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Comparative Analysis of the UK Bribery Act 2010 and Anti-Bribery Legislation in Ukraine, Indonesia, and Kenya

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Summary

This is a comparative analysis of the UK Bribery Act (2010) and anti-corruption legislation in Ukraine, Indonesia and Kenya, in order to discern areas for legislative improvement therein. Those three jurisdictions were selected on the basis that they exercise a degree of influence over their respective regions (and those regions reflect an appropriate level of geographical diversity), they encompass a broad political interest in anti-corruption policies within, they operate under a parliamentary democracy and operate a sufficiently detailed body of pertinent legislation.

In order to ensure a degree of consistency across the analysis of the three countries, each was examined in terms of:

- definition of a 'bribe'
- definition of a 'public official'
- definition of a 'foreign public official'
- extraterritoriality
- gifts and hospitality
- bribery through intermediaries
- corporate liability for the actions of subsidiaries
- facilitation payments
- adequate compliance procedures
- enforcement mechanisms and trends in legislative implementation

This comparative study indicates that the UK Bribery Act (2010), whilst doubtless occupying a well-deserved position as an effective and far-reaching piece of legislation, is not without its faults in terms of definitions and scope. In spite of this, the other jurisdictions hosting an arguably more complex and often multi-legislative framework are, in most instances, replicating, or at least attempting to mirror, the main components and drivers of the UK Bribery Act.

The study asserts that, apart from the similarity (in terms of broad consistency of provisions) of other jurisdictions' legislation, several issues require resolution if anti-bribery and anti-corruption efforts marshalled through legislation are to succeed. These concern the minutiae of definitional constructs, such as what constitutes a 'bribe' or a 'gift'; the nature and impact of corruption within a society; the nature and influence of corruption within the ranks of those charged with its eradication; and the lack of cohesion across a range of historically driven laws; rather than the absence of effective legislation.

The study provides an examination of legislation, not a detailed analysis of the causes, nature and extent of bribery and corruption per se. In that context, the study recognises, but does not detail, that there are a number of extraneous factors within each jurisdiction that may have an impact on the effectiveness of the implementation of the legislation outlined. These include political interference, bureaucracy, lack of human and financial resources and lack of investigative and judicial capacity. Naturally, the mitigation or eradication of such issues can only strengthen the impact of the legislative provisions discussed in the study.

Ukraine

Ukraine has a complex legal system, developed in a piecemeal fashion over a relatively short period of time. It maintains a plethora of legislation concerning bribery and corruption offences, which ensures that a comprehensive number of actions and prospective offenders are captured within it. Conversely, however, it may be somewhat onerous a task to rapidly situate a person and/or their alleged malfeasance in the correct piece of legislation. Ukraine's legislative framework nevertheless incorporates aspects of the UK Bribery Act 2010, such as the notion of extraterritoriality and the refusal to countenance facilitation payments, even if it does not deal directly with the bribing of a foreign public official.

Indonesia

Indonesia has arguably clouded the approach it takes to bribery by electing to deal with the issue under its Law on the Eradication of Corruption, rather than under its Law on the Criminal Act of Bribery. Of greater difficulty, perhaps, is the omission, within its legislative framework, of the criminalisation of bribery in the private sector and lack of a definition of a foreign public official or provisions against the bribing of that official.

Kenya

Given its close mirroring of the UK Bribery Act 2010, Kenya's Bribery Act reflects the simple range and ambit of the UK's provisions in relation to bribery, gifts and hospitality, extraterritoriality and the use of Deferred Prosecution Agreements. In keeping with the UK Bribery Act 2010, however, Kenya runs the risk, as does the UK, of permitting a certain degree of ambiguity in the definitions within its Bribery Act of, for example, the terms 'financial or other advantage' and 'corporate hospitality', respectively. Simply stated, where the application of a term can be questioned by the person to whom it is deemed to apply, the power of a provision can be undermined.

Given the remit of the study, the focus has rightly been placed upon the selected jurisdictions, but arguably the issues raised and discussed within will be relevant to other countries across each continent. That is primarily because, with minor differences in its nature, scope and volume, the act of bribery is remarkably consistent in terms of its core characteristics. In that sense, the legislative response tends to proceed down fairly consistent lines; that is, it will endeavour to encapsulate the meaning of a bribe and bribery, identify those parties who can become involved in the act of bribery and establish the criteria by which malfeasance can be determined. Naturally, the extent to which, and manner with which, this task is undertaken will be subject to jurisdictional variations in, for example, the approach, nature and strength of legislation and degree of political will. In essence, therefore, the issues discussed and analysed with this comparative analysis offer other jurisdictions a useful position from which to observe how situations they themselves might be experiencing, in terms of tackling bribery, have been approached and/or addressed by others.

1. Introduction

The rationale for the study was conceptualised as a vehicle for enabling WFD Country Offices to:

1. engage with the relevant parliamentary committees, government officials, business community, legal professionals, anti-corruption agencies and other stakeholders regarding the anti-bribery legislation in their country, and how to improve it;
2. solicit (political and financial) support from UK Embassies and High Commissions to work on legislative initiatives strengthening the anti-corruption framework in selected countries; and
3. contribute to a more favourable, and fair, climate for business, trading and investing abroad, as promoted by the UK Trade Envoys.

The countries of Ukraine, Kenya and Indonesia, against which the provisions of the UK Bribery Act 2010 were compared, were selected on the basis that, respectively:

- ▶ they represented the necessary degree of geographical diversity (Eastern Europe, Africa and Asia) and held significant levels of influence in those locations;
- ▶ there is broad political interest in anti-corruption policies within each country;
- ▶ each country is a parliamentary democracy in a presidential system; and
- ▶ there is a sufficient body of anti-corruption and anti-bribery legislation in place to facilitate a comparative analysis.

This study is a broad comparative analysis of anti-bribery legislation in the United Kingdom and in three other jurisdictions, namely, Ukraine, Indonesia and Kenya. The desk-based research was complemented by virtual interviews with, and subsequent provision of information by, a number of experts based in the respective jurisdictions.¹

Within the aforementioned analytical framework, certain key elements were examined in relation to each of the four jurisdictions in order to discern similarities and differences in terms of those jurisdictions' respective approaches. Thus, the framework considered the definitions and ambits of 'bribe', 'public official', 'foreign public official', 'extraterritoriality', 'gifts and hospitality', 'bribery through intermediaries', 'corporate liability for the actions of their subsidiaries', 'facilitation payments' and 'adequate compliance procedures'.

The analysis also incorporated elements deemed to be missing from the legislative provisions, the potential application of key elements from the UK Bribery Act to the other jurisdictions and any areas by which the legislation in each jurisdiction might be improved.

1. See Annex 2

2. The United Kingdom

The UK Bribery Act 2010 is deemed to sit at the zenith of anti-bribery legislation; other jurisdictions are encouraged to model their own legislative frameworks upon it, and many jurisdictions are increasingly compared against it. The UK House of Lords Select Committee observed that the Act was *'an excellent piece of legislation which creates offences which are clear and all-embracing'*. Moreover, it observed that the *'...offence of corporate failure to prevent bribery is regarded as particularly effective, enabling those in a position to influence a company's manner of conducting business to ensure that it is ethical, and to take steps to remedy matters where it is not.'* Finally, reflecting the views of various witnesses who appeared before the Committee, the Act remained *'... an example to other countries, especially developing countries, of what is needed to deter bribery.'*²

Whilst the Bribery Act is indeed held in high regard - not least because of its stance on facilitation payments, its provisions on bribery of foreign public officials, and its operating principle of extraterritoriality - there have nevertheless been queries concerning its practical implications and application.

Definition of a bribe

In relation to domestic bribery, the Bribery Act is silent on the definition of a 'bribe', electing instead to discuss and explore the broad parameters of the act of 'bribing'. In the absence of a strict definition, 'bribe' is simply to be inferred in terms of the factors that lead to the act of bribery. Conversely, in relation to foreign bribery, although the term 'bribe' is not explicitly mentioned, let alone defined, the meaning of that term can be construed as meaning a 'financial or other advantage'.

Unfortunately, the Bribery Act does not further define 'financial or other advantage' which may result in a degree of latitude in terms of the interpretation of which acts or actions might constitute 'other advantage'.³ In practical terms, the potential variance in definition could afford an organisation the ability to construe that an action on its part was not construed by it as an advantage and it would be difficult for authorities to determine otherwise. It is likely that a common sense approach will be adopted, but the lack of certainty is unnecessary and could be ameliorated and/or at least mitigated through the provision of indicative categories of 'other advantage'.

Definition of public official

The Bribery Act applies equally to both the public and private sectors. In terms of the former, it is silent as to the meaning of 'public official', but the term may be construed as relating to any person working in the public sector. As with the lack of a specific definition of 'other advantage' noted above, the lack of definition of 'public official' is unhelpful since it might be assumed that the term would encompass all those working within, or for, central and local government, from the Prime Minister to local councillors to civil servants. The extent to which that assertion holds true can only really be tested during criminal proceedings. This might certainly be the case in relation to the prospective applicability of the Bribery Act to Arm's Length Bodies (ALBs), since there has been consistent debate regarding their categorisation, their relationship to the government architecture

2. House of Lords, Select Committee on the Bribery Act 2010, Report of Session 2017-19, HL Paper 303, The Bribery Act 2010: Post-legislative scrutiny

3. An interesting expansion of the notion of 'advantage' beyond the financial context can be seen in relation to request for sexual favours. In Romania, for example, s.299 of Law No. 286 of the Criminal Code - 17 July 2009 - makes the abuse of power for sexual gain an offence.

that utilises them and the level and degree of their accountability. In terms of the latter, one report⁴ noted that *'...the Public Administration Select Committee (PASC) reviewed the state of accountability for arm's-length bodies. It found inconsistency, overlaps, confusion and clutter'*. However, it may be a useful working presumption, and certainly one that is perhaps better for the Bribery Act's efficiency, if those working in the public sector adopt a position that they and their actions fall within the ambit of the legislation and that they should accordingly disengage from, or refuse to engage in, bribery-related activity.

