supporting research independently funded or sponsored by organisations with a vested interest?

44 See page 237.

45 The original 20 drafts of this book included a very long chapter on the Carbon World. When Gower ran short of paper it was withdrawn but is available on <http://wwwcobasco.com> It is not for the timid!

46 And individual investors.

- Are performance targets and key performance metrics valid?
- Does the cause distort economic markets and if so why, how and where?
- Are the supporters of the cause open about its limitations (or, as in the case of global warming, insist that the 'debate is closed' and vilify dissenters)?
- Who benefits⁴⁷ the most?

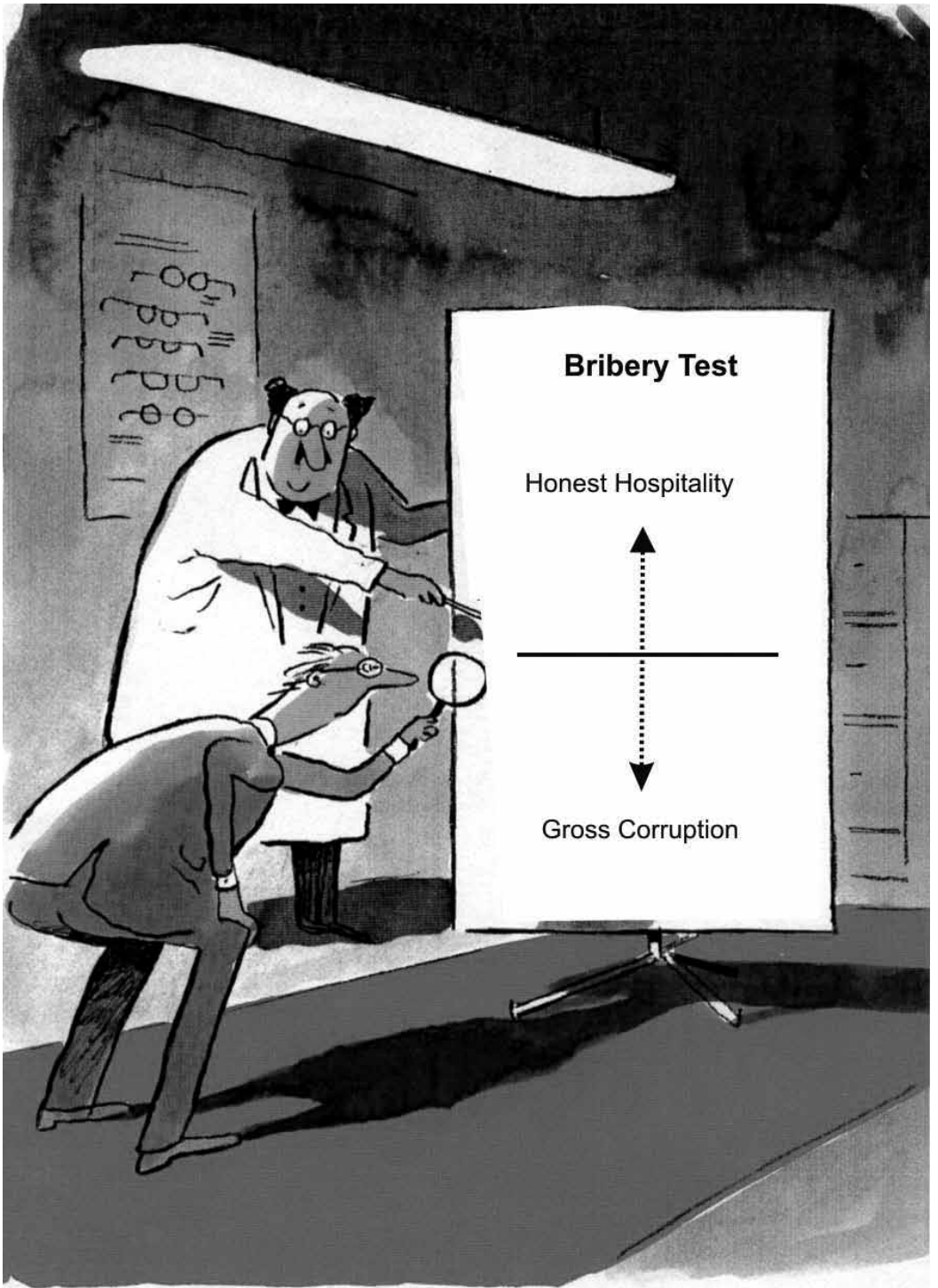
Finally, companies should consider all of the decisions that are involved (both outside and within the organisation), catalogue how they might be perverted and then decide to what extent the cause should be supported, while still remaining on the lookout for indicators of skulduggery.

Conclusions

Readers are urged not to be misled by the framing of the Bribery Act and its supporting research, and to accept the possibility - if not probability - that corruption and fraud are taking place under their own noses and possibly in ways framed as the norm. Equally, they should not write off entire countries as corrupt and refuse to deal with them, or jump onto a noble cause bandwagon without very careful thought.

Finally, from today onwards, if they don't already do it, readers are advised to think carefully about the frames in which everything is presented to them and what they really mean. The following chapters try to put the anti-bribery legislation (and all that goes with it) into a real-world frame of corruption. It is all about C-O-N-T-E-X-T and decision-centricity

⁴⁷ By applying the rule 'Follow the money'.



mikewilliams.

'I know you think it's a fine line Mr Jones, but can you see anything?'



'It's disgusting and they are not even on fees'

Background on Corruption Laws

Introduction

The UK is believed to be the first country to pass anti-corruption legislation in 1215 in the Magna Carta,¹ and by the late 1890s was still ahead of the game. What happened between 1890 and 2010 may not appear immediately relevant and **readers who are not worried about the context or framing of the recent legislation can happily skip Chapter 2 and scoot off to the Pink Pussycat Lap Dancing Club² providing they note that the Bribery Act is not all that it seems.**

However, Part 1 says a lot about the political shenanigans behind the current Act – the Bribery Act 2010 – the organisations that have driven it and its framing and motivation. It explains the corruption of the word ‘bribery’ and all that goes with it and the things politicians should have done but, because it would constrain their own flexibility, did not.

The laws in existence prior to 2010 are relevant because for the next few years they still apply, as will the Companies Acts, the Proceeds of Crime Act, the Fraud Act and the money-laundering regulations. It is also important – because of the promised cooperation between international agencies – to recognise the part played by American laws and regulators in the corruption field, as well as other bodies such as the Organisation for Economic Cooperation and Development (OECD), the United Nations and Transparency International, to name but a few. Their roles and the conventions they promote are explained in Part I.

PUTTING THE BRIBERY ACT IN CONTEXT

Some members of the Cottage Industry, not to mention politicians and the media, have hyperbolised bribe payment (but not bribe extortion or stratospheric corruption) as the evil of all evils and fighting it a noble – if not Godly – cause ranking alongside ~~global warming~~ climate change, multi-culturism, England’s independence from Scotland or, in Kenneth’s case, sustainability of bones. **In fact, bribery is just one of many priorities faced every day by business managers.** Unlike members of the Cottage Industry, bribery comes low on the managerial radar behind more important things like

1 ‘We will sell to no man ... either justice or right’.

2 The significance of which will become clear later. (Readers who cannot stand the suspense should read the Law Commissioner’s comments on page 110. They kicked off the authors’ childish humour.)

ensuring that their businesses survive in the face of a worldwide economic crisis, political dishonesty, ever burgeoning bureaucracy, misplaced social engineering initiatives and taxation.

Unquestionably, effective control is very important for all organisations. Firstly, to ensure that they run profitably with true integrity, can be sustained economically and otherwise, to avoid throwing hard earned income down the drain through incompetence or skulduggery and then to tick all compliance boxes in multiple silos. **But readers should note that proof of adequate procedures or, in America, effective compliance and ethics programs (EPECs) to stave off prosecution or to mitigate penalties is usually a chimera** (see pages 73 and 613).

Even in the narrow field of compliance, chasing down bribery comes near the bottom of the regulatory priority list. This is confirmed in an excellent paper by Brandon L Garrett, Professor of Law, University of Virginia School of Law, published in the Virginia Law Review in December 2011, of which more later. He notes that in over 95 per cent of federal prosecutions defendants plead guilty. Some commentators view this as a sign of investigative excellence: others consider it little more than the result of coercion. The paper estimates that 72.4 per cent of FCPA actions are against foreign firms and that penalties imposed on them are 22 times larger than for their domestic counterparts. **It sometimes appears that American regulators are primarily interested in protecting national interests.**

Another problem is that laws and regulatory requirements are issued in silos with each agency promoting its own interests above all others. Where guidelines are issued, they are seldom if ever co-ordinated leaving it for companies to decide on priorities. The silo mentality is even more acute when international regulations are taken into account and it is more a case of multiple than simply double jeopardy (see page 146) and of trying to resolve direct conflict.

The Silo Mentality

In January 2013 the Danish company Novo Nordisk was fined \$3 million by the Russian authorities for anti-competition violations based on the argument that its requirement that potential agents must submit to due diligence reviews and other measures necessary to comply with the FCPA were restrictive and were not fair under Russian law. The claim was that the compliance program disqualified suitable candidates and that Novo's practice of carrying out due diligence, especially when based Internet searches, was unreliable, unfair and unacceptable.

The Russians, effectively, demanded that Novo abandon its anti-bribery compliance program. The Ministry of Justice repeatedly recommends Internet searching.

