Bribery—corporate culture in the spotlight

Individuals versus corporates: who shoulders the blame in bribery cases? Allison Clare QC examines the 'adequate procedures' defence

© Getty Images/iStockphoto

IN BRIEF

▶ Considers the principles which can be gleaned so far about the legal basis for the adequate procedures defence, the relevance of individual fault to corporate blameworthiness, and the emerging role of corporate culture.

After ten years of the operation of the Bribery Act 2010 (BA 2010), one of the most vexed questions remains the legal and factual basis for the BA 2010, s 7(2) adequate procedures defence. The question is particularly challenging when the relevant commercial organisation (RCO) facing a 'failure to prevent' allegation had extensive anti-bribery and corruption (ABC) policies in place, but one or more of its employees caused or permitted their circumvention.

In the absence of direct judicial guidance, some assistance can be gained from a number of sources: consideration of the underlying purpose of the adequate procedures defence, the terms of BA 2010 itself, cases thus far, and the 'corporate culture' concept.

The purpose of the adequate procedures defence

The Law Commission paper *Reforming Bribery* (Law Com No 313, *bit.ly/2TlHNCM*) proposed the model of a failure to prevent offence accompanied by an adequate procedures defence. The precise terms of that proposal called for an offence of *negligently* failing to prevent bribery, with the adequate procedures defence available only where that negligence was not attributable to a company director or equivalent. However, in BA 2010 as passed, any reference to negligence has been omitted.

Despite this key difference, the Law Commission paper does shine valuable light on the purpose behind the failure to prevent model. The commission considered the principal justification for the offence to be 'to deter companies from giving direct or indirect support to a practice or culture of bribe-taking on the part of those with whom they do business'. The proposed defence was needed because 'our focus is not on ethically well-run companies which have made an error (albeit culpable) in a particular case leading to the commission of bribery by [an associated person]' (see Pts 6.1–6.7, p98).

The paper goes on to highlight a distinction between 'instances of carelessness leading to the commission of bribery that even good preventative systems cannot completely eliminate and instances of carelessness that tend to reveal either the absence of preventative systems or their inadequacy' (Pt 6.105, p121)

The paper cites two examples of 'single instances' of carelessness which were considered compatible with a corporate having adequate procedures:

i. where one company takes over another and an employee from the acquired company has not fully yet understood how the acquiring company's ABC policies operate; and
ii. where the company's employee fails to do their ABC job properly because they were distracted by a search for another job.

Although these examples seem very restrictive, they illustrate the wider principle that 'individual failings of particular [employees] do not necessarily illustrate systematic failures in the way that it is sought to prevent… bribery' (Pt 6.108, p122).

Hence in assessing the adequacy of ABC procedures, the key question is whether there really has been *organisational* blameworthiness. Pinpointing what and why can be complex, especially where there has been wrongdoing or fault by individual employees.

The challenge for lawyers and the courts is to identify or formulate the correct legal principles which can assist a corporate to properly accept or reject an allegation of organisational fault.

BA 2010 provisions

BA 2010, s 7 provides that:

> '(1) A relevant commercial organisation ('C') is guilty of an offence under this section if a person ('A') associated with C bribes another person intending—
> (a) to obtain or retain business for C, or
> (b) to obtain or retain an advantage in the conduct of business for C.
>
> '(2) But it is a defence for C to prove that C had in place adequate procedures *designed to prevent* persons associated with C from undertaking such conduct' (emphasis added).

The RCO must prove the defence on the balance of probabilities. The statutory wording makes plain that the mere fact of bribery by an associated person cannot of itself provide the answer to whether adequate procedures were in place. Otherwise, the defence would be otiose.

On one view, BA 2010, s 7(2) seems to call for an 'after the fact' assessment rather than the arguably more generous test of what was 'reasonable in all the circumstances' at the time (as used in the failure to prevent tax evasion offences within the Criminal Finances Act 2017). However, it is worth noting that the House of Lords Select Committee on the Bribery Act 2010 recorded in its 2019 post-legislative scrutiny report that in his evidence before them, Sir Brian Leveson said he would be 'very happy to accept' that '"adequate" would be construed by a judge as meaning, in effect, "reasonable in all the circumstances"' (para 202).

R v Skansen Interiors Limited (unreported, 2018, Southwark Crown Court) appears to be the only contested case thus far in which a corporate has relied upon the BA 2010, s 7(2) defence. The House of Lords Select Committee report noted that the direction of the trial judge to the jury in that case, namely that proof of adequate procedures was entirely for them to decide and both words were to have their 'everyday meaning' (para [203]). While each word in isolation might be easily understandable by any jury, it is reasonably arguable that the same cannot

be said of them when placed in the context of ABC policies within a large commercial organisation.

Neither adequate procedures nor 'reasonable in all the circumstances' provide tangible assistance to a jury or a corporate wrestling with the BA 2010, s 7(2) defence. The six principles which BA 2010 guidance states should inform a corporate's procedures are a helpful starting point, but were never intended to be prescriptive. Nor do these six principles provide a great deal of help in harder cases, where for example a corporate's policies and procedures are deliberately bypassed by one or more of its employees. The House of Lords Committee acknowledged the current difficulties and, while it stopped short of suggesting an amendment to BA 2010, s 7, did urge greater clarity be provided under the statutory guidance.