The UK Bribery Act 2010

The Bribery Act comprises a small number of offences which are clear and concise, and which are the key drivers of its perceived effectiveness in negotiating the issue and consequences of bribery.

Section 1 - Bribing another person

This involves offering a bribe, or promising to give a bribe, whereby the person making the bribe intends either to induce the recipient to improperly perform a relevant function or activity or to reward that person for improperly performing a relevant function or activity. The notion of 'improper performance' refers to a breach of an expectation of good faith, whereby the test is what a reasonable person would expect in performance of the type of function or activity concerned.

Section 2 - Accepting a bribe

This involves requesting, accepting, agreeing to or receiving a bribe offering a financial or other advantage intending that, in consequence, the relevant function or activity should be performed improperly by the person accepting the bribe or by another person.

Section 6 - Bribery of a Foreign Public Official

This deals with the situation whereby a person offers, promises or gives financial or other advantage to a foreign public official with the intention of influencing that official in performance of his or her official functions. 'Official functions' are those set out in law or other regulation in the country of operation.

Definition of Foreign Public Official

The Act defines (s.6(5)) a foreign public official as an individual who:

- a) holds a legislative, administrative or judicial position of any kind, whether appointed or elected, of a country or territory outside the United Kingdom (or any subdivision of such a country or territory),
- b) exercises a public function:
 - i) for or on behalf of a country or territory outside the United Kingdom (or any subdivision of such a country or territory), or
 - ii) for any public agency or public enterprise of that country or territory (or subdivision), or
- c) is an official or agent of a public international organisation (an organisation whose members are from one or more of the categories of: countries or territories, governments of countries or territories, other public international organisations).

4. National Audit Office, 2016, Departments' Oversight of Arm's-length Bodies: A Comparative Study

The definition of 'foreign public official' is broad in its ambit and this has led to alleged uncertainty among UK businesses in terms of their practical everyday interpretation of the category. It has been suggested⁵ that a 'foreign public official' might also include the senior management of companies which may operate in the private sector, but whose shares are largely owned by foreign governments. In this context, the level of governmental control exercised over such companies will be a key determinant of whether they are to be viewed as public entities or not.

Thus, for example, if a state had significant control over a particular bank, the board of directors of that bank might be construed as foreign public officials. The Serious Fraud Office⁶ guidance on foreign public officials has been deemed as potentially confusing given that it fails to properly delineate the precise degree of control that must be exercised by the state's representatives over the company's affairs to qualify those representatives as 'foreign public officials.' In purely practical terms, it has been suggested⁷ that UK businesses should retain a high degree of caution in relation to overseas-based companies and perhaps operate from the premise that they will have a degree of state ownership and therefore employ foreign public officials. The level of caution that businesses might employ will depend upon the level and complexity of their risk management strategies and the extent to which those are driven by a pre-determined risk appetite.

Extraterritoriality

Although the core rationale of the Bribery Act is to legislate against acts of bribery within the United Kingdom, it is certainly the case that the act of bribery itself does not have to have been committed in the United Kingdom for there to be an offence under the Act. Providing that the person committing the offence has a close connection with the United Kingdom (defined variously under section 12 of the Act but including a 'body incorporated under the law of any part of the United Kingdom'), the physical act of bribery can occur inside or outside the United Kingdom; that is, extraterritorially. By logical extension, the offence under section 7 of the Act, pertaining to the failure of a commercial organisation to prevent bribery, also applies to organisations located outside of the United Kingdom. Indeed, section 7 (5) specifically references:

'a body which is incorporated under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere)' and 'a partnership which is formed under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere).'

Gifts and hospitality

The House of Lords Select Committee⁸ observed that *'[c]orporate hospitality is a necessary and legitimate part of doing business, but it can also be taken advantage of by companies seeking to disguise bribery as legitimate corporate hospitality'* and that therefore *'...a balance needs to be struck between regulating corporate hospitality and allowing businesses to build relationships with clients.'* It might be suggested of course that this sentiment is something of a contradiction in

5. Charlie Monteith, former Head of Assurance at the UK Serious Fraud Office, cited in Lim, R-E, 2014, *'Parting the Fog of the UK Bribery Act 2010: A Critical Discussion of What We Do Know about the Act and Why It Is in the Company's Interests to Comply with Its Provisions'*, International Company and Commercial Law Review, 25(1) 1

6. The Serious Fraud Office is a non-ministerial government department of the Government of the United Kingdom that investigates and prosecutes serious or complex fraud and corruption in England, Wales and Northern Ireland

7. *ibid*

8. House of Lords, Select Committee on the Bribery Act 2010, Report of Session 2017-19, HL Paper 303, *The Bribery Act 2010: Post-legislative scrutiny*

terms, since one might argue that behind every act of corporate hospitality there will be a desire that the client will be influenced in the short or long term with regard to their relationship with the organisation offering the hospitality, and that therefore all such hospitality could conceivably fall under the ambit of the Act.

The Act itself is silent as to the meaning and scope of 'corporate hospitality'. The Ministry of Justice's⁹ statutory guidance on the Act indicates that in order for the prosecution to proceed with a charge that hospitality was intended to be a bribe, it would have to show that that hospitality was intended to induce conduct that amounted to a breach of an expectation that a person will act '...in good faith, impartially or in accordance with a position of trust', as judged by what a 'reasonable person' in the UK thought. The prosecution must also demonstrate that there is a sufficient connection between the advantage and the intention to influence and secure business or a business advantage. That connection might be indicated by factors such as the type and level of advantage offered. As the guidance notes:¹⁰

'...the more lavish the hospitality or the higher the expenditure in relation to travel, accommodation or other similar business expenditure provided to a foreign public official, then, generally, the greater the inference that it is intended to influence the official to grant business or a business advantage in return.'

This has caused consternation within the corporate environment because what is considered lavish expenditure by those enforcing the law might be construed as normal in the context of their particular sector and be the basis for a charge under the Act.

Where lavish or disproportionate hospitality might be construed as bribery, a company may reasonably argue that the hospitality was provided in order to establish the degree of relations integral to commercial activity. It could be argued that ambiguity exists in relation to where the Serious Fraud Office would mark the distinction between criminal and legitimate hospitality. In practice, whether the hospitality is deemed 'reasonable' and 'proportionate' will be determined in relation to the context in which it was provided.

This approach may have its disadvantages in relation, for example, to a small company seeking to offer its goods to an overseas government department that may offer to bring an official over to the company's jurisdiction. Conceivably, bringing that official via an economy flight to stay in a moderately priced hotel might be deemed reasonable and proportionate whereas offering business class flights and a five-star hotel might be deemed unreasonable and disproportionate. However, the small company may simply have wished to convey a confident market position which might justify the additional expense. Conversely, the Serious Fraud Office in the UK would find it difficult to ascertain the company's real intention and therefore the issue of what might be deemed reasonable for the business in question remains a key determining factor. As the former director of the Serious Fraud Office noted:

*'[w]hat is sensible and proportionate will need to be judged with reference to who you are talking about and what is generally regarded as acceptable and safe practice. When we are talking about senior individuals in large pension funds or Sovereign Wealth Funds, then you would not expect to put them up at very modest hotels after travelling economy. It is not how it is done.'*¹¹

9. Ministry of Justice, 2011, The Bribery Act 2010 - Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing

10. *ibid*

11. Alderman, R, 2011, Speech at Debevoise & Plimpton LLP, 21 June

There is, however, an inbuilt contradiction with that approach since those organisations with the market power to offer what might be deemed extravagant hospitality will invariably be in a better position to engage in bribery but may not naturally fall within the scope of suspicion because extravagant hospitality is deemed to be the norm within their sector.

Organisations deserve a more resolute definition to abide by lest they inadvertently risk a criminal sanction where their interpretation of 'reasonable' differs from the Serious Fraud Office's determination. Conversely, however, a narrower, more technical, definition may encourage the discovery of loopholes through which the central driver of the legislation might be undermined by determined legal counsel for companies.

Moreover, it might be suggested that a monetary limit should be introduced for hospitality and expenses, based on costs of living in respective countries. The potential difficulty in this could be ameliorated by creating a generic descriptor such as an offer of accommodation in a hotel of, for example, 3- or 4-star standard, notwithstanding the different realities represented by star classifications globally.

Bribery through intermediaries

The UK Bribery Act is silent as to bribery through intermediaries, although in cases brought under the Act the role of intermediaries has been highlighted. Thus, for example, in the case of the Serious Fraud Office v. Rolls-Royce plc, Rolls-Royce had had 250 relationships with intermediaries, agents, advisers and consultants. Moreover, the Organisation for Economic Co-operation and Development (OECD) has noted that in '*...a vast majority of cases, bribes are paid, offered or promised through an intermediary*'.¹² Since the Act itself is silent, the Ministry of Justice's guidance¹³ emphasises that corporations consider the issue within the scope of the adequate procedures they are permitted to advance as a defence against a charge under section 7 of the Act.

Corporate liability for actions of subsidiaries

The Bribery Act is silent as to liability for the actions of subsidiaries, but the overarching scope of the Act in terms of its extraterritoriality necessarily encompasses the malfeasance of a UK company's foreign-based subsidiary organisation, if that non-UK subsidiary commits an act of bribery in the context of performing services for the UK parent company. However, this remains largely a decision for the courts. Thus, for example, it may be the case that the subsidiary company engages in bribery but not on behalf of the UK parent company. Equally, as the Ministry of Justice's guidance on the Act has noted, '*...having a UK subsidiary will not, in itself, mean that a [foreign] parent company is carrying on a business in the UK, since a subsidiary may act independently of its parent or other group companies*'.¹⁴ A difficulty may arise, in terms of how possible it will be for authorities to determine, from the evidence, whether or not the actions of a subsidiary were undertaken on behalf of the parent company.