Although Novo's may appear an exceptional case, potential conflicts arise between regulatory silos in other fields. Therefore companies should not view the Bribery Act in isolation but ensure that their integrity programmes achieve all business objectives and deal with disparate regulatory silos. This is the approach recommended in Chapter 23.

Introduction

Prior to the Bribery Act, British anti-corruption¹ enforcement was based on a mixture of statute and common law, differentiating between the private and public sectors and supported by a raft of other legislation relating to fraud and Companies Act violations. The main problem, so the prosecutors said, was that the laws, as they stood, made it difficult for them to convict companies whose representatives paid bribes, unless responsibility could be pinned to a 'directing mind'. The Bribery Act 2010 overcomes this problem with the draconian Section 7 corporate offence, which comes into play simply if any associated person - no matter how junior - is or **would be** guilty of an offence.

The old legislation was mainly based on the principal-agent relationship,² whereas the new Act centres on improper performance and, in the case of foreign public officials (FPOs), mere 'influence'. These changes may not appear striking, but they are. The old legislation (that applies to offences committed before 30 June 2010) is as detailed below.

The Public Bodies Corrupt Practices Act 1889

This Act made corruption of a member, officer or servant of a **public body** a criminal offence. The definition of a public body was amended by a 1916 Act to include: 'local and public authorities of all descriptions with statutory or public duties to perform'. Unsurprisingly the definition does not include MPs, judges or certain other elected officials.

The Act prohibited a public officer, whether by himself or in conjunction with any other person, 'from corruptly soliciting or receiving, or agreeing to receive, etc., for himself, or for any other person, any gift, loan, fee, reward or advantage whatever as an inducement to, or reward for, doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed, in which the public body is concerned'. (This is erroneously called 'passive corruption'.)

It was also illegal for a person to corruptly promise, or offer, etc. (erroneously called 'active corruption'), 'any gift, loan, fee, reward, or advantage whatsoever, to any person, whether for the benefit of that person, or of another person, as an inducement to, or reward for, doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed, in which the public body is concerned'.

The maximum penalties were:

1 Note that it was always 'corruption'.

2 The Bribery Act is quite different and is structured on an 'improper performance' model. So, more or less, is the civil law.

- On summary conviction, six months' imprisonment, or a fine not exceeding the statutory maximum, or both;
- On conviction on indictment, seven years' imprisonment, or an unlimited fine, or both;
- In addition, conviction could result in:
 - Liability to pay to the public body in question the amount or value of any gift, loan, fee or reward received, or any part thereof;
 - Prevention from being elected or appointed to any public office for five years from the date of conviction, and forfeiture of any office held at the time of the conviction;
 - On a second conviction for a like offence, prevention for ever from holding any public office, and prevention, for five years, from being registered as an elector, or voter, for elections to Parliament or any public body;
 - Forfeiture of any right or claim to compensation or pension to which the person might otherwise be entitled.

The consent of the Attorney General or the Solicitor General was necessary to start a prosecution. Although there is no suggestion that political influence had ever prevailed (ho hum!), political involvement in prosecutorial decision-making did not comply with the conventions of the Organisation for Economic Cooperation and Development (OECD) or the Council of Europe, which require a totally independent prosecuting authority³

The Prevention of Corruption Act 1906

BASIC OFFENCES

This Act dealt with the corruption of agents who, in simple terms, are people entrusted to act on behalf of a principal. All employees, in both the private and commercial sectors, were regarded as agents. They were prohibited from 'corruptly accepting or obtaining, or agreeing to accept or attempting to obtain, from any person, for themselves, or for any other person, any gift or consideration as an inducement or reward for doing or forbearing to do any act, or for showing or forbearing to show favour or disfavour to any person', in relation to their principal's affairs or business.

It was an offence for any person 'corruptly to give or agree to give, or offer, any gift or consideration to any agent as an inducement or reward for doing or forbearing to do, or for having done or forborne to do, any act, or for showing or forbearing to show favour, or disfavour, to any person in relation to his principal's affairs or business'.

ACCOUNTING OFFENCES

It was also an offence for any person 'knowingly to give to any agent, or for any agent knowingly to use, with intent to deceive his principal, any receipt, account or other document, in respect of which his principal was interested, and which contains any

³ Ironically, the American system, which has been greatly applauded, relies on judges who are political appointees!

statement which was false or erroneous or defective in any material particular and which to his knowledge was intended to mislead the principal’.

The maximum penalties were:

- On summary conviction, six months’ imprisonment, or a fine not exceeding the statutory maximum, or both;
- On conviction on indictment, seven years’ imprisonment, or an unlimited fine, or both.

Although this Act was promoted as the UK’s primary law against corruption, it had been used very rarely and prosecutions were more often run as a common law conspiracy or under the Theft Acts, which did not require the permission of the Attorney General or Solicitor General.

The Prevention of Corruption Act 1916

This Act effectively extended and clarified its predecessors but created a presumption of corruption where it was proved ‘that any money, gift or other consideration had been paid, or given to or received by a person in the employment of Her Majesty, or any Government Department or public body by or from a person, or agent of a person, holding or seeking to obtain a contract from Her Majesty, or any Government Department or public body’. Any money, gift, or consideration was deemed to have been paid or given and received corruptly, unless the contrary could be proven. It was a rare example of the burden of proof being shifted to the defendant to prove his innocence. It is noteworthy that the Bribery Act makes it far harder to prosecute public officials (a bit more ‘Animal Farm’⁴) **because it no longer requires the person giving an advantage to a UK official, as well as the official himself, to prove that it was not corrupt.**

Comment on the Statutes 1998

In March 1998 the Law Commission made a stinging criticism of the three Acts, stating that they were: ‘obscure, complex, in spectacular disarray, inconsistent and insufficiently comprehensive’.

Notwithstanding this view as we shall see in a moment, the defective legislation was incorporated, warts and all, into the Anti-terrorism Crime and Security Act and, to make matters worse, given extraterritorial coverage.

In 2004, the Home Office told the authors:

The three Acts have provided the United Kingdom with generally effective legislation to combat corruption and have, to a certain extent,⁵ stood the test of time. Nonetheless, there are concerns about the scope and overlap of the existing legislation, about the difficulty of interpreting language and concepts used in the statutes and about procedural difficulties.

4 Explained in the Foreword.

5 Is this mealy mouthed, or what?

This claim is not borne out by the facts, because there had been only one successful prosecution for corruption of a public official in Britain in the previous 100 years and none involving a company. This raw statistic hides the reality that a number of public officials were prosecuted under the Theft Act, or for conspiracy, for what was effectively corruption.

Political Corruption in the UK

AN ARCHAIC PRIVILEGE

Members of Parliament have from time immemorial been in a privileged and influential position and are obvious candidates for corruption, not least of all because of the system of party political funding and cronyism. Cases exposing all of the leading parties (except the Raving Monster Loony Party) are all cause for concern and there are too many to list here.

More recent scandals such as ‘cash for questions’, ‘cash for honours’ and, of course, the incredible British Aerospace (BAE) settlement, reinforced the grounds for concern about the integrity of British politicians. Even more recently cases involving alleged corruption by senior police officers and the press confirm that corruption in the UK prospers.

All three Corruption Acts failed to tackle corruption by MPs, who were not defined as public officers⁶ or agents and, in any event, were supposedly not accountable to the courts because of ancient (if not archaic) laws on parliamentary privilege under the Bill of Rights Act 1689. No member of the House of Commons or House of Lords had ever been prosecuted for corruption, or seriously threatened with prosecution for such an offence.

PUBLIC COMMITTEES AND REVIEWS 1994

There were multiple studies, committees and reviews of political corruption, starting with the Redcliffe–Maude report into local government in 1973 through to the Salmon Report in 1974 and the Committee of Standards in Public Life and to Codes of Conduct for MPs in 1974 and 1975.

In 1994 and 1995 the Committee on Standards in Public Life, chaired by Lord Nolan, recommended that: ‘the Government should now take steps to clarify the law relating to bribery’⁷. The Government accepted Nolan’s recommendations and in June 1997 the Home Office made a statement on the Consolidation and Amendment of the Prevention of Corruption Acts, 1889 to 1916.

It stated:

The question of the law relating to the bribery of Members of Parliament, however, touches on constitutional issues involving parliamentary privilege, the application of the Bill of Rights and the Claim of Right and the sovereignty of Parliament. It was therefore considered that this was

⁶ The position is quite different in other countries and, for example, Hungary has recently passed laws explicitly exposing elected politicians to prosecution for corruption.

⁷ See http://www.public-standards.gov.uk/Library/OurWork/First7Reports_ProgressReview.pdf (accessed 7 November 2012).

not simply a question of law for the Law Commission but a question of policy which should be considered by Parliament itself.

To assist this consideration the Home Office published a discussion paper, 'Clarification of the Law relating to the Bribery of Members of Parliament' in December 1996.⁸ This was formally submitted to the House of Commons Select Committee on Standards and Privileges and to the House of Lords Committee on Privilege. The government – in a typical 'Sir Humphrey' non-comment said it 'would wish to reflect carefully on ... that paper before it reached a view on whether and how the law on corruption needs amendment'. It did not actually say it would reflect, merely that it 'would wish to reflect'. The two phrases do not mean the same and what actually happened, as far as can be seen, was nothing.

LAW COMMISSION REPORT 1998

In March 1998, the Law Commission published a nearly excellent report on corruption (based on the consultation paper issued around two years earlier and referred to above) and included a draft Bill. However it avoided the question of corruption of MPs and stated that

*the report does not deal with that issue. This is because the issue is currently under consideration by the Home Office and Joint Committee on Parliamentary Privilege. In these circumstances we have decided that it would be a wasteful duplication of effort for us to examine it as well.*⁹

It appears, yet again, that the question of MPs and their corruption was simply too difficult to handle.