A judicial 'hands off' approach as seen in *Skansen* will fuel concern that a jury will incorrectly equate the fact of bribery with a lack of adequate procedures. More importantly, a purely lay assessment in a specialised area promotes uncertainty and inconsistency. Hence, allowing the adequate procedures defence to operate *purely* as a question of fact for the jury is unsatisfactory for both those being investigated and those investigating. In particular, it arguably leaves the RCO (which bears the evidential burden) faced with playing an expensive guessing game.

What is clear under BA 2010 is the definition of substantive bribery, and therefore its operation within BA 2010, s 7. The BA 2010, s 1 offence, for example, can be committed upon the offering of a financial advantage with the intention that a relevant person be induced to perform a relevant function improperly. So the offence may be complete whether or not that relevant person is ever paid. This makes sense on a practical level, because it is often the case that bribes are paid well after the contract has been obtained by the RCO and it is this obtaining of the contract which distorts the market. BA 2010's broad definition of substantive bribery means that payment freezes may be insufficient without more to demonstrate 'adequate procedures designed to prevent' bribery. If so, preventing payment would go only to mitigation.

Deferred prosecution agreements

Three of the deferred prosecution agreements (DPAs) concluded thus far provide useful factual contrasts relevant to adequate procedures:

SFO v ICBC Standard Bank plc

Serious Fraud Office v Standard Bank plc (now known as ICBC Standard Bank plc) [2015] Lexis Citation 567 alleged a single corrupt deal where the bank had a number of ABC committees, policies and procedures. Despite this, procedures were said to be inadequate for various reasons, including:

- allowing the formal structure of a transaction rather than the broader risks to dictate the approach;
- a key policy was unclear on its face coupled with insufficient or ineffective guidance and/or training about how it applied on certain facts;
- staff insufficiently alive to ABC risks; and
- no effective demonstration of an anti-corruption culture.

SFO v Rolls Royce plc

Serious Fraud Office v Rolls Royce plc and another [2017] Lexis Citation 3 alleged systematic bribery spanning over 20 years, spread across many jurisdictions, and involving three business divisions and senior or very senior employees. This corruption co-existed with extensive ABC policies and procedures.

SFO v Airbus SE

The judgment in *Director of the Serious Fraud Office v Airbus SE* [2020] Lexis Citation 56 described bribery as endemic in two core business areas, and that prior to a certain date the company's 'policies and procedures were easily bypassed or breached' and there existed a 'corporate culture which permitted bribery' by business partners and/or employees. It was alleged on one of the counts, that compliance employees agreed to falsely represent relevant facts.

These cases highlight some common-sense principles:

- A single instance of corruption can still have been made easier by inadequate procedures.
- Widespread corruption across different business or geographical areas indicates organisational blameworthiness.
- Deliberate actions by employees which cause or permit the bypassing of procedures does not automatically mean there was no organisational fault.

Despite the differing facts, the above DPAs explicitly or implicitly reference 'corporate culture'. Where a key written policy is found wanting, consideration of adequate procedures is relatively straightforward. However, policies and procedures are only part of the picture, and most large corporates will have these in place. Vulnerability often lies in the approach taken to those policies by employees operating at the coalface of the business.

Nonetheless, individual blameworthiness and corporate blameworthiness are not mutually exclusive.

The anchor of corporate culture?

Corporate culture is much discussed as a key concept, but less often defined as a legal term. Australia is one of the few countries which has sought to grasp the nettle. The Australian Criminal Code (ACC) permits the fault element of an offence committed by a corporation to be made out by a number of routes, including by proving that:

i. a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to noncompliance with the relevant provision; or
ii. the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision [(Division 12.3 (c) and (d)).

The ACC defines corporate culture as 'an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes [sic] place' (12.3 (6)).

The Australian Law Reform Commission's (ALRC) report *Corporate Criminal Responsibility* (April 2020, *bit.ly/3y4loII*) noted that its consultees were overwhelmingly in favour of retaining corporate culture as a means of attributing corporate fault (6.49). That may indicate an acceptance by many with experience in the area that culture is a reliable mirror for organisational fault.

The ALRC quoted this non-legal definition, illustrating the nexus with individual employees: 'corporate culture is what people do when no-one is watching' (1.41). It seems reasonably arguable that to have one rogue employee may be regarded as misfortune; to have more than one may indicate cultural problems. In this important respect, individual and corporate blameworthiness are not necessarily mutually exclusive.

Striving for consistency

Assessing adequate procedures should be about careful consideration of legal principles as applied to the detailed, objective facts in each case. It cannot be dealt with impressionistically. Both those investigating and those being investigated should be precise about any failings alleged or accepted and why they do or do not indicate organisational fault. This in turn should help promote consistency—and, therefore, greater certainty—for all parties. NLJ

Allison Clare QC is a practising barrister at Red Lion Chambers (*www.redlionchambers.co.uk*). She specialises in complex fraud, corruption and money laundering allegations. Allison would like to thank Alex Benn, a pupil at Red Lion Chambers, for their assistance with this article.