Facilitation payments

The Bribery Act does not specifically mention facilitation payments (payments made to speed up an ongoing administrative process) but deems such payments to constitute bribery. It relies upon the bribery provisions within the Act to automatically encompass such payments. The outlawing of facilitation payments under the Bribery Act has led to consternation in the corporate world. It

12. Organisation for Economic Co-operation and Development, 2020, Foreign Bribery and the Role of Intermediaries, Managers and Gender

13. *op.cit*

14. *ibid*

has been opined that in some countries such as China, such payments are an integral and accepted mode of business.¹⁵ The Bribery Act is unequivocal, however, that no form of bribery or corruption, whether characterised as a facilitation payment or otherwise, will be tolerated. Ironically, however, the Ministry of Justice's guidance¹⁶ acknowledges '*...the problems that commercial organisations face in some parts of the world and in certain sectors.*'

The Serious Fraud Office will consider, in this regard, whether the company alleged to have made such payments has a clear policy regarding such payments, whether written guidance is available to employees in relation to the procedure they should abide by when asked to render such payments, and whether those procedures are being followed by employees. It will also consider whether there is evidence that all such payments are being recorded by the company, whether evidence demonstrates that proper action is being taken to inform the appropriate authorities in the countries concerned that payments are being demanded and whether the company is taking all practical steps to curtail the making of such payments.¹⁷ In essence, the Serious Fraud Office expects businesses to strive to remove themselves from the necessity of having to offer such payments in the first instance. The Ministry of Justice's guidance¹⁸ advises businesses to, *inter alia*, seek advice on the law of the foreign jurisdiction in order to determine the difference between properly payable fees and disguised requests for facilitation payments and to build realistic timescales into the project planning documentation so that areas such as shipping can be reconfigured should a payment be requested in order for shipping to be arranged.

Adequate compliance procedures

The UK Bribery Act deals with compliance measures indirectly rather than directly in the sense that there is no legal requirement for an organisation to have such measures in place; but the presence of such measures may afford an organisation facing charges under section 7 of the Act a defence against such charges, as will be elucidated further below.

Section 7 - Failure of a commercial organisation to prevent bribery

Under this section a commercial organisation may be guilty of failing to prevent bribery where a person performing services for or on its behalf bribes another individual, with the intention of obtaining or retaining business, or a business advantage, from that individual.

The House of Lords Select Committee¹⁹ observed that:

'...[c]ompanies are creatures of statute. They are not corrupt, they do not have consciences, they do not show remorse. But they, and their shareholders, can benefit hugely from the corrupt conduct of their agents, their employees and their directors, sometimes at the highest levels. The problem of how they can be punished for the conduct of perhaps a tiny minority of those involved, without at the same time

15. The well-established cultural practice of 'guanxi', akin to a mutually beneficial personal relationship, involves the provision and receipt of gifts which in some contexts might be construed as bribes. See Bu Q, 2018, 'The Culture Variable Vis-à-Vis Anti-bribery Law: A Grey Area in Transnational Corporate Criminal Liability', *Rur Bus Org Law Rev* 19, 183-213, and Zhang, C and Seock-Jin, H, 2017, 'Guanxi Culture: How it Affects the Business Model of Chinese Firms', in Paulet, E and Rowley, C, *The China Business Model*, Chandos Publishing.

16. *op.cit*

17. Serious Fraud Office and Director of Public Prosecutions, 2011, *Bribery Act 2010: Joint Prosecution Guidance of The Director of the Serious Fraud Office and The Director of Public Prosecutions*

18. *op.cit*

19. *op.cit*

harming the great majority who have played no part in the corrupt activities, is one which has exercised lawmakers for many years.'

Section 7 has also been subject to questions regarding its effective implementation. Thus, for example, the definition of a 'relevant commercial organisation' could conceivably include almost all multinational corporations, since a majority of those will operate their business from within the UK, or at least have a presence in the UK. The corollary of this is that a German company with retail outlets in the UK that pays a bribe in Italy could theoretically face prosecution in the UK under the Bribery Act. In addition, the definition of an 'associated person' (that is, 'a person...who performs services for, or on behalf of a company') is wide in its ambit such that it could include any other contractual counterparties such as joint venture partners, distributors, consultants and professionals advising the relevant company. The situation is rendered yet more complex by the absence of effective guidance as to what degree of connection would be sufficient to constitute a connection under the ambit of section 7.

The House of Lords Select Committee²⁰ has confirmed that there is not, under the Bribery Act, any substantive requirement for commercial organisations to have anti-bribery procedures. However, given the strict liability inherent in the section 7 offence, it has, arguably, become important for corporations to have adequate procedures in place, because a lack of them effectively removes the central platform upon which a defence against a section 7 prosecution can be mounted.

An organisation is able to raise a defence of 'adequate procedures' by having appropriate safeguards in place to prevent associated persons engaging in bribery.

The procedures are constructed and construed in the form of six principles.²¹

Principle 1 - Proportionate procedures

Prevention of bribery procedures should be proportionate to the bribery risk faced by the organisation, taking into account matters pertaining to the nature, scale and complexity of the organisation's activities.

Principle 2 - Top-level commitment

Senior management should demonstrate commitment to preventing bribery through means such as fostering a culture that bribery is never acceptable, communicating an organisation's anti-bribery stance and providing an appropriate degree of involvement in developing bribery prevention procedures. At the MNE (multinational enterprise) level, a board is responsible for setting bribery prevention policies, for operating and monitoring bribery prevention procedures and for keeping policies and procedures under regular review.

Principle 3 - Risk management

A company should assess the nature and extent of exposure to potential external and internal risk of bribery on its behalf by associated persons. The aim is to promote adoption of risk assessment procedures which are proportionate to an organisation's size, nature and location of activity.

20. *op.cit*

21. Ministry of Justice, 2011, *op.cit*

Principle 4 - Due diligence

An organisation is obliged to consider an appropriate due diligence procedure which is proportionate and a risk-based approach in relation to persons who perform or will perform services for or on behalf of an organisation.

Principle 5 - Communication including training

Companies should embed bribery prevention policies and procedures throughout an organisation, including internal and external communication and training proportionate to the risks faced by an organisation.

Principle 6 - Monitoring and review

This principle recognises that bribery risks evolve over time and are aligned with the activities and locations of an organisation. Anti-bribery procedures must reflect those changes.

A crucial issue in relation to the presence of adequate procedures, as the only defence against a charge under section 7, has been: what precisely constitutes 'adequate'? There has been a tendency to proceed on the basis that if bribery is shown to have taken place, any existing anti-bribery procedure cannot, logically, have been adequate. However, to formally adopt such a position would require equating adequate with 'perfect' and that was clearly not the intention behind the legislation. The House of Lords Select Committee proposed that *'... "adequate" would be construed by a judge as meaning, in effect, reasonable in all the circumstances.'*²² That conjecture, however, also opens up the broader question of what might constitute relevant circumstances and from whose perspective the determination of what is 'reasonable' would be made. In general legal terms, the standard of 'reasonableness' would be objective; that is, it would not be dependent upon the particular viewpoint of the defendant but relate to generally accepted good practice.

Connected to that issue is the inevitable question of how much diligence, scrutiny or vigilance would be sufficient. In the unreported case of *R. v. Skansen* (2018), the defendants had argued that their procedures were 'adequate'. They maintained that the company's small size and limited geographical range meant that they did not need complex procedures in place. Moreover, they argued that they did not need a detailed policy advising staff not to bribe because they could rely upon the staff's integrity and honesty. Finally, they argued that their broadly worded policies which enforced ethical conduct were sufficient even though they had no anti-bribery policy. The jury determined that their procedures were therefore not adequate and returned a guilty verdict. Corporations need to remain mindful of the fact that the mere presence of written anti-bribery procedures may not be sufficient if, for example, they cannot effectively be implemented and/or do not deal adequately with the bribery issues that might arise for the corporation.

It has been noted that *'...the Bribery Act appears to have resulted in significant changes to corporate policy and practices regarding bribery'*. Conversely, the provisions of the UK's Modern Slavery Act 2015, for example, do not *'...appear to have yielded substantive change in multinational enterprises' policy and practices regarding labour standards in their global supply chains.'*²³ It is debatable, therefore, whether the Bribery Act is responsible for a sea change in corporate culture *per se*, or simply in relation to bribery, for which the Act provides significant sanctions. In the context of this

22. *op.cit*

23. LeBaron, G. and Rühmkorf, A. (2017) 'Steering CSR Through Home State Regulation: A Comparison of the Impact of the UK Bribery Act and Modern Slavery Act on Global Supply Chain Governance', *Global Policy*, 8 (53). pp. 15-28.

study, arguably all that should be of concern is whether the Bribery Act has led to a demonstrable change in the corporate approach to the risks of bribery, whatever the driver.

Conclusion

The UK Bribery Act has successfully created a position for itself at the top of the global panoply of legislation designed to mitigate acts of bribery.²⁴ It has earned that position largely by dint of its comprehensive scope and clear and concise provisions. A cursory glance at its content immediately reveals how a malfeasant could be deemed to have offered or accepted a bribe both domestically and extraterritorially.

However, some of its provisions are ambiguous; for example, the notion and scope of 'gifts and hospitality'. Moreover, the utilisation of Deferred Prosecution Agreements for large corporations, as will be discussed shortly, implies that those entities that are allowed to enter such agreements are either potentially less likely to deem their behaviour in a negative light, or are more likely to escape the prosecution individuals or smaller organisations might face. The net effect of the use of such agreements, even if only perceptually, might be a dilution of the otherwise positive impact of the legislation as a whole.



UK Houses of Parliament, London

24. *op,cit*

3. Ukraine

The Ukrainian anti-bribery and anti-corruption framework is complex, nuanced and interconnected. In part, this is because the legislative architecture has developed in a piecemeal fashion over a relatively short period of time with no systematic consolidation of disparate but related pieces of legislation. In addition, the legislation concerned with bribery and corruption seemingly endeavours to incorporate every potential avenue for illicit behaviour, in terms of the individuals to whom the legislation applies as well as the full scope of activity or behaviour with which they might conceivably be involved.