Thus the regulation of MPs remained with the Committees on Standards and Privileges and a Parliamentary Commissioner for Standards, who was responsible for ensuring that elected politicians complied with a Code of Conduct, including the registration of potentially conflicting interests. It should be noted, however, that the Commissioner had no statutory power to compel witnesses to give evidence or to produce records and that no declaration was necessary of conflicting interests by an MP's spouse, or close family members.

JOINT COMMITTEE 1999

In March 1999, the Joint Committee on Parliamentary Privilege submitted its report and concluded that corruption (of MPs) could only be dealt with effectively by using the police and the courts. It continued: 'The proposed bribery legislation will expose

⁸ See Home Office Discussion Paper, December 1996, available at: <http://www.publications.parliament.uk/pa/jt199899/jtselect/jtpriv/43/8012002.htm> (accessed 7 November 2012).

⁹ See 'Legislating the Criminal Code: Corruption' (Executive Summary) [Report Law Com No. 248], 3 March 1998: paragraph 2. Available at: <http://www.lgcplus.com/lgc-news/legislating-the-criminal-code-corruption-executive-summary/1477470.article> (accessed 7 November 2012).

MPs and prosecution should require the consent of the Attorney General or the Lord Advocate'.¹⁰

The Committee recognised that the definition of 'proceedings in Parliament' needed to be clarified and supported an earlier recommendation that the term should cover 'everything done by an MP or Peer as part of his or her duties', obviously including a trip to a lap dancing club if it took place the day before a debate or with a constituent.

Although the Government again promised to change the law it did nothing, even though suspicions and hard cases of political corruption continued to surface.

COMMITTEE ON STANDARDS AND PRIVILEGES 2001

In December 2001, Elizabeth Filkin, then Commissioner for Committees on Standards and Privileges, left, or was pushed out of, her job, claiming that some Government Ministers had briefed (which means spun and lied) against her and had obstructed her. Still, British citizens could sleep peacefully in their beds knowing that the report of the Joint Committee on Parliamentary Privilege was being vigorously pursued and that a review of the law was imminent. Ten years later it is still awaited!

MORE HANKY-PANKY BY POLITICIANS

Besides the high-profile cases of political corruption that come readily to mind, there are others which are quickly forgotten but illustrate the appalling 'tone from the top':

Political Donations

In March 2006, Angus MacNeil, a Scottish Nationalist MP, made an allegation to the police that the rules on party political funding had been evaded by mis-describing what were effectively donations as loans. If any UK company had been involved in the same sort of shenanigans they could have expected a knock on their door by the Old Bill. Mr MacNeil also suggested that these 'loans' had been made in anticipation of the donors being rewarded by elevation to the House of Lords.

During a 14-month investigation by the Metropolitan Police, costing more than £800,000, four people were arrested, including Lord Levy, Tony Blair's personal envoy to the Middle East and fund-raiser extraordinaire, Ruth Turner, Director of Government Relations, Christopher Evans, a biotech multimillionaire and 'lender' and Des Smith, a headmaster involved in setting up Mr Blair's Inner City Academies. Mr Blair, who was then serving Prime Minister, was questioned three times by the Metropolitan Police; allegations of perverting the course of justice were raised but Lord Goldsmith, then Attorney General, took out an injunction against the BBC preventing it from reporting the story.

¹⁰ See <http://www.parliament.the-stationery-office.co.uk/pa/jt199899/jtselect/jtpriv/43/4303.htm> (accessed 7 November 2012).

Although the police repeatedly expressed confidence that there was sufficient evidence to prosecute, in July 2007 the Crown Prosecution Service decided not to do so by exercising 'prosecutorial discretion', and all charges were dropped against everyone. Prosecutors were quick – if not too quick – to volunteer that their decision had not been influenced by political pressure. This is known in skulduggery circles as an 'unprovoked denial', and is therefore questionable.

On 25 January 2009, The reported a sting operation against five Labour Party peers, three Conservative lords, one Liberal Democrat and one Ulster Unionist. Four of the Labour peers fell into the trap and offered lobbying and political services in return for heavy fees. None of the others rose to the bait, possibly because they all had prior engagements at the Pink Pussycat Lap Dancing Club or the local Turkish Baths.

House of Lords

The Code of Conduct of the House of Lords requires that members must never accept a financial inducement for exercising influence in Parliament, nor vote on any bill or motion, or ask any question in the House or a committee, or promote any matter in return for payment or other material benefit. The rules are very clear. Notwithstanding this the four Peers had offered to have laws changed or new ones introduced to help their fee-paying clients, to lobby ministers on their behalf and to persuade senior civil servants and committee members to assist.

Lord Taylor of Blackburn was asked by undercover reporters how he could get dodgy amendments through Parliament and whether he would do it himself. Lord Taylor responded: 'No, no, no. You don't do things like that. What you do is to talk to the Parliamentary team who drafts the statutes ... You meet the Minister, you meet the various people'.

On 11 February 2009, after one of the shortest investigations ever, the Metropolitan Police concluded that no action would be taken, stating that: 'application of the criminal law to members of the House of Lords in the circumstances that have arisen here is far from clear. In addition there are very clear difficulties in gathering and adducing evidence in these circumstances in the context of parliamentary privilege'.

The case was dropped, faster than a hooker's bloomers.

Parliamentary privilege is very important in the corruption context – given the unhealthy interplay between some large commercial organisations, which sponsor scientific surveys or other research to justify changes in the law or to gain some other advantage for their business. Funding of far too many scientific, academic or research organisations is conditional on reports ('dodgy dossiers') that support the funder's commercial agenda. If academics and researchers fail to produce the right result, money quickly dries up.

RELIANCE ON 'DODGY DOSSIERS'

'Dodgy dossiers' have become the justification for politicians to introduce dodgy legislation or drive through other decisions that benefit research funders and their sponsors. The circle is inherently corrupt and ultimately funded by the taxpayer

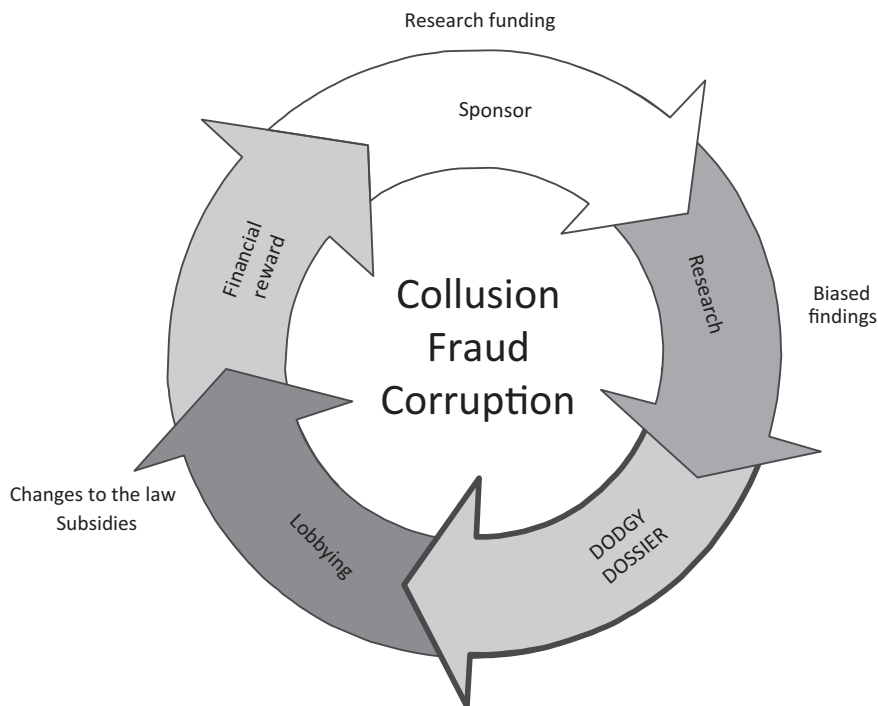
**Figure 2.1 Circle of 'Dodgy Dossiers' and Corruption**

Figure 2.1 suggests that the spiral often starts with a commercial, social or political interest, which sponsors research (possibly 'dodgy dossiers') leading to political intervention that benefits the sponsors. Corruption can be involved at any stage in the spiral.

Misleading, false or perjured evidence may be given in Parliament, either before the assembled House or in committee, but nothing that is said or submitted, by anyone, can be adduced in evidence against anyone. This is one of the problems with parliamentary privilege: trading in influence and lobbying. The fact that all of these levers of stratospheric corruption were deliberately and cynically excluded from the Bribery Act 2010 says all that needs to be said about political commitment to the fight against corruption. As Kenneth Clarke, the ex-Justice Secretary and supposed 'anti-bribery'¹¹ champion has said - the initiative must be 'business-led'. This means, in the words of Samuel Goldwyn 'include me out'.

11 Note: Not the 'anti-corruption champion'.

UK Ratifies the OECD Convention February 1999

The British Government accepted that the three existing domestic acts were defective and undertook to pass new legislation when Parliamentary time became available. The Government also promised to remove what was effectively immunity for MPs against prosecution for corruption and to bring them under the criminal law¹²

On 15 February 1999 the UK ratified the OECD Convention but continued to argue that the UK's domestic laws complied with every condition. A point which is often overlooked or not understood is that the UK did not adopt the Convention into British law and is therefore not bound by it. In fact, the UK specifically opted out of the Council of Europe's provisions concerning 'trading in influence' (for example, political lobbying, 'cash for questions' and 'cash for honours' type skulduggery) as compliance would – supposedly – constrain the legitimate work of Members of Parliament! This is yet another example of the UK government cherry-picking the OECD and other conventions to protect the political status quo.