In a sense, the Ukrainian legislation is an improvement on that present in other jurisdictions where many key terms are left undefined and/or ambiguous. The legislative framework comprises: the Anti-Corruption Law (Law of Ukraine No. 1700-VII 'On Preventing Corruption') 2014, which is concerned with combatting corruption in Ukraine; the provisions of the Administrative Offences Code (Code of Ukraine on Administrative Offences) 1984 (as amended) which incorporates administrative liability for corruption-related offences; and the Criminal Code (Criminal Code of Ukraine) 2001 (as amended) which establishes criminal liability for corruption offences. There are also a number of additional legal provisions which establish, *inter alia*, the rules of conduct of Ukrainian government officials, including those representing Ukrainian legislative, administrative and regulatory bodies.

Definition of a bribe

Within the Ukrainian legislative framework there is no distinction drawn between corruption and bribery. Thus, aside from a broad provision (Article 22) prohibiting officials from using their powers or position for the purpose of obtaining illegal benefits for themselves or others, the Anti-Corruption Law contains provisions directly or indirectly related to bribery such as gifts to officials, and the Criminal Code contends directly with the meaning of bribery. The legal notions of 'bribe' and 'bribery' have both effectively been replaced with the notion of 'unjustified benefits', which are characterised as money or other property, preferences, advantages, services, non-pecuniary assets and any other benefits of a non-pecuniary or intangible nature that are being illicitly promised, offered, delivered or received. This broad definition facilitates the exercise of wide discretion by law enforcement authorities and the courts. However, the specific reference to bribery within both pieces of legislation arguably creates an unnecessary layer of complexity regarding how such offences are dealt with.

The Criminal Code alludes to the notion of bribery either as part of an offence or as constituting the whole of the offence. Article 157, which pertains, *inter alia*, to the right to vote or the right to take part in a referendum or be involved in the work of an election or referendum committee, speaks to those issues being '...accompanied by bribery' and Article 160, which alludes to violations of referendum law, precludes a citizen from exercising their right to be involved in a referendum by means, *inter alia* of bribery.

On the other hand, Article 368 creates an offence of taking a bribe, whereby an official, by means of their authority or official powers, takes, or refrains from taking, action for the benefit of the person providing the bribe. Article 368 further provides for bribes which involve a 'gross' or 'especially great' amount, which is calculated as 200 tax-free minimum incomes²⁵ or 500 tax-free minimum incomes, respectively.

25. A tax-free minimum income is set at 50% of the national living wage.

Article 369 creates an offence of giving a bribe and Article 370 creates an offence of provocation of bribery where there is an intentional creation, by an official, of circumstances and conditions that cause the giving or taking of a bribe for the purpose of uncovering those who gave or took the bribe.

Definition of a public official

The term 'public official' is not defined in the legislation, with the Anti-Corruption Act (Article 3) simply detailing the 'subjects' to whom the Act applies. Those subjects include:

- persons authorised to perform the functions of the state or local government (Article 3(1));
- persons who are equated to persons authorised to perform the functions of the state or local government (Article 3(2)); and
- persons who constantly or temporarily hold positions related to the performance of organisational, administrative and economic duties, or who are specially authorised to perform such duties in private legal entities and persons who are not officials but who perform work or provide services (Article 3 (3)).

The Criminal Code refers simply to 'officials' in relation to the offences it outlines and they are defined (Article 364) as persons who permanently or temporarily represent public authorities, or permanently or temporarily occupy positions in businesses, institutions or organisations of any type of ownership, where those positions are related to organisational, managerial, administrative and executive functions.

Overall, therefore, a public official may be broadly construed as one who performs the functions of a state or local government representative and holds a position which entitles the official to manage and be responsible for other employees' work, or to manage and dispose of assets at state or local government authorities, or at a state or municipal enterprise (that is, a company in which a state or local government holds 50 per cent or more shares or votes in the company). Thus, public officials would include, *inter alia*, members of parliament, ministers, judges and the management of state-owned enterprises.

Definition of a foreign public official

A foreign public official is defined as an individual who holds a position in the legislative, executive or judicial authorities of a foreign jurisdiction. The term also includes any official of international non-governmental organisations, members of international parliamentary assemblies of which Ukraine is a member, and judges and officials of international courts. There is no express provision in the legislation that speaks to an offence of bribing a foreign public official but the ambit of sections 7 and 8 of the Criminal Code (discussed below) would encompass such activity.

Extraterritoriality

Article 7 of the Criminal Code provides that Ukrainian citizens who have committed crimes overseas will be held criminally liable unless otherwise protected by international treaties ratified by the Ukrainian Parliament.

Article 8 of the Criminal Code provides that foreigners who do not permanently reside in Ukraine, and who have committed crimes abroad, can be held liable in Ukraine under the Criminal Code, in cases provided by the ratified international treaties of Ukraine, or if they committed grave or especially grave crimes against human liberties or the interests of Ukraine. Further, Article 8

provides that foreigners who do not permanently reside in Ukraine can be prosecuted under the Criminal Code if, acting in complicity with officials who are nationals of Ukraine, they accepted an offer or promise, or received unjustified benefits from an official, made a corrupt payment to a private company officer or to a public services official or offered, promised or provided unjustified benefits to an official or engaged in improper influence.

Gifts and hospitality

There is no definition of 'hospitality' under Ukrainian legislation. However, the definition of 'gift' provided in the Law seems sufficient to cover the notion of hospitality or entertainment (as it does within the context of the UK Bribery Act).

Under Article 1 of the Anti-Corruption Law, the notion of a 'gift' is defined as cash or other property, benefits, services or intangible assets that are provided or received free of charge or at a price lower than the minimum market price. The legal definition of a gift is somewhat broad and in practice the only test available for distinguishing between a gift and an unjustified benefit appears to be the pecuniary nature of the gift.

Conversely, Article 23, part one, of the Anti-Corruption Law prohibits persons authorised to perform the functions of the state or local government, and persons who are equated to persons authorised to perform the functions of the state or local government officials, from demanding, requesting or receiving gifts for themselves or their loved ones from legal entities or individuals. The request for and supply of gifts must be in connection with activity related to the implementation of the functions of the state or local self-government and, by logical extension, are functions which could only have been performed by the recipient of the gift. The restriction on receiving gifts is undermined somewhat by the acceptability of gifts that are deemed to correspond to '*...accepted notions of hospitality*'. The value of a one-time business gift may not exceed the amount of one minimum subsistence level amount established for work-capable individuals on the date of the acceptance of the gift (approximately €65). The aggregate value of gifts from one person (or group of persons) within a year should not exceed two minimum subsistence level amounts established for work-capable individuals.

Aside from the gift's intrinsic value, the context in which the gift is presented is also important. Thus, for example, a business gift of a small sum of money or a modest private lunch could raise the suspicion of law enforcement and result in allegations of corruption depending upon the circumstances.

However, it is important to evaluate the potential conflict posed by the offer of hospitality or entertainment to any official. Thus, payment of an honorarium to an official in relation to a speaking engagement at a conference or similar is not prohibited by the Law and should not be treated as an act of corruption. Conversely, compensation of the official's expenses for travelling to and from the venue might be construed as corruption. The restriction on receiving gifts is also undermined by the fact that the so-called 'subsistence' level of the quantum of gifts does not apply to those given by 'close persons', that is, those with a familial connection to the recipient, and to those received in the form of generally available discounts for goods or services. It is conceivable, of course, that a family member may work within or own a corporation and what might, in relation to the bestowing of a gift to a non-family member be deemed a bribe, will not be regarded as such if paid to an official with whom a familial relationship exists.

Bribery through intermediaries

Bribery through intermediaries is regarded as being equivalent to bribery made directly. The Criminal Code provides that an undue advantage received by a third party related to a public official or company officer constitutes a criminal offence equal to the offence that would apply in the case of such a payment being made directly to that official or officer. The same logic pertains to cases where an undue advantage has been promised, offered or given to a public official or company officer in the sense that a third party might benefit from that official or officer acting or refraining from acting in the exercise of their official duties.

Corporate liability for actions of subsidiaries

In essence, parent companies are regarded as being legally independent of their subsidiaries and as such are not deemed liable for the actions of those subsidiaries. However, indirectly, liability might pertain under a requirement within the Anti-Corruption Law rendering shareholders responsible for the monitoring and mitigation of corruption risks. Whilst there is no explicit liability for a failure to meet this responsibility, companies may accord liability to subsidiaries if the subsidiaries' internal compliance policies fail to address such matters.

Facilitation payments

Facilitation payments are not permitted under Ukrainian legislation and any payments other than officially mandated fees may be viewed as corruption under Ukrainian law.

Adequate compliance procedures

Article 38 of the Anti-Corruption Law contains a broad obligation for officials using their official powers to strictly comply with the requirements of the Law and generally recognised ethical standards of conduct. More specifically, Article 61 covers general principles in relation to the prevention of corruption in the activities of a legal entity and provides, *inter alia*, that Ukrainian companies should ensure the development and implementation of adequate measures for preventing corruption in their activities. Further, it mandates the CEOs of companies and their founders to ensure regular assessment of the corruption risks their companies might face and the implementation of relevant anti-corruption measures.

Article 62 further provides for the creation of an anti-corruption programme (the broad contents of which are outlined in Article 63) in the form of a set of rules, standards and procedures for detecting, counteracting and preventing corruption in the activities of a legal entity. An obligation to have an anti-corruption programme exists for state, communal enterprises and economic societies (wherein the state or communal share exceeds 50 per cent) where the average number of employees for the financial year exceeds 50 people and the amount of gross income exceeds Ukrainian hryvnia (UAH) 70 million. It also includes companies (including foreign-owned companies) which participate in public procurement for projects equal to or exceeding UAH 20 million. Furthermore, pursuant to the Law of Ukraine 'On Public Procurement' 2016 (as amended), legal entities that participate in a procurement procedure are also required to have an anti-corruption programme if the cost of purchasing goods or services is equal to or exceeds UAH 20 million.