The UK Government's Intentions June 2000

In June 2000, Jack Straw, then Home Secretary, at long last responded to the Law Commission recommendations (March 1998!) and reported ('Raising Standards and Upholding Integrity: The Prevention of Corruption')¹³ that 'corruption is like a deadly virus'. He stated his commitment to fighting corruption 'wherever it is found'.¹⁴ As well as reforming the corruption offences, the Government proposed two major changes:

- UK citizens will be triable in the UK for corruption offences committed abroad;
- Citizens of any country to be prosecuted in the UK, even for offences that did not occur wholly within the UK.

Jack Straw stated: 'our overriding consideration is to clarify and codify the law in line with developments both in this country and internationally'.

If he had stuck to his word and dealt with MPs, as he had promised, no one could have had any reasonable objection; but he did not. Part 6 of the Report sets out a summary of the Government's proposals:

- The Government proposes replacing the existing principal statutes of corruption in England and Wales by a single statute, modelled on that published by the Law Commission. Its provisions will reflect:¹⁵
 - Acceptance of the Law Commission's recommendation that there should be a single offence of corruption to cover both public and private sectors;

¹² By removing Parliamentary Privilege.

¹³ TSO, 22 June 2000; available at: <http://www.archive.official-documents.co.uk/document/cm47/4759/4759.htm> (accessed 7 November 2012).

¹⁴ But not in politics.

¹⁵ Note provisions that are quite different from the Bribery Act 2010.

- Abolition of the current presumption of corruption for public servants in the Prevention of Corruption Act 1916;
- A statutory definition of what is meant by ‘acting corruptly’, and a definition of the concept of ‘agent’;
- The inclusion in the offence of corruption of ‘trading in influence’, where the decision-making of public officials by intermediaries is targeted;
- That the corruption of, or by, a public official is not confined to the public of the UK;
- Extending jurisdiction over offences of corruption to cover both offences committed in whole or in part within the jurisdiction and those committed by UK nationals abroad;
- Evidence relating to an offence committed or alleged to have been committed by a Member of either House of Parliament to be admissible notwithstanding Article 9 of the Bill of Rights;
- The Law Commission’s recommendations that the new offence of corruption should continue to be triable either in the Magistrates’ Court or in the Crown Court, and the Government view that the current maximum penalty of seven years’ imprisonment should be unchanged;
- Retention of the requirement for the consent of the Law Officers for prosecution.

The report seems to have sat on the shelf for another year, with a complacent government believing that nothing had to be done to comply with the OECD Convention. They had a shock coming.

Council of Europe: Civil Law Convention

On 8 June 2000, with testosterone levels at breaking point in the ‘fight against corruption wherever it happens’, Jack Straw signed the Civil Law Convention. It required Member States to provide in its internal laws effective remedies for persons who had suffered damage as a result of corruption, including the possibility of obtaining compensation from the state for hanky-panky by officials.

However, the UK never ratified the Treaty, although 34 other countries did. Other notable ‘non-rats’ include Denmark, Germany, Ireland, Italy, Russia, Sweden and Switzerland, which corroborates just how prepared politicians are to fight corruption on a political or official level.

International Development Select Committee, April 2001

In April 2001, the International Development Select Committee of the House of Commons reported:¹⁶

¹⁶ Select Committee on International Development, Fourth Report, available at: <http://www.publications.parliament.uk/pa/cm200001/cmselect/cmintdev/39/3912.htm>

- The Committee criticises the fact that the Government has yet to introduce legislation to implement the OECD Convention.
- Simple and clear legislation should be brought forward as a matter of urgency.
- The Committee concluded:
 - Corruption undermines development, hampers growth and has to be tackled. We must continue to help developing countries build an environment that will eliminate corruption. The impact of petty corruption must not be overlooked, for it is petty corruption that will have the most direct impact on the poor
 - The Government cannot continue to make improvements in governance a condition for development assistance when it has failed to implement the OECD Convention.
 - A lack of focus and coordination is hampering efforts to tackle corruption and money-laundering in the UK. There is a need for one department or body to take a lead and provide a focus for current activity. We urge the UK Government to act on these issues swiftly.
 - We must equip companies with the necessary legislative backing to resist extortion and bribery. The law should provide companies with a shield that protects them from those who solicit bribes by giving the argument that a company and the individuals concerned would face the stiffest penalties (including prison) in the UK if they were to engage in corruption of any sort.
 - We believe that the DTI should work with companies to help them address issues of corporate governance and ethics and through Trade Partners should provide help and support on the ground to companies working in countries where corruption is endemic.

Transparency International said: ‘To delay enacting this offence could severely damage the future success of the Convention, which rests on the basic assumption that the same rules will apply to all major exporters’.

A common thread of the OECD’s influence has been to penalise what are quaintly classified as ‘demand-side’ countries while making little headway with controlling countries whose nationals routinely extort bribes. This appears to reflect the current trend of controlling those who are amenable to it while letting blatant skulduggers escape unpunished. It happens in every aspect of law enforcement from parking to violence, tax and benefits fraud.

The Anti-terrorism Crime and Security Act 2001

THE SUPPOSED JUSTIFICATION

By April 2001 the UK government was faced with increasing pressure to keep its promises to do something about corruption and to comply with the OECD Convention:

- The Law Commission had made strong recommendations to revise Britain’s anti-corruption laws and in June 2000 the Government had agreed to do so.
- The public was concerned about corruption by MPs and Government Ministers.

- Various committees had suggested that the laws on corruption, including those relating to MPs, should be changed.
- Parliament had undertaken to review the question of political corruption and privileges.
- The Parliamentary Commissioner of Standards was creating mayhem by chasing after Ministers.
- The UK's partners in the OECD and the USA were pressing for action.

Notwithstanding this, the Government did nothing until the tragic events of 11 September 2001 appeared to have provided a golden opportunity to 'bury the bad news'.

It subsequently emerged that Jo Moores, the aide to Stephen Byers, then Transport Minister, used this phrase and worked on this principle when consigning other bad news to the back pages, so it is not going too far to believe that the same happened with corruption legislation. Otherwise it is difficult to see how or why anti-corruption measures were submerged in a law on terrorism. It should be noted that in none of the research, nor in any of the conventions, is any convincing connection made between corporate corruption and terrorism. The Anti-Terrorism, Crime and Security Act (ATCSA) was a convenient way of getting the OECD off Britain's back without causing too much public scrutiny over the new corruption laws. But politicians had no will to enforce it.

SUPPOSED LINKS BETWEEN CORRUPTION AND TERRORISM

The Home Office summary of the ATCSA¹⁷ states:

Part 12 brings in provisions to strengthen the law on international corruption, which is linked to conditions which cause terrorism.

There is absolutely no support for this preposterous statement, but no one seemed to challenge it at the time and probably would have accepted any restrictions that countered terrorism in the light of 9/11.

ATCSA came into force on 14 February 2002 and ranks as one of the strangest pieces of legislation ever passed. It is arranged in 14 parts with 8 schedules. Its purpose was supposedly to enhance the UK's anti-terrorist and security capability. It does this via measures tackling terrorist finance; streamlining relevant immigration procedures;¹⁸ provisions against inciting religious hatred or violence; new offences on Weapons of Mass Destruction; better security in dealing with pathogens and toxins; improving civil nuclear security; better security at airports and nuclear sites; extension of police powers; extension of the jurisdiction of the British Transport Police and Ministry of Defence Police; intelligence measures, including on-data retention and data gateways; an enabling power to implement by secondary legislation a small number of terrorism-related European Union (EU) agreements on Justice and Home Affairs; and amendments to the Terrorism Act 2000.

¹⁷ A summary is available at: http://image.guardian.co.uk/sys-files/Politics/documents/2001/11/20/Anti-terrorism_bill.pdf (accessed 7 November 2012).

¹⁸ Yes: that's what it says!

ANTI-CORRUPTION PROVISIONS

Part 12, sections 108 and 109, in simple terms, applied extraterritorial provisions to the three existing corruption acts - accepted by anyone with any sense as hopeless - criminalising and making punishable in the UK:

- Facilitation payments made to FPOs (which are permitted under the Foreign Corrupt Practices Act (FCPA), and the OECD and Council of Europe Conventions);
- Persuasive payments to members of the private sector in foreign countries (which are not replicated under the FCPA or the OECD Convention and are only included in the Council of Europe Convention when a breach of trust is involved).

No other OECD member had passed equivalent legislation criminalising corruption in the overseas public *and* private sectors; no other country had mixed corporate corruption with anti-terrorism; no other country has got itself into such a mess.

On 29 January 2002, Baroness Symons, Minister for Trade and Investment, told a DTI-sponsored conference that the new measures will 'outlaw acts of bribery by UK nationals and companies abroad in the same circumstances as they are outlawed here'.

This was not so. The Law Commission and others had already recognised that the three UK Acts were unworkable, so giving them extraterritorial scope was hardly sensible.

BUT DON'T WORRY ... WE WON'T PROSECUTE

At the same DTI-sponsored conference, Mr Martin Polaine representing the Crown Prosecution Service (CPS), said that neither the Attorney General nor the CPS would be likely to take action in respect of facilitation payments. He said that even if the evidence was sufficient to bring a prosecution, the CPS would consider the circumstances in which the payment was made and whether coercion was involved in deciding whether to prosecute. It was the strongest 'wink, wink, nudge-nudge' possible that the ATSCA was a sham.

PROSECUTIONS UNDER SECTION 12 OF ATSCA

This paragraph can be kept very short because there were no prosecutions under ATSCA and all went quiet after a very successful 'burying of the bad news'. But the objective of placating the OECD had been achieved. It was also a double whammy because the absolution afforded to MPs under the Bill of Rights remained unmolested.

The Law Commission Report, October 2008

In October 2008 (believed to be in response to public outrage over the Blair-induced collapse of the BAE case) the Law Commission was charged with, yet again, reviewing the UK laws on 'bribery'.¹⁹ The reframing of the old laws on corruption to those planned on bribery was no coincidence and effectively enabled the thorny problems of political

¹⁹ Not corruption.

corruption to be averted. The Commission's report was produced in one month, indicating the urgency with which the government felt obliged to react.

The Commissioners' proposed Bribery Bill was subsequently reworded by the Ministry of Justice (MOJ) to become the Bribery Act 2010. Although there are some significant differences between the draft Bill and the final Act, the Commissioners' thought processes throw light on the way judges might interpret the new legislation.

Such interpretations are important for three reasons. The first is because there is not a single precedent that companies can refer to when deciding what to do, or not to do, in relation to the Bribery Act. The second is that the Serious Fraud Office (SFO) has already made moves to expansively interpret the Act on such definitions as what constitutes a bribe and what is a relevant commercial organisation, or to obtain or retain business or other advantage (see pages 80 to 105). The third reason is that judges have not been impressed with the SFO's approach to civil disposals²⁰ and are expected to overturn settlement agreements and lenient sentences for cooperating witnesses. Judges have implied that they want blood on the carpet for serious corruption offences and they are right. It is morally wrong and an abuse of process that Section 2 orders, intended to assist the SFO (and now other prosecutors) convict serious fraud, should be used for pre-investigation fishing trips with a view only to grabbing money from alleged perpetrators.

The Commissioners' comments on facilitation payments, hospitality and other difficult and uncertain areas are incorporated in Chapters 28–33. To what extent their views will be followed by judges is uncertain.

The Impact Assessments

OBLIGATION TO PREPARE AND FILE

The UK Government undertakes to prepare a formal 'Impact Assessment' (IA) of all proposed legislation to 'provide transparency for all significant government interventions'. An unattributed,²¹ and undated, document titled 'Impact Assessment Guidance' states that assessments are a continuous process linked to five important stages in the following chronological order:

1. Development
2. Consultation
3. Final proposal
4. Implementation
5. Post-implementation review

The guidance continues that one of the purposes of publishing assessments is 'to ensure affected parties are given the opportunity to identify potential unintended consequences,

²⁰ 'Civil Disposal' is defined in the Foreword.

²¹ No mention of the department or author, but probably the Department for Business, Enterprise and Regulatory Reform (BERR), the predecessor of the Department for Business Innovation and Skills (BIS).

primarily through a consultation process' and that the Impact Assessments' minimum requirements include:

- The rationale for the proposal;
- Details of the costs and benefits of the policy change;
- Consideration of the options;
- The consultation summary.

If the procedure is followed, interested parties can see for themselves what effect consultation has had in the development of the law. The assessments are also critical for Parliament in deciding whether or not new laws are justified and proportionate.

In August 2011, more detailed guidance was published by the Department for Business Innovation and Skills (BIS),²² titled 'Impact Assessment Overview' and 'IA Toolkit. How to do an Impact Assessment'. Both sets of guidance require detailed calculations of the financial impacts of new laws, their effect on UK competitiveness, social, equality and other considerations.²³ According to the overview, every assessment should be signed off by a minister, who is required to certify:

I have read the Impact Assessment and I am satisfied that the assessment (i) represents a fair and reasonable view of the expected costs, benefits and impact of the policy and (ii) the benefits justify the costs.

The guides do not say anything about the need for honesty, accuracy or integrity although the earlier unattributed version states:²⁴

[S]purious accuracy in the presentation of the with ranges used where appropriate. (Emphasis added)

The avoidance of spuriousness – in aspects other than costs and benefits – does not appear to be a priority, although if a proposal goes beyond the minimum requirements of a related EU directive (known as 'gold-plating'), the overview requires that this is made clear:

It is critically important that the evidence base should show how the headline costs and benefits have been generated, by clear and transparent disaggregation of figures. This information must stand up to external scrutiny – that is, it should be accessible to the lay reader, and external parties with an interest must be able to contest the data.

Since April 2008, all central departments are required to archive copies of their assessments in a web-based library managed by BIS.²⁵

22 BERR's successor (see Note 20 above). The 'Impact Assessment Overview' is available at: <http://www.bis.gov.uk/feeds/-/media/2B4A9F36CFA64DF3A9F354505C0CDCDC.ashx>; and the 'IA Toolkit. How to do an Impact Assessment' is available at: <http://www.bis.gov.uk/assets/biscore/better-regulation/docs/i/11-1112-impact-assessment-toolkit.pdf> (both accessed 7 November 2012).

23 Inevitably including 'climate change', with no mention of 'global warming'.

24 Omitted from the later, more polished, versions.

25 Available at: <http://ialibrary.bis.gov.uk/search/index.cfm> (accessed 7 November 2012).

THE ARCHIVED IMPACT ASSESSMENTS

The BIS archive has no references, whatsoever, to any Impact Assessment on the Bribery Act. This is both amazing and unacceptable given its importance. The Ministry of Justice (MOJ) website²⁶ refers to two assessments:

- Impact Assessment – Guidance about commercial organisations preventing bribery (Section 9 of the Bribery Act 2010 (filed on 13 September 2010));
- Bribery Bill Impact Assessment – ‘Version 2’ (filed on 20 November 2009, but undated).

When the authors asked the MOJ about the missing assessments, its Bribery Bill Team was helpful and provided another document,²⁷ dated 20 February 2009, titled: ‘Version 1: Draft Implementation Stage’. The significance of this document is discussed later.²⁸

THE MISSING ASSESSMENT

The first mention of any Impact Assessment in relation to the proposed bribery law was a ‘draft implementation stage document’,²⁹ referred to in paragraph 96 of the ‘Bribery – Draft Legislation – Explanatory Notes’ on 25 March 2009 (Cm 7570). Although the document is not annexed to that report,³⁰ it is hyperlinked to the MOJ website where it can – supposedly – be found. The problem is, it has vanished.

However, the Explanatory Notes extract from the missing assessment are as follows:

- [F]or the most part, the provisions in the draft Bill represent a *reformulation of existing*³¹ bribery offences. *Due to low levels of offending*,³² the increase in the maximum sentence of imprisonment for those offences should have a negligible impact in terms of prison places.
- **[W]e believe that the draft Bill will not impose any significant additional administrative burden on business.**
- [T]he corporate offence³³ is not regulatory in nature and there will be no monitoring of compliance.
- [T]he offence will have a beneficial effect for corporate governance by encouraging those companies which have not already done so to adopt adequate systems to prevent bribery.
- [T]he benefits of the new corporate offence include enhanced ability on the part of business organisations to assess the suitability of their systems due to increased clarity

26 Available at <http://www.justice.gov.uk> (accessed 7 November 2012).

27 Which had been scanned rather than being in a direct PDF format, which is normal on the MOJ website.

28 The MOJ subsequently claimed that there were no other assessments of the Bribery Act.

29 With no mention of its date.

30 When it would have been prudent to do so.

31 (Emphasis added.) Misleading.

32 (Emphasis added.) How does this align with the doom and gloom scenarios?

33 Section 7 – strict liability.

in the law and in efficiency savings through, for example, reducing the cost of risk assessment.³⁴

- In addition, the enhancement of the UK's reputation as a consequence of our reforms should allow UK business to compete more successfully in international markets.³⁵

Anyone reading the Explanatory Notes could be forgiven for concluding that the proposed law was pro-business and that its implementation would incur negligible costs and administrative burdens. How unrealistic is this – but where is the actual document?

ASSESSMENT REVIEWED BY THE JOINT COMMITTEE

The next mention of an Impact Assessment appears in the Joint Parliamentary Committee Report dated 28 July 2009.³⁶ Again the document referred to is not annexed³⁷ but the Committee was scathing, stating that: 'further explanation is required as to why it³⁸ is not complete'. The Committee did not think it necessary to record the date of the Impact Assessment it had cited, its version number or any other identifying details. It is clear, however, that what the Committee did review is not among the documents on any government website.

It now appears that the scanned 'Version 1', dated 20 February 2009, provided by the MOJ to the authors, was the document referred to by the Joint Committee; it states – among other things – that:

- The average annual cost of the provisions of the draft Bill is estimated at £4.1 million, including £2.1 million to fund additional enforcement activities by the SFO³⁹ (and others) and £2 million for additional private sector defence costs.
- It is based on an additional 1.3 criminal prosecutions and three extra civil recovery actions per year. The Committee was critical that the calculation of these estimates was 'insufficiently explained'.
- **There is no detailed explanation for the cost-benefit impact on the private sector.**
- **The proposals go beyond the minimum EU requirements** (that is, they are 'gold plated').
- The new discrete corporate offence is 'intended particularly to combat the use of bribery in high-value transactions in international markets'.
- Given the fact that the new proposed general offences and the new discrete offence of bribing a FPO are a reformulation⁴⁰ of existing criminality, we do not expect any significant additional burden on the Criminal Justice System.