Furthermore, the Anti-Corruption Law imposes a direct obligation in relation to anti-corruption compliance upon all employees of any Ukrainian company, violation of which (if made part of the employment duties) may result in disciplinary action against guilty employees which may entail their dismissal. Those obligations include not committing or participating in committing corrupt

offences pertaining to the company's activities, and immediately informing the company's anti-corruption compliance officer, its CEO or shareholders of any actual or potential conflicts of interest.

Enforcement mechanisms and identified trends in legislative implementation

Enforcement agencies

There is a plethora of agencies concerned directly or indirectly with the enforcement of corruption and **bribery** legislation.

National Anti-Corruption Bureau of Ukraine (NABU)

This Bureau is concerned with the investigation and prevention of corruption offences and its detectives conduct pre-trial investigations of allegations of corruption.

The Specialised Anti-Corruption Prosecutor's Office (SAP)

The Office forms part of the Prosecutor General's Office of Ukraine and is responsible for the supervision of NABU during the pre-trial stage and for representing the state in the prosecution of subsequent proceedings.

National Agency for Corruption Prevention

The Agency is a central executive body responsible for the development of anti-corruption policy and the prevention of corruption.

The State Bureau of Investigation (SBI)

The SBI is charged with preventing and investigating corruption offences including those alleged to have been committed by officials within NABU and the SAP.

Penalties

In relation to the offence of taking a bribe (Article 368 of the Criminal Code), a person will be punished by a fine of between 750 and 1,500 tax-free minimum incomes, or a term of imprisonment of between two and five years. In addition, the penalty will be accompanied by the removal of the right to take up certain (unspecified) positions or to engage in certain (unspecified) activities for a period of up to three years.

Where the taking of a bribe concerns a 'gross' amount by an official who occupies a responsible position, the punishment will involve a term of imprisonment of between five and ten years, the removal of the right to take up certain (undefined) positions or to engage in certain (undefined) activities for up to three years and the forfeiture of property.

Where a bribe of an 'especially great amount' is taken by an authorised person holding a responsible position, the punishment will involve a term of imprisonment of eight to twelve years, the removal of the right to take up certain (undefined) positions or to engage in certain (undefined) activities for up to three years and the forfeiture of property.

In relation to the offence of giving a bribe (Article 369 of the Criminal Code) the punishment consists of a fine of between 200 and 500 tax-free minimum incomes, or 'restraint of liberty' for a term of between two and five years.

Where the act of giving a bribe is repeated the punishment meted out will be a term of imprisonment for a period of between three and eight years and may include forfeiture of property.

In relation to the offence of provocation of bribery (Article 370 of the Criminal Code), the punishment provided is the 'restraint of liberty' for a period of up to five years, or imprisonment for a term of between two and five years.

Pattern of enforcement

In 2020, the High Anti-Corruption Court concluded three cases concerning unjustified benefits. The most frequently prosecuted corruption-related cases concern Article 368 of the Criminal Code (that of taking a bribe). There is an increase in the prosecution of high-level officials and judges, particularly in relation to Article 364 of the Criminal Code (concerning abuse of office). In the second half of 2020, the National Anti-Corruption Bureau of Ukraine²⁶ sent 35 indictments concerning 56 individuals to court and served notices of suspicion to more than 70 individuals including former and current MPs, former officers of the Armed Forces of Ukraine and members of regional state administrations. Eleven convictions were recorded against, *inter alia*, former directors of state-owned enterprises, judges of district and commercial courts and former officials from the Prosecutor General's Office.

Conclusion

Ukraine is well-served by a robust legislative framework which encompasses the full range of potential offences and offenders that might be involved in bribery and corruption. Positive aspects of Ukraine's bribery legislation include extraterritoriality, prohibition of facilitation payments, and requiring corporations and individual employees to ensure that adequate anti-corruption procedures and programmes are created and adhered to. On the other hand, the presence of bribery provisions across different pieces of legislation renders prosecutions more onerous than might be the case if there was one law, as is the case with the UK Bribery Act. It is also ironic that, despite a plethora of legislation, Ukraine does not currently address the offence of bribing a foreign public official (a central and lauded feature of the UK Bribery Act), nor does it render a corporation liable for the actions of its subsidiaries.



26. National Anti-Corruption Bureau of Ukraine, 2021, *Report July - December 2020*

4. Indonesia

Indonesia features two main pieces of legislation concerning bribery and corruption, namely, Law No. 11 of 1980 on the Criminal Act of Bribery (the Anti-Bribery Law) and Law No. 31 of 1999 on the Eradication of Crimes of Corruption, as amended by Law No. 20 of 2001 (the Anti-Corruption Law). In practice, however, prosecutions in Indonesia usually invoke the Anti-Corruption Law such that the focus of anti-bribery and anti-corruption enforcement in Indonesia is bribery and corruption of public officials within the context of the Anti-Corruption Law.

Definition of a bribe

Article 2 of the Anti-Bribery Law does not define the term 'bribe' but does define the act of 'bribery' as giving or promising something with the intention to persuade the recipient to do or not to do something related to his or her duties which is contrary to their authority or obligations and which is contrary to the public interest. However, the Anti-Bribery Law does not define 'public interest'.

Article 3 of the Anti-Bribery Law makes the receipt of a bribe a criminal offence if the recipient knows, or should know, that the gift or promise they received was given with a corrupt intent. In this context, the meaning of the term 'bribe' may be regarded as a 'gift or promise'.

The Anti-Corruption Law does not criminalise bribery in the private sector. However, Article 378 of the Indonesian Criminal Code indirectly captures the notion of private bribery by configuring that behaviour as a fraudulent act.

Article 13 of the Anti-Corruption Law provides a broad formulation of the crime of bribery, whereby it criminalises anybody who gives a gift or promise to a government employee in consideration of the power or authority attached to the recipient's office or position (or which the giver of the gift or promise assumes is attached to the office or position of the giver).

Definition of a public official

The Anti-Corruption Law provides a broad scope of public officials, involving the terms 'government officials' and 'state administrative officials'.

Government officials include civil servants, government officials within the context of the Criminal Code, people who receive salary or wages from the state or regional government budget, people who receive salary or wages from a corporation that receives financial aid from the state or regional government budget and people who receive salary or wages from a corporation that utilises capital or facilities from the state or public.

State administrative officials are officials who perform the executive, legislative and judicial functions in state administration and include, *inter alia*, the president and the vice president; the chair, vice chair and members of the People's Consultative Assembly, the People's Representative Council and the Regional Representative Council; judges; ministers and ministerial level officials; governors and vice governors; and the first echelon officers and first echelon level officers in the civil service, military and the police force.

The specificity in defining public officials might be regarded from two positions. Firstly, as a valiant attempt to ensure that there is no room for doubt in terms of whether a particular person is included or not. Secondly, as a potential avenue for a person who does not fall within the definitional ambit to be used as an intermediary in bribery transactions.

In terms of offences pertaining to bribery (without using that precise term) of public officials, Article 5 concerns anybody who *'...gives or promises something to a civil servant or state apparatus with the aim of persuading him/her to do something or not to do anything because of his/her position in violation of his/her obligation'* or *'...gives something to a civil servant or state apparatus because of or in relation to something in violation of his/her obligation whether or not it is done because of his/her position.'*

Article 6 concerns anybody who *'...gives or promises something to a judge with the aim of influencing the decision of the case handed down to him/her for trial'*, or *'...gives or promises something to an individual who according to the legislation is appointed a lawyer to attend a trial session with the aim of influencing the advice or views on the case referred to the court for trial...'*

Article 11 concerns a *'...civil servant or state apparatus who receives a payment or a promise believed to have been given because of the power or authority related to his/her position or prize or a promise which according to the contributor still has something to do with his/her position...'*

Article 12 is the broadest provision in relation to the actions of officials and relates, *inter alia*, to a *'...civil servant or state apparatus who receives a payment or promise believed to have been given to encourage him/her to do something, or not to do anything because of his/her position, in violation of his/her obligation...'*, to a *'...civil servant or state apparatus who receives a prize believed to have been given due to the fact that he/she has done something or not done anything because of his/her position in violation of his/her obligation'* or to a judge that *'...receives a payment or a promise believed to have been given to influence the verdict of the case handed down to him/her for trial.'*

Definition of a foreign public official

The Anti-Corruption Law does not expressly define a 'foreign public official', and neither does it prohibit the bribery of foreign public officials. This contravenes an undertaking by Indonesia to enact a legislative instrument in this regard pursuant to its commitments to the UN Convention against Corruption and the G20 Anti-Corruption Working Group number two. Conceivably, Articles 2 and 3 of the Anti-Bribery Law, which refer to *'anyone who gives or promises something to someone'* and *'anyone who receives something...'*, respectively, could include foreign public officials and officials of international organisations. However, the provisions are not sufficiently precise to meet international standards.

Extraterritoriality

The Anti-Corruption Law has an extraterritorial ambit such that any person or company outside Indonesia who bribes or facilitates the corruption of an Indonesian public official may be dealt with in the same manner as any person or company who facilitates corruption in Indonesia. Any public official found to have accepted a bribe outside of Indonesia for projects related to or within Indonesia may be deemed to have engaged in bribery.

Gifts and hospitality

Article 12B of the Anti-Corruption Law states that any 'gratification' (which may be likened to 'gift') given to a civil servant or state apparatus will be considered to be a bribe if the gratification has *'...something to do with his/her position and is against his/her obligation or task.'* Under the Act, a gratification is defined as a reward that would include *'...money, goods, discounts, commission, interest-free loans, travel tickets, lodging, travel tours, free medicine, and other facilities, whether received in Indonesia or abroad by whatever means.'*

Thus, Article 12B makes it clear that every gratification provided to the relevant official is potentially a bribe. However, to be pursued as an offence under the Act it must be shown to be connected to the official's position and involve some form of *quid pro quo* by the recipient to do or not to do something in contravention of their duties. In essence, there is a requirement for some degree of corrupt intent, indicated by an intention to misuse office, or to achieve a prohibited purpose, or both. In terms of the burden of proof, it falls upon the recipient of the gratuity to prove that the gratuity given to them was not a bribe if the gratuity amounts to 10 million rupiahs. If it involves a value of less than 10 million rupiahs, then the public prosecutor carries the burden of proving that the gratuity given was a bribe. This is a somewhat curious position since it seems to be based on an assumption that an amount lower than 10 million rupiahs is less likely to be a bribe. A better position to adopt would be to assume that all payments should be construed as bribes unless evidence to the contrary exists.

Article 12C permits the recipient to avoid prosecution in connection with receiving a gratification if she or he reports the gratuity to the Commission for Corruption Eradication (KPK) within a period of 30 days following the receipt of the gratification, at which juncture the KPK will decide if the employee can keep the gratuity or must surrender it to the state.

In practice, and counter-intuitively, the KPK distinguishes between two forms of gratuity, namely, those that must be reported (prohibited gratuity) and those that are exempted from the reporting obligation (permissible gratuity).

Prohibited gratuities include gratuities given for services to the public, gratuities given during the process of communicating, negotiating and implementing an event, gratuities given as a token of gratitude prior to, during or after a procurement process, gratuities given on religious holidays (for example, food hampers or gift baskets given for *Eid ul-Fitr* or Christmas) and entertainment facilities, travel facilities or vouchers given during an event or activity which is irrelevant to the recipient's position.

Permissible gratuities are those received by an official which have no connection to their official position or function.

Companies in Indonesia may be approached by officials with a request for the payment of travel and logistical costs and/or the daily allowances of officials in relation to the performance of their official duties. Companies have questioned whether acceding to such requests might constitute a breach of the Anti-Corruption Law. There is no regulation which expressly provides, obliges, or allows companies to bear the travel costs and pay the daily allowances of government officials. The general rule for official travel clearly stipulates that the daily allowances of government officials are to be borne by the relevant government ministry or state institution. In practice, there is a recognition that some ministries and other government bodies may lack the necessary budget to facilitate official travel and that subsequently it might be permissible to ask that the private sector be asked to bear some or all of the costs of official travel. This position requires, however, that the amount given to an official does not exceed the maximum amount stipulated by the Minister of Finance for official travel and that the daily allowance of the officials has not already been covered by the state budget. This inconsistency between the law and practice creates uncertainty and leaves the route to prosecution open for private companies that pay such costs.

Bribery through intermediaries

Use of an intermediary by a person or company to facilitate the payment of a bribe does not exempt the person or company from liability for the act of bribery. Moreover, the Supreme Court issued a regulation pertaining to corporate criminal liability,²⁷ under which a company may be subject to criminal sanctions if it obtained a benefit from the crime or the crime was committed in the interests of the corporation, or it allowed the crime to be committed and did not take any action to prevent it, mitigate its consequences or to ensure compliance with the prevailing legislation in order to prevent the commission of a crime. The regulation can be applied to corruption. More broadly, any person who aids, abets or conspires to commit bribery is liable.

Corporate liability for actions of subsidiaries

In Indonesia, a parent company is regarded as a separate legal entity and is not therefore liable for the actions of its subsidiaries unless the parent company itself is involved in the criminal conduct alleged against the subsidiary. Thus, if the parent company authorised or instructed a subsidiary to bribe an official or knew that the subsidiary was involved in criminal conduct that might lead to culpability for the parent company. Moreover, the Supreme Court Regulation²⁸ would also pertain.

Facilitation payments

Facilitation payments are not recognised under Indonesian law and accordingly any unauthorised payment to any government official, regardless of its purpose, is likely to be construed as a bribe. This follows the overarching position of the Anti-Corruption Law in terms of its express provision that gratifications given to a government official or state organiser are to be considered a bribe if they are related to their position and are contrary to their official duty or obligations.

Adequate compliance procedures

The Anti-Corruption Law does not specify that compliance procedures must be in place and moreover does not provide for any procedures that are in place to be relied upon as a defence to a charge of bribery.

Conversely, under the auspices of Article 4 of the Supreme Court Regulation,²⁹ when imposing criminal sanctions on a corporation, the judge can assess the fault of a corporation by reference to, *inter alia*, whether or not the corporation gained benefit from the crime or whether or not the crime was committed in the interests of the company, whether or not the corporation allowed the crime to occur, whether or not the corporation failed to take necessary action to prevent the occurrence of the offence, failed to take mitigating measures and/or failed to comply with the prevailing laws in order to prevent the occurrence of the offence. In this way, the determination reached by the judge on those matters may afford the corporation a defence to an allegation of bribery.

27. Supreme Court Regulation No. 13 of 2016 on Case Handling Procedures for Corporate Crimes

28. *ibid*

29. *ibid*

Enforcement mechanisms and identified trends in legislative implementation

Enforcement agencies

In Indonesia, the Police, the Corruption Eradication Commission (KPK) and the Attorney-General's Office are authorised to investigate acts of alleged corruption.

Police

The Police gain their authority to investigate under the auspices of the Indonesian Criminal Procedural Code.

Corruption Eradication Commission

The Commission has the authority (under Law No. 30 of 2002) to undertake pre-investigations, investigations and prosecutions of acts of corruption.

Attorney General's Office

Obtaining its authority from Law No.16 of 2004, the Attorney General's Office has the capacity, *inter alia*, to conduct prosecutions and investigations and implement decisions reached by the courts.

Penalties

There are a number of Articles within the Anti-Corruption Law which touch upon issues of bribery and corruption and each includes an overview of the available penalties. In essence, however, taking those Articles in *toto*, individuals prosecuted under the Law will be given a penalty ranging from a term of imprisonment of between one and twenty years, or a fine ranging between 50 million and one billion Indonesian rupiahs, or both. Companies prosecuted under the Law may attract a fine (equating to the total quantum of fines levied against the individuals who committed the offence and an additional sum of one third of that amount), the temporary or permanent closure of the business and/or the payment of compensation.

Patterns of enforcement

The Indonesia Corruption Watch³⁰ reported that in the second half of 2020, 91 cases concerning corruption were pursued by the Attorney General's Office, 72 cases by the Police and six by the Corruption Eradication Commission. The Corruption Eradication Commission³¹ reported, for the second half of 2020, that it had conducted investigations of 43 new cases, leading to the naming of 53 suspects. Global Investigations Review³² noted that its review of the Corruption Eradication Commission (KPK) demonstrated that approximately 40% of cases involved members of the Indonesian House of Representatives or Regional Legislative Councils. Furthermore, bribery has been the most common issue investigated by the Commission.

30. Indonesia Corruption Watch, 2020, *Monitoring Report - Trends in Corruption Cases Prosecution 1st Semester of 2020*

31. Corruption Eradication Commission, 2020, *KPK Performance Report Semester 1 of 2020*, <https://www.kpk.go.id/en/news/press-releases/1837-kpk-performance-report-semester-1-of-2020>

32. Global Investigations Review, 2019, *Asia Pacific Investigations Review 2020*

Conclusion

Although Indonesia has an Anti-Bribery Law, in practice, all cases concerning bribery and corruption are routed through its Anti-Corruption Law. That legislation does not criminalise bribery in the private sector (a focal point of the UK Bribery Act) although it does provide a circuitous route via the Criminal Code. This involves reconfiguring the exchange as fraudulent. Another difference between Indonesian and UK anti-bribery laws is that the act of bribing a foreign official is lacking in Indonesian legislation. However, as with the bribery offence *per se*, it is possible to construe the actions of foreign public officials as falling under the auspices of the Anti-Bribery Law.

Another point of departure from the UK Bribery Act concerns the lack of corporate liability for the actions of subsidiaries unless the corporation was involved in the criminal conduct of those subsidiaries. This lack of positive responsibility might effectively allow a corporation to benefit from subsidiaries' malfeasance without accruing any attendant culpability.

Finally, another significant difference is that in Indonesia, the Anti-Corruption Law does not require the presence of compliance procedures within corporations. Equally, it does not provide for a corporate defence based on bribery prevention procedures that are in place in the event of charges being laid. Perhaps disconcertingly, however, under the Supreme Court Regulation, it is permissible for a judge to make an assessment of a corporation's culpability by assessing whether or not it took the action necessary to mitigate the occurrence of any crime, including, one presumes, bribery and corruption. In that context, a positive view taken by the court in relation to a corporation's actions might *de facto* offer the corporation a form of the defence that is not explicitly provided for in the legislation.



Indonesian parliament building, Jakarta

5. Kenya

The key piece of legislation in Kenya which addresses the issue of bribery is the Bribery Act (No. 47) 2016. It is clearly modelled upon the UK Bribery Act.

Definition of a bribe

As is the case with the UK Bribery Act, the Bribery Act in Kenya is silent as to the definition of a 'bribe' or indeed 'bribery', electing instead to focus upon the notion of what the act of bribery might involve, and allowing for the inference to be drawn that the notion of a bribe and bribery may be determined in consequence.

Section 5 (1) of the Act stipulates that a person commits the offence of giving a bribe if the person offers, promises or gives a financial or other advantage to another person, who knows or believes the acceptance of the financial or other advantage would itself constitute the improper performance of the relevant function or activity.

In this context, it does not matter whether the person to whom the advantage is offered, promised or given, is the same person as the person who is to perform, or has performed, the function or activity concerned, or whether the advantage is offered, promised or given by a person directly or through a third party.