34 Nonsense.

35 On what basis?

36 Available at: <http://www.publications.parliament.uk/pa/jt/jtbribe.htm> (accessed 7 November 2012). The assessment was reviewed by the House of Commons Scrutiny Committee in April 2009 and its analysis is at Annex 1 of the Joint Report. Again the date of the Impact Assessment reviewed is not recorded!!

37 Nor is its date recorded!!

38 That is, the Impact Assessment.

39 A supposed further £6 million of funding for the City of London Police is not discussed.

40 This is not correct.

- The House of Commons Scrutiny Committee⁴¹ commented that: ‘**[there is no] formal competition assessment and no evidence is provided to support the assertion that the draft Bill will have a positive effect on UK companies’ international competitiveness**’.
- ‘Therefore, the Joint Committee may wish to recommend that the formal Competition Assessment is undertaken as part of a primary legislation resulting from the draft Bill’.⁴²
- ‘In a memorandum to the Committee, the Ministry of Justice explained that there was only a limited opportunity for the government to prepare a detailed Impact Assessment and that the decision had been taken to publish the proposals as draft legislation and to develop the Impact Assessment [later]’.
- ‘While a consultation summary is not provided, the structure of the assessment conforms [...]’ (Footnote 372 states ‘because the range of consultations previously carried out in relation to the reform of the law on bribery, no further formal consultation process on the impact of the draft Bill is anticipated’).
- It “‘Applauded”⁴³ [that] the Government’s suggestion that a review of the impact of the legislation would be conducted after three to five years of its enactment, but recommended that any revised Impact Assessment generated by the Government should set out a comprehensive set of performance indicators so that the criteria against which the legislation is being assessed are clearly understood’.⁴⁴

Notwithstanding what should have been regarded as fatal defects, the Joint Committee passed the Bill through pre-legislative scrutiny. It would not be unreasonable to expect that incomplete and misleading though it was, the Impact Assessment might have caused a few feathers to fly in Parliament. But this was not the case. In fact, the debates were described by some Honourable Members as ‘love fests’ and although there was some mandatory and token pouting, debates lacked enthusiasm, mainly because the Labour Party was determined to drive through the Act and the Conservatives were not prepared stir up the wrath of Luvvie-leaning voters by raising objections to such a ‘noble cause’ immediately before an election. So just to get thoughts absolutely clear about the two most important laws on corruption: ATCSA was buried with the bad news of 9/11 and the Bribery Act was coerced through in pre-election euphoria.

THE BOTTOM LINE?

The bottom line of all of the shenanigans related above is that it is impossible from publicly available records to track how many Impact Assessments there were, their dates, the minister who signed them off, the stage concerned or the supposed benefits and costs. Whether the mess is deliberate or just inefficiency is impossible to say.

Anyway the MOJ (finally) estimated that the Act would result in:

⁴¹ Which assisted the Joint Committee.

⁴² The Joint Committee made no such recommendation.

⁴³ Pure ‘Luvvie’.

⁴⁴ This recommendation was not followed. The undated ‘Version 2’ referred to in the Government’s response is far from complete.

- Just 1.3 additional contested prosecutions a year;
- Three additional civil disposals;
- No additional burdens on the criminal justice system or prison accommodation;
- Additional enforcement cost of £2.1 million for the SFO and £2 million of defence costs.

It did not calculate the extra compliance costs for British businesses and, as far as can be seen, made no attempt to do so. On the contrary, it implied that the Act would have a beneficial effect by improving the reputation of UK companies and making them more assured in overseas markets. Ho, hum!

So what is the alternative and likely more realistic estimate? The following are working assumptions which readers are invited to adjust or recalculate:

- There are around 2 million businesses registered in the UK, of which 2,300 are listed.
- They mostly have parents, subsidiaries, siblings, associates, customers, suppliers, most of whom – for purposes of prosecutorial prudence – will be assumed to be ‘associated persons’.
- The top 1,000 companies in the UK will take the Bribery Act seriously and will fully deploy legal, compliance and other internal and external teams to make sure their compliance systems are sound. Their initial legal and other costs are unlikely to be less than £400,000.
- The next 49,000 ranked companies will spend, say, an average of £25,000 a year.
- Companies outside the top 50,000 will not incur additional compliance costs.
- Based on the above, the estimated annual costs of compliance with the Bribery Act can be estimated at no less than £1,625 million per annum excluding allocations of management time or lost opportunity costs.

Whatever realistic alternative figures are chosen, the results demonstrate the complete codswallop of the MOJ’s claims that the impact on British business will be negligible or manageable. It is a lot of money to spend for 1.3 additional prosecutions! But it is a noble cause, although one the UK can ill afford in the present economic climate.

The Broken Silence: January 2007 to 2009

Everything remained nice and quiet, with possibly a few rumblings by the OECD, but nothing that could not be batted away with a few ‘Sir Humphreyisms’⁴⁵ Things were about to change. The six-year investigation by the SFO into scandalous worldwide corruption by BAE was, in January 2007, brought to an abrupt end by Mr Blair, who argued that prosecution would result in Saudi Arabia flouncing away and refusing to assist in the fight against Al Qaeda, thus causing British deaths on the streets. This explanation was nonsense but allowed the BAE directors to escape imprisonment and the problem to be buried.

Mr Blair’s decision clearly outraged OECD countries and, especially, America, and all of a sudden pressure came back on the UK to get its anticorruption house in order.

⁴⁵ The phrase refers to Sir Humphrey Appleby, the fictional character from the British TV series, ‘Yes, Prime Minister’.

In April 2008, morale in the SFO hit rock bottom and Robert Wardle, the director and other senior officials left for pastures new. And who could blame them?

House of Lords and Commons Joint Committee Report, July 2009

In July 2009 a Joint Committee of the House of Lords and the House of Commons reported on their deliberations into what was then the Bribery Bill, and started off by expressing their disappointment that the government had given them so little time to carry out their task. This is another indication of the unhealthy rush to get the law onto the statute books.

There are some significant points in the report:⁴⁶

- **‘At no stage has the government accepted that the UK is non-compliant with any of its international obligations’**, but it has acknowledged that failure to implement law reform could ‘bring into question the UK’s commitment to the OECD convention’.⁴⁷
- The committee believed that in making the ‘reasonable expectation test’ all of the circumstances should be taken into account. This qualification was not adopted in the Bribery Act and it makes a significant difference.
- The committee concluded that ‘improper performance’ would include the case where a senior banker, being asked by a rival bank to induce his or her trading team to join it in return for increased remuneration, would be in breach of expectation of good faith and could fall within the provisions of the Act.
- The committee struggled with the offence relating to bribery of FPO, believing that the advantage should be ‘improper’ or ‘not legitimately due’. These conditions were removed from the Act.
- On offset projects, the OECD Secretariat acknowledged that those payments that incidentally benefited an official alongside other members of the public were unlikely to amount to bribery.
- It is hard to imagine any circumstances in which the procedures could be regarded as adequate where a senior officer was at fault.
- It is generally accepted that corporate hospitality is a legitimate part of doing business at home and abroad, provided it remains within appropriate limits. The committee concluded that ‘we [...] call upon the government to reassure the business community that it does not risk facing prosecution for providing proportionate levels of hospitality as part of competing fairly in the international arena’.
- The committee seriously struggled with the role of the Attorney General in establishing a balance between prosecutorial independence and Parliamentary accountability.
- Unsurprisingly the committee struggled with the question of Parliamentary privilege and Article IX of the Bill of Rights 1689, which states that: ‘freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament’. The committee pointed out that it is not intended

⁴⁶ Joint Committee on the Draft Bribery Bill. First Report, 28 July 2009. Available at: <http://www.publications.parliament.uk/pa/jt/jtbribe.htm> (accessed 7 November 2012).

⁴⁷ This conflicts with the justification given for the ‘draconian act’.

to protect members from the criminal law but as a result of a 'historical accident' this is currently the case as neither House is considered for the purposes of the Public Bodies Corrupt Practices Act 1889 or the Prevention of Corruption Act 1906 to be a public body. The committee concluded that reform is best left to a separate review of the Parliamentary Standards Bill (or other legislation) and should not be addressed in the Bribery Act.

The committee was critical of the MOJ's Impact Assessment questioning whether the estimated £50,000 promotional costs would be adequate to bring the Act to the attention of business: that 1.3 additional prosecutions for bribery per year was almost laughable and that the cost of enforcement to British businesses was likely to far exceed the estimate of £3 million per year.

Government Response to the Joint Committee Report, November 2009

In August 2009, the 'Lockerbie Bomber' was released from prison, supposedly because he had only weeks to live but more likely in exchange for an oil deal with Libya. The UK's international reputation had again suffered because of skulduggery by its political leaders, so there was an increasing need to get things moving on the corruption front.

The MOJ's patronising response was published in November 2009 and concludes:⁴⁸

- '[T]he draft Bill provides a modern and comprehensive scheme of bribery offences, **in order to allow investigators, prosecutors and courts to tackle bribery effectively**'. This Freudian slip reveals the real purpose of the Act, whose main public justification was to help British businesses succeed in corrupt international markets!
- The government considers that relying on prosecutorial discretion is the proper way to proceed and that 'an important element of the government's policy in this area is to encourage a changing culture in emerging markets away from the cynical and pragmatic acceptance of bribery as the only effective way of doing business'.
- The government intends to review the Honours (Prevention of Abuses) Act 1925 once the Bribery Act is established.⁴⁹
- The government agrees that guidance should be available to commercial organisations (but clearly not government departments). However, in our view, it would not be appropriate to add a clause to the Bill giving the government power to approve guidance prepared by others
- We confirm that the government does not intend that this legislation should be used to penalise the legitimate and proportionate use of corporate hospitality to establish or maintain good relationships with prospective customers.
- The exercise of confiscation powers is directed towards the recovery of all the proceeds of crime. It is not intended to be punitive in effect.