The term 'advantage' is given a broad definition which includes money or any gift, loan, fee, reward, commission, valuable security or other property of any description whether movable or immovable; any office, employment or contract; any payment, release, discharge or liquidation of any loan, obligation or other liability, whether in whole or in part; or any other service, favour or advantage of any description whatsoever, including protection from any penalty or disability incurred or apprehended or from any action or proceedings of a disciplinary or penal nature, whether or not instituted and including the exercise of the forbearance from the exercise of any right or any official power or duty. Furthermore, the term advantage relates to any offer, undertaking or promise of any gratification in relation to the aforementioned and any facilitation payment made to secure the performance by another person.

Section 6 (1) provides that a person commits the offence of receiving a bribe if:

- a) the person requests, agrees to receive or receives a financial or other advantage intending that, in consequence, a relevant function or activity should be performed improperly whether by the person receiving the bribe or by another person;
- b) the recipient of the bribe requests for, agrees to receive or accepts a financial or other advantage and the request, agreement or acceptance itself constitutes the improper performance by the recipient of a bribe of a relevant function or activity; or
- c) in anticipation of or as a consequence of a person requesting for, agreeing to receive or accepting a financial or other advantage, a relevant function or activity is performed improperly by that person, or by another person at the recipient's request, asset or acquiescence.

It does not matter (s.6(2)) if the recipient requests, agrees to receive or receives the advantage directly or through a third party. It does not matter if the recipient intends to request, agrees to receive or to accept the advantage directly or through a third party. Nor does it matter if the advantage is, or is intended to be, for the benefit of the recipient or another person.

Furthermore, it does not matter (s.6(3)) whether the recipient of the bribe is performing the function or activity, or that the person giving the bribe knows or believes that the performance of the function or activity is improper. In addition, where a person other than the recipient of the bribe is performing the function or activity, it does not matter whether that person knows or believes that the performance of the function or activity is improper.

The Department of Justice³³ has argued that the notion of 'improper' performance requires further clarification since it is arguably, in its current context, ambiguous and capable of being undermined or inappropriately applied.

A function or activity is construed to be relevant if it includes (s. 7 (1)(a)) any function of a public nature, any function carried out by a State officer or public officer, pursuant to his or her duties, any function carried out by a foreign public official pursuant to his or her duties, any activity connected with a business, any activity performed in the course of a person's employment or any activity performance by or on behalf of a body of person whether corporate or otherwise.

The Department of Justice³⁴ has posited that the word 'includes' infers that the list provided is by no means exhaustive and is therefore open to wider interpretation. Whilst that potential breadth of application might be based on pragmatism, that is, to encompass an as yet unidentified function or activity, there is a perceptual danger of never-envisaged functions or activity being brought erroneously into the legislative frame.

In addition, the function or activity requires one or more of three conditions to be met, namely, that (i) the person performing the function or activity is expected to perform it in good faith, that (ii) the person performing the function or activity is expected to perform it impartially and that (iii) the person performing the function or activity is in a position of trust by virtue of performing it.

Definition of a public official

The Bribery Act is silent as to the notion or definition of 'public official' although it does reference the notion of a 'public office' (defined by Article 260 of the Constitution as '*...an office in the national government, a county government or the public service, if the remuneration and benefits of the office are payable directly from the Consolidated Fund or directly out of money provided by Parliament*'), 'public officer' (defined by Article 260 of the Constitution as '*...any State officer or any person, other than a State officer, who holds a public office*') and 'public service' (defined by Article 260 of the Constitution as the '*...collectivity [sic] of all individuals, other than State officers, performing a function within a State organ*').

Definition of a foreign public official

The Act defines a foreign public official as including any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected, a person exercising a public function for a foreign country, including for a public agency or public enterprise and an international civil servant or any person who is authorised by such an organisation to act on behalf of that organisation.

Section 8 provides that any person who bribes a foreign public official with the intention of influencing that official's capacity commits an offence. In this context, a foreign public official

33. Documentation provided in lieu of a virtual meeting by Carole Nyaga, Senior State Counsel, Department of Justice, Kenya, March 2021

34. *ibid*

includes any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected, a person exercising a public function for a foreign country, including for a public agency or public enterprise and an international civil servant or any person who is authorised by such an organisation to act on behalf of that organisation.

A person commits the offence of bribery under the Act (s.8 (2)) if, directly or indirectly or through a third party, the person promises or gives any financial or other advantage to the foreign official or to another person at the foreign official's request or with the foreign official's assent or acquiescence and the foreign official is neither permitted nor required by the written law applicable to him or her to be influenced in his or her capacity as a foreign public official by the offer, promise or gift.

In this context, influencing a foreign official means influencing him or her in his or her functions, including any omission to exercise those functions and any use of the position as an official even if not within the official's authority.

Extraterritoriality

The Bribery Act has extraterritorial application in relation to bribery-related offences carried out beyond Kenya's borders. Persons falling within the ambit include Kenyan citizens, public or private entities as well as persons associated with such entities whether as employees, agents or otherwise. All acts of bribery committed by a Kenyan citizen, a public or private entity, or a person associated with such a public or private entity outside Kenya are treated as if the act of bribery occurred in Kenya (s.15). Furthermore, any bribery of a foreign public official in order to influence their capacity is an offence (s.8). Moreover, under section 7(2), a function or activity referred to within the offences of the Act remains a relevant function or activity even if performed in a country or territory outside Kenya. The Ministry of Justice has noted a potential loophole in the framing of s.15 which is that it might be inferred that a defendant might escape liability if they opted to engage a non-Kenyan citizen to act on their behalf instead of the Kenyan citizen the section refers to.

Gifts and hospitality

The Bribery Act includes the notion of a 'gift' within the overarching definition of 'advantage', that is, '...money or any gift...' but makes no express provisions in relation to corporate hospitality. The Department of Justice³⁵ has suggested that the latter might be attributable to the initial drivers of the Bribery Act. The Taskforce on the Review of the Legal, Policy and Institutional Framework for Fighting Corruption in Kenya³⁶ recommended, *inter alia*, targeting corruption in the private sector, a cause taken up by the Kenya Private Sector Alliance which drafted the Bribery Bill (borrowing, as seems evident, from the UK Bribery Act). In that context, the Department of Justice³⁷ intimates that the private sector, which provided the Bill's impetus, would have considered hospitality to be a normal business function or expectation and would not therefore have deemed such matters a necessary issue for the legislation to address.

However, the question as to whether such hospitality might constitute a bribe is likely to be assessed on case-by-case basis in terms, for example, of whether there was sufficient evidence to show that it was given with the intention of inducing conduct that would amount to a breach of an expectation that a person should act in good faith, impartially or in accordance with a position of trust.

35. *ibid*

36. Report of the Taskforce on the Review of the Legal, Policy and Institutional Framework for Fighting Corruption in Kenya, 2015

37. *op.cit*

Conversely, the Leadership and Integrity Act 2012 provides that a State officer shall not accept or solicit gifts, hospitality or other benefits from a person who (i) has an interest that may be achieved by the carrying out or not carrying out of the State officer's duties, (ii) carries on regulated activities with respect to which the State officer's organisation has a role or (iii) has a contractual or legal relationship with the State officer's organisation.

Further, the Public Officers and Ethics Act 2003 provides that a public officer shall not, without the general permission or special permission of the Director of the Ethics and Anti-Corruption Commission (EACC), accept or solicit any gifts, rewards, benefits or any other valuable present in any form, including free passage, hospitality and other favours, from any person who has an interest that may be affected by the officer's official duties. The Integrity Centre of the EACC has identified³⁸ the lack of specificity within the Act on the notions of 'hospitality' and 'gifts' as issues requiring a higher degree of legislative specificity.

Bribery through intermediaries

The Bribery Act does not expressly provide for the actions of intermediaries, but the Act incorporates the notion of a party acting on behalf of another within section 10 which makes it an offence for a person associated with a private entity to bribe another person intending to obtain or retain business for the private entity or advantage in the conduct of business by the private entity. The fact of association is satisfied if the person involved in the act of bribery performs services for or on behalf of another person as an agent, employee or in any other capacity. It falls to the courts to establish, by reference to all relevant circumstances, whether or not the person involved in the act of bribery was indeed performing services on behalf of that other person.

Corporate liability for actions of subsidiaries

The Bribery Act makes no specific reference to subsidiaries *per se*, nor indeed to the question of whether and if so to what extent an organisation in Kenya would be responsible for any acts of bribery perpetrated by subsidiaries. In essence, however, the same principle that applies to intermediaries within the ambit of section 10 applies equally to subsidiaries. Naturally, the facts that the subsidiary committed bribery and/or that if it did so, this was done on behalf of the organisation in Kenya, have to be determined by the courts. The Integrity Centre of the EACC³⁹ argues that offences concerning whether or not corporations should be liable need to be specifically referenced in the Act.

Facilitation payments

The Bribery Act implicitly regards such payments as a form of bribery. Section 5 (1) creates an offence of offering, promising or giving a financial or other advantage to another person and the definition of 'advantage' in this context includes (s.2(f)) '*...any facilitation payment made to expedite or secure performance by another person.*'

Adequate compliance procedures

Section 9 (1) of the Act requires that a public or private entity puts in place procedures appropriate to its size, scale and nature of its operation for the prevention of bribery and corruption.

38. Material provided by David Too, Director Legal Services and Asset Recovery, Integrity Centre, Ethics and Anti-Corruption Commission, in lieu of a virtual meeting, April 2021

39. *ibid*

Where a private entity fails to put in place procedures, and where that failure is proved to have been committed with the consent or connivance of a director or senior officer of the private entity, or a person purporting to act in such a capacity, or occupying such a position by whatever name, the director, senior officer or other person commits an offence (s.9(2)).

Pursuant to that preventive requirement, section 10 provides that a private entity commits an offence if a person associated with it bribes another person intending to obtain or retain business for the private entity or advantage in the conduct of business by the private entity. In this context, the offence is deemed to be a reflection of a failure (under s.9) to institute procedures for the prevention of bribery.