⁴⁸ See 'Government Response to the conclusions and recommendations of the Joint Committee Report on the Draft Bribery Bill', November 2009. Available at: <http://www.official-documents.gov.uk/document/cm77/7748/7748.pdf> (accessed 7 November 2012).

⁴⁹ If you believe in Father Christmas.

- The EU procurement directive introducing mandatory debarment of suppliers convicted of specific offences including corruption (actually this means only paying bribes) represented a strengthening of earlier rules. Bribery is a serious offence and the government considers it important that we work with our European partners to identify good practice in the application of exclusion procedures. We are considering whether a conviction for the proposed new corporate offence of failure to prevent bribery would trigger the conditions of automatic debarment.

The above response (mainly composed by the Bribery Bill Team in the MOJ) reveals a remarkable misunderstanding of the nature of corruption and the ways in which it might be controlled.

World Bank, December 2010

In December 2010, the World Bank sponsored the modestly named 'International Corruption Hunters' Alliance' meeting in Washington, admitting that there was a long way to go in achieving the OECD's objectives and that only 9 out of the 39⁵⁰ signatory countries had taken *any* enforcement action relating to facilitation payments to FPOs (see page 243). The fact is that 'demand-side' countries have done virtually nothing to implement the Convention.

Passing of the Act, April 2011

The Act was passed through Parliament on the day before it prorogued pending the General Election. It was the Labour Government's final present to British industry. Chapter 5 continues with the sorry tale.

50 As of November 2012.

Overview

The main international conventions on corruption rather than bribery are as follows:

Table 3.1 Main Conventions on ‘Corruption’

Sponsor name and Convention	Deals with	Extent and current position
European Union: May 1997 Convention on the Fight Against Corruption Involving Officials of the European Communities and Member States	Corruption of foreign and domestic public officials of EU Member States (extraterritorial)	15 Member states plus candidates. Not ratified Not in effect A very limited convention applying only to the EU
OECD: December 1997 Convention on Combating Bribery of Foreign Public Officials in International Business Transactions	Corruption of foreign public officials (FPOs) (extraterritorial)	30 Member States 5 Non-Member States Now effective Effectively applies only to 'supply-side' states
Council of Europe: November 1998 Criminal Law Convention on Corruption	Corruption of domestic public officials Corruption of Parliamentarians Corruption in the private sector Trading in influence Money-laundering and proceeds of corruption offences Accounting offences relating to corruption (extraterritorial and domestic)	43 Member States Ratified by 8 Member States Needs 14 ratifications to become effective Not in effect, but signed by the UK A very good convention
United Nations: January 2002 Convention against Corruption	As Council of Europe only even wider (extraterritorial and domestic)	140 signatories A good convention that has been overtaken by the much narrower OECD edition possibly because it does not tackle political corruption. For these reasons it is not fully analysed in this book

To keep this book to the indecently short length it now is, other conventions - which regionalise or tinker with the above - have not been included.

The UK has signed (or will sign) all four conventions and has ratified the first two. Followers of committees and conventions will already know that signature means that the terms are generally agreed and ratification that domestic laws comply or will be put in place. The third stage is that the convention is taken onto a country's statute books. If a country which ratifies a convention fails to observe its obligations, it may come under pressure from other members and in the case of the European Union (EU), political, legal and financial sanctions. In most cases this is akin to being mauled by a dead sheep.

However, it should be noted - despite all of the political posturing on Britain leading the way - it has cynically avoided incorporating the Organisation for Economic Cooperation and Development (OECD) Convention into its statutes and can therefore ignore it. It has done precisely this with the Council of Europe Convention, relating to 'trading in influence', thereby further protecting skulduggery by politicians.

Organisations Concerned With Corruption

INTRODUCTION

There are a number of organisations that are leading the way in the supposed fight against corruption, including those described in detail below and:

- The World Economic Forum
- International Chamber of Commerce
- United Nations Global Compact
- Extractive Industries Transparency Initiative.

All of these issue guidelines that are of limited value to companies, but the most significant players¹ are described below.

TRANSPARENCY INTERNATIONAL (TI)

TI is an international non-governmental organisation devoted to combating corruption and its publicity² claims that

it brings civil society, business, and governments together in a powerful global coalition. TI, through its International Secretariat and more than 80 independent national chapters around the world, works at both the national and international level.

TI is funded by donations from chapter contributions, foundations and business organisations, some of which (such as Enron), have had less than impeccable track records. That said, TI has done some good work and has been among the most effective pressure groups in the anti-bribery field.

TI's publicity continues:

¹ There are many others, including the World Bank.

² See <http://www.transparency.org/> (accessed 7 November 2012).

In the international arena, TI raises awareness about the damaging effects of corruption, advocates policy reform, works towards the implementation of multilateral conventions and subsequently monitors compliance by governments, corporations and banks. At the national level, chapters work to increase levels of accountability and transparency, monitoring the performance of key institutions and pressing for necessary reforms in a non-party political manner.

TI also produces the Perceptions of Corruption Index and Bribe Payers' Index (which are discussed in Chapter 4) and some other interesting papers. One, by Paul Lashmar, in the organisation's 'Global Corruption Report of 2001', notes the corrupt influence of political party funding and massive corruption of politicians in, among other places, Germany, Italy, Ireland, Spain, France, Greece, Portugal, Belgium and, of course, the grand EU headquarters itself.

Mr Lashmar comments that:³

- In 1998 the US Intelligence Community found that some 60 major international contracts valued at US\$30 billion went to the biggest briber. In 2002, *The Economist* reported that 'the US government learned of significant allegations of bribery by foreign firms in over 400 competitions for international contracts valued at \$200 billion. The practice is global in scope, with firms from over 50 countries implicated in offering bribes for contracts in over 100 buyer countries over the past seven years'.
- The OECD Convention contains a major loophole: 'It does not bar multinational companies from making contributions to foreign political party officials⁴ and that may prove to be a key means to gain influence'.

Some spectators believe that any criticism of TI is beyond the pale and that its image – which is akin to that of the Red Cross or Mother Theresa – should be protected at all costs. There is no doubt that TI has done some very good work, but criticism is justified because:

- It concentrates too heavily on the so-called 'supply side' of corruption (around 22 countries) while paying little regard (or at least, not emphasising the results) to approximately 160 countries on the so-called 'demand side'. In fact, corruption is an equal transaction between an extorter and coërcer and very often initiated by the former.
- It should publish a summary of the internal laws against corruption in so-called 'demand-side' countries and promote these widely to the international business community.
- It should abandon the misleading terms 'active' and 'passive' corruption.

But most of all it should coordinate and think again about its perceptions (and what they entail) and concentrate much more on tackling extortion, kleptocracypolitical corruption and the plundering of foreign aid.

³ See [http://archive.transparency.org/publications/gcr/gcr_2001-Regional Reports: West Europe and North America](http://archive.transparency.org/publications/gcr/gcr_2001-Regional%20Reports%20West%20Europe%20and%20North%20America) (accessed 7 November 2012).

⁴ The Foreign Corrupt Practices Act (FCPA) has such a provision but the UK Bribery Act does not.

TRACE INTERNATIONAL

TRACE International Inc. is an America-based, non-profit membership association that pools resources to provide practical and cost-effective anti-corruption compliance solutions for multinational companies and their commercial intermediaries (sales agents and representatives, consultants, distributors, suppliers, etc.). It is funded, primarily, by subscriptions.

TRACE provides several core services and products, including: due diligence reports on commercial intermediaries; model compliance policies; an online Resource Center with foreign local law summaries, including guidelines on gifts and hospitality; in-person and online anti-corruption training; and research on corporate best practices. It also produces the excellent 'Trace compendium' of enforcement actions taken throughout the world.

EUROPEAN UNION

The EU was set up after the Second World War, and the drive towards European integration was launched on 9 May 1950 when France officially proposed the creation of 'the first concrete foundation of a European federation'. Six countries (Belgium, Germany, France, Italy, Luxembourg and The Netherlands) were the founder members. Today, after four waves of accessions (1973: Denmark, Ireland and the United Kingdom; 1981: Greece; 1986: Spain and Portugal; 1995: Austria, Finland and Sweden) the EU has 15 Member States and is preparing for the accession of 13 eastern and southern European countries.

An early version of the EU website stated:

The European Union is based on the rule of law and democracy. It is neither a new State replacing existing ones nor is it comparable to other international organisations. Its Member States delegate sovereignty to common institutions representing the interests of the Union as a whole on questions of joint interest. All decisions and procedures are derived from the basic treaties ratified by the Member States.

The principal objectives of the Union are to:

- Establish European citizenship (fundamental rights; freedom of movement; civil and political rights);
- Ensure freedom, security and justice (cooperation in the field of justice and home affairs);
- Promote economic and social progress (the single market; the Euro, the common currency; job creation; regional development; environmental protection);
- Assert Europe's role in the world (common foreign and security policies; the EU in the world);
- The EU is run by five institutions, each playing a specific role:
 - The European Parliament (elected by the peoples of the Member States)
 - The Council of the Union (composed of the governments of the Member States)
 - The European Commission (the driving force and executive body)
 - The Court of Justice (compliance with the law)
 - The Court of Auditors (sound and lawful management of the EU budget).

- Five further bodies are part of the institutional system:
 - The European Economic and Social Committee (expresses the opinions of organised civil society on economic and social issues)
 - The Committee of the Regions (expresses the opinions of regional and local authorities on regional policy, environment, and education)
 - The European Ombudsman (deals with complaints from citizens concerning maladministration by an EU institution or body)
 - The European Investment Bank (contributes to EU objectives by financing public and private long-term investments)
 - The European Central Bank (responsible for monetary policy and foreign exchange operations).

A number of agencies and bodies complete the system.

On 26 May 1997, the EU enacted the ‘Convention on the Fight Against Corruption Involving Officials of the European Communities or Officials of Member States’.⁵ The Convention comes into force 90 days after the Secretary-General of the Council of the European Union has been notified by the last Member State to ratify.

The Convention states: ‘For the purposes of this Convention, the deliberate action of an official, who, directly or through an intermediary, requests or receives advantages of any kind whatsoever for himself or for a third party, or accepts a promise of an advantage, to act or refrain from acting in accordance with his duty or in the exercise of his functions in breach of his official duties constitutes passive corruption’ (i.e. excludes facilitation payments).

There is a parallel offence of active corruption and Member States will be required to take the necessary measures to ensure that both are made a criminal offence. The definition of ‘official’ and ‘Community Official’ are vague and would seem to exclude MPs and certain other elected representatives like Members of the European Parliament (MEPs). At the present time, it is not a convention worth worrying about.

COUNCIL OF EUROPE

The Council of Europe is a non-statutory body, not backed by the compulsion of law. Any European state can become a member of the Council provided it accepts the principle of the rule of law and guarantees human rights and fundamental freedoms to everyone under its jurisdiction. The Council should not be confused with the EU. The two organisations are quite distinct. It has 43 members including the 15 EU states.

The Criminal Law Convention on Corruption was adopted by the Committee of Ministers of the Council of Europe on 4 November 1998 and opened for signature on 27 January 1999. The website explains: ‘The Convention is an ambitious instrument aiming at the co-ordinated criminalisation of a large number of corrupt practices’. It also provides for complementary civil law measures and for improved international cooperation in the prosecution of corruption offences.⁶

⁵ Available at: [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:41997A0625\(01\):EN:NOT](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:41997A0625(01):EN:NOT) (accessed 7 November 2012).

⁶ For the Council of Europe website see <http://hub.coe.int/> (accessed 7 November 2012). Full details of the Convention are available on <http://conventions.coe.int/treaty> (accessed 7 November 2012).

The Convention is open to the accession of non-member States. Its implementation will be monitored by the Group of States against Corruption (GRECO), which started work on 1 May 1999. To date, the Convention has been ratified by 8 countries and signed by 31, including the UK. It provides for enhanced international cooperation (mutual assistance, extradition and the provision of information) in the investigation and prosecution of corruption offences and will come into force when it has been ratified by 14 states.

States are required to provide effective and dissuasive sanctions and measures, including deprivation of liberty which can lead to extradition. Legal entities will also be liable for offences committed to benefit them, and will be subject to effective criminal or non-criminal sanctions, including monetary sanctions.

The Convention also incorporates provisions concerning aiding and abetting, immunity criteria for determining the jurisdiction of states, liability of legal persons, the setting up of specialised anti-corruption bodies, protection of persons collaborating with investigating or prosecuting authorities, gathering of evidence and confiscation of proceeds. It is a good convention and far better than the OECD's.

The Council also supported a civil law convention (see page 44), which has not been ratified by the UK.

THE ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT

The OECD has been called a think tank, a monitoring agency, a rich man's club, an un-academic university and a load of hot air. Its publicity explains that its 34 member states,⁷ grouped in a unique and supposedly economic forum,

discuss, develop and refine economic and social policies. They compare experiences, seek answers to common problems and work to co-ordinate domestic and international policies to help members and non-members deal with an increasingly globalised world. Their exchanges may lead to agreements to act in a formal way – for example by establishing legally binding agreements to crack down on bribery, or codes for free flow of capital and services.

The OECD is also known for soft law – non-binding instruments on difficult issues such as guidelines for multinational enterprises. Beyond agreements, the discussions at the OECD are said to make for better-informed work within member states' own governments across the broad spectrum of public policy and help clarify the impact of national policies on the international community

The publicity also states:

The OECD is a group of like-minded countries. Essentially membership is limited only by a country's commitment to a market economy and a pluralistic democracy. It is rich, in that its [...] members produce two thirds of the world's goods and services, but it is by no means exclusive and now involves in its work some 70 non-member states from Brazil, China and Russia to less developed countries in Africa and elsewhere.⁸

⁷ A list of member states and other information about the organisation is available on the OECD website at <http://www.oecd.org/> (accessed 7 November 2012).

⁸ Whiteford, Peter, 'Anticipating Population Ageing – Challenges and Responses', available at: <http://www.oecd.org/social/socialpoliciesanddata/31639461.pdf> (accessed 7 November 2012).

Over the years there has been a considerable amount of international pressure - mainly from the USA - to standardise anti-bribery laws. TI and the OECD took up the challenge, resulting in the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

On 21 November 1997, negotiators from 29 OECD member states and five other countries adopted the convention. A signing ceremony took place in Paris on 17 December 1997.⁹ The Convention makes it a crime to offer, promise or give a bribe to an FPO in order to obtain or retain international business deals. A related text effectively puts an end to the practice of affording tax deductibility for bribe payments made to foreign officials. It is concerned only with 'active bribery' of FPOs.

The Convention commits the 35 signatory countries to adopting common laws to punish companies and individuals who engage in bribery transactions. So far, 28 countries have been subjected to close monitoring to determine the adequacy of their implementing legislation.

Article 1 states:

Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.¹⁰

Further, Article 2 states that

each Party shall take any measures necessary to establish that complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official shall be a criminal offence. Attempt and conspiracy to bribe a foreign public official shall be criminal offences to the same extent

And Article 5 forbids considerations of international relations or economic interest to influence the investigation of or prosecution for bribery of an FPO.¹¹

For the purpose of this Convention a 'foreign public official' means any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organisation. This is usually interpreted to include elected politicians.¹²

⁹ Not at le Rose Chatte Boîte de Nuit.

¹⁰ The Convention is available at: <http://www.oecd.org/investment/briberyininternationalbusiness/anti-briberyconvention/38028044.pdf> (accessed 7 November 2012).

¹¹ This was why Mr Blair's initial attempts to scupper the British Aerospace case had to be 'reframed' in the context of Saudi withdrawal in the fight against terrorism.

¹² But not in the UK.

FPO Anomaly

Thus a Belgian businessman who bribes a British MP could be prosecuted in his home country whereas the MP could not.

After ratifying the Convention on 15 February 1999, the UK argued that its existing laws (and especially its Common Law provisions) were in compliance and that nothing had to be done. It maintained this stance until April 2001 when, facing severe criticism from the International Development Select Committee of the House of Commons, and pressure from the USA and its OECD partners, the Government agreed to act. Although the Anti-terrorism Crime and Security Act (ATSCA) complied with the OECD Convention, the British Aerospace scandal put the UK under even more pressure to put its house in order and this ultimately led to the Bribery Act 2010.

THE GROUP OF STATES AGAINST CORRUPTION

GRECO came into being on 1 May 1999 and 49 states are now members, including the UK. GRECO is responsible for monitoring not only the OECD Convention but also the application of the Guiding Principles for the Fight against Corruption and other conventions or legal instruments drawn up by the Council of Europe under its Programme of Action against Corruption.

UK Regulatory and Law Enforcement

OVERVIEW

The Business Anti-Corruption Portal maintained by the British Government (note: rather than being comprehensive and ‘anti-corruption’, its concern is business and ‘anti-bribery’, relating only to ‘emerging markets and developing countries’) states that it is ‘a comprehensive and practical tool tailored to meet the corruption risk management needs of small and medium sized companies (SMEs) operating in or considering doing business in emerging markets and developing countries’.

The website² provides 17 ‘country profiles’,³ sample policies, codes of conduct, guides on such things as a one-page ‘risk assessment procedure’,⁴ and notes on control tools and training. It lists some of the UK government agencies concerned with ‘corruption’ as detailed in Table 4.1 and more detail on page 66.

Table 4.1 UK Government Departments Involved in ‘Corruption’ (or is it ‘Bribery?’)

Department	Activities
Anti-corruption Champion	On 10 June 2010 the Prime Minister appointed the Lord Chancellor (Kenneth Clarke) as ‘Anti-corruption Champion’. The role seems to have been passed on to Chris Grayling after the reshuffle in 2012.
Business Innovation & Skills (BIS)	Coordinates government work to support ethical business overseas. It represents the UK at the OECD Working Group on Bribery and provides the contact point for the OECD Guidelines for multinational enterprises.
Department for International Development (DFID)	The department is committed to tackling corruption and ensuring that foreign aid is used for its intended purpose.
Export Credits Guarantee Department (ECGD)	Takes corruption risks into account when asked to support export transactions.
UK Trade and Investment (UKTI)	Provides advice and support on how to trade internationally ‘but does not make commercial judgements for a company’.

1 Supported by Austria, Denmark, Germany, The Netherlands and Sweden (only).

2 At <http://www.business-anti-corruption.com/> (accessed 7 November 2012).

3 But not aligned with Transparency International (TI) perceptions.

4 Based almost entirely on ‘country risk’.