A potential corollary to this issue has been raised by the Integrity Centre of the EACC⁴⁰ which observes that pending the finalisation of guidelines by the EACC for the preparation of prevention procedures, institutions may not be penalised for their failure to put procedures in place.

Enforcement mechanisms and identified trends in legislative implementation

Enforcement agencies

The main enforcement agencies in relation to bribery in Kenya are the Ethics and Anti-Corruption Commission (EACC), the Directorate of Criminal Investigations (DCI), the Office of the Director of Public Prosecutions (ODPP), and the High Court.

The Ethics and Anti-Corruption Commission

The Commission has the jurisdiction, *inter alia*, to undertake investigations into bribery, following which it reverts to the ODPP with a recommendation that a person is prosecuted for corruption or other economic crime.

The Directorate of Criminal Investigations

The DCI is responsible for conducting criminal investigations and has wide ranging powers including the ability to require any persons they reasonably believe to have pertinent information to assist it.

The Office of the Director of Public Prosecutions

The Office institutes and undertakes prosecution of criminal matters.

The High Court of Kenya

The High Court has an Anti-Corruption and Economic Crimes division which adjudicates in cases concerned with corruption and other economic crime.

Penalties

In relation to the offence of giving, receiving or assisting someone to give and/or receive a bribe (section 6 of the Bribery Act), the offender shall be liable upon conviction to an imprisonment term not exceeding ten years or to a fine not exceeding Kenyan shillings (KES) 5 million, or both.

40. *ibid*

Where, as a result of the conduct, one person obtained a quantifiable benefit or another person suffered a loss, an additional fine equal to five times the benefit or loss, respectively, can be levied.

In relation to the failure by a private entity to prevent bribery, it shall be liable upon conviction to a fine and possibly a requirement to pay back the value of the advantage it obtained. In addition, the courts may order the confiscation of any property acquired as the direct result of any advantage obtained.

Where State or public officers are convicted of a bribery offence, they will be barred from holding public office and any other person convicted will be disqualified from election or appointment to state or public office for a period of not more than ten years after their conviction.

In relation to directors of companies or partners at firms who are convicted, they will be disqualified from holding such positions for a period not exceeding ten years.

Moreover, any person other than a natural person (that is a corporation or similar legal body as opposed to an individual) convicted of bribery will be disqualified from engaging in business with national or county governments in Kenya for a period not exceeding ten years.

Where no indication is provided in the Bribery Act, the default sentence range is a fine not exceeding KES 5 million or a term of imprisonment not exceeding ten years, or both.

Pattern of enforcement

The Office of the Director of Public Prosecutions⁴¹ noted that between January 2018 and 30 June 2020, a total of 238 cases pertaining to corruption had been completed, with 20 of those completions occurring in 2020. The conviction rate sat at 63.16% during the first half of 2020. Those statistics notwithstanding, it has been suggested⁴² that in recent years, driven by President Kenyatta's anti-corruption drive, the number of arrests, investigations and prosecutions for bribery and corruption in the public sector has increased. However, high-profile individuals connected to malfeasance have rarely been prosecuted or punished,⁴³ although this might be starting to change, as reflected in judgements of the courts in 2020. Thus, for example, in May 2020, the Anti-Corruption Court in Nairobi fined a former Kenya Revenue Authority Senior Manager KES 2,000,000 for soliciting and receiving a bribe of KES 15 million six years previously.⁴⁴

Conclusion

As might be expected from a piece of legislation overtly based upon the UK Bribery Act, there are relatively few issues pertaining to the content and ambit of the Bribery Act 2016. There are similar definitional lacunae in terms, for example, of the lack of clarification as to the meaning of the words 'bribe' and 'bribery', 'financial or other advantage' and 'another person'. Naturally, this lack of definition may be construed as either leading to an unnecessary creation of ambiguity and/or as a future-proofing exercise which will permit the inclusion of a fuller range of individuals than might have been the case had the categorisation been more closely defined within the Act.

41. Office of the Director of Public Prosecutions, 2020, *Annual Report Highlights 2017 - 2020*

42. Global Legal Group, 2021, *Global Legal Insights - Bribery and Corruption*

43. *ibid*

44. *ibid*

In keeping with the UK Bribery Act, the Bribery Act 2016 does not expressly define 'corporate hospitality' (and therefore raises the same spectre of ambiguity that exists in the UK Bribery Act). It does, however, systematically provide in other legislation (Leadership and Integrity Act 2012 and Public Officers and Ethics Act 2003) that officials and/or officers may not accept any form of hospitality or gifts. Finally, the Bribery Act 2016 does not refer to subsidiaries nor therefore to any potential corporate liability for their actions. This is a potential issue for law reform.



The 1,000 Kenyan shilling banknote, showing the Kenyan Parliament building

6. UK Bribery Act 2010

a. UK Bribery Act: Focal Point 1 - Deferred Prosecution Agreements

Deferred Prosecution Agreements (DPAs) have been heralded as one of the innovative characteristics of the UK Bribery Act. This is because of their apparent propensity to bring a number of large corporations to account for their bribery-related misdemeanours, without the need for costly and lengthy prosecutions. However, DPAs were created not by the Bribery Act but by the Crime and Courts Act 2013 and in essence constitute a bargain under which the prosecutor undertakes not to proceed with the prosecution of a corporation for a fixed time in return for the defendant mending its ways and paying a financial penalty for the privilege. The rationale for the creation and utilisation of DPAs rests largely in cost savings relative to the alternative prosecution route and the remediation of collateral effects upon corporations found criminally liable. In relation to bribery offences, the Serious Fraud Office and the Director of Public Prosecutions have the power to offer and enter into DPAs, subject to the court's approval. Any subsequent breach of the DPA can result in the DPA being brought to an end and criminal proceedings instituted. Thus, the logic of DPAs is that they allow corporations to avoid the stigma of a criminal conviction and the collateral damage to its reputation that might ensue, and they ensure that the corporation is nevertheless punished for its crimes.

Indirect corollaries to the availability of a DPA are the issues of self-reporting and cooperation, respectively. The Serious Fraud Office and the Director of Public Prosecutions⁴⁵ have noted that they regard self-reporting of malfeasance by organisations merely as a public interest factor which might militate against prosecution. However, the Serious Fraud Office has stipulated that a self-report might be the most important factor in its decision not to prosecute. Furthermore, cooperation is regarded as relevant to the Serious Fraud Office's charging decision matrix and an important factor in the determination of whether a DPA is appropriate. Crucially, cooperation requires a demonstration by the corporation above and beyond what is strictly required by law and might include the corporation identifying suspected malfeasance and the people responsible, reporting within a reasonable timeframe, preserving evidence and obtaining and providing further material for the Serious Fraud Office.

There have been concerns raised in relation to the use of DPAs, not least of all from Transparency International UK who argued⁴⁶ that there was a danger that a DPA settlement would, perversely, *'...encourage corrupt acts if companies come to see the fines as a calculable cost of doing business'* such that it could be factored into a risk-reward analysis. Moreover, there has been a concern raised that DPAs remain an alternative to prosecution for only the largest corporations.

As Corruption Watch⁴⁷ noted in its evidence to the Select Committee:

'...[t]here are genuine public confidence issues around DPAs and one of them is that... the big companies can negotiate them. The small companies are much easier to prosecute, including for the substantive offences, which makes the offending more serious. Therefore, the public interest in offering them a DPA is lower, because the offending appears more serious.'

45. *op.cit*

46. Transparency International UK, 2018, Written Submission to the Select Committee on the Bribery Act 2010, 11 July

47. Evidence of Susan Hawley, Policy Director, Corruption Watch, Bribery Act 2010 Committee, 17 July 2018

In one of the latest uses of a DPA in the United Kingdom, the Serious Fraud Office entered into an agreement with Rolls-Royce under which in January 2017 the company paid £497.25 million. In February 2019, the Serious Fraud Office dropped its investigations into Rolls-Royce and this has given rise to a concern that the deterrent nature of the DPA is reduced if, as a result of the closure of an investigation, criminal procedures are unlikely to occur, whether the DPA is subsequently abandoned by the corporation or not.

Authorities charged with responding to corporate malfeasance have been concerned about the potential collateral damage that might follow a criminal prosecution in terms of reputational damage and potential subsequent litigation by other parties leading, *inter alia*, to credit rating downgrading. DPAs are regarded by the authorities, and presumably by the corporations connected to the agreement, as a vehicle through which punishment (primarily financial) can be achieved whilst avoiding the punitive collateral issues. There remain, however, potential further consequences of the application of a DPA including a risk for shareholders if the corporation agrees to a substantial fine and costly compliance programmes as conditions for being granted the DPA, yet there is no guarantee that a prosecution will nevertheless follow at some point in the future even if a DPA has been agreed to.

Also, there remains a danger for the corporation of litigation pursuant to admissions of its actions which must necessarily be made transparent as part of the DPA process. Although DPAs are not available to individuals, there is a danger that, in the course of agreeing a Statement of Facts with the Serious Fraud Office, a corporation may name and criticise individuals who have no right to challenge claims made within what is a public document. In *Financial Conduct Authority v. Macris*,⁴⁸ the Supreme Court held that the Financial Conduct Authority should not have identified a former JP Morgan manager in a notice created in that case in relation to JP Morgan *per se*.

Kenya

There is no express provision in the Kenyan legal framework that provides for DPAs. However, the Ethics and Anti-Corruption Commission (EACC) can issue an undertaking (registered in court by virtue of section 56B, Anti-Corruption and Economic Crimes Act 2003) not to issue criminal proceedings against a person who has given full disclosure of all material facts relating to past corrupt conduct and economic crimes (including bribery) and has voluntarily paid or refunded all the property acquired through the corruption or economic crime as well as paying for all the losses associated with the same.

The Office of the Director for Public Prosecutions can enter into a DPA with corporations in order to defer the prosecution for a set period, on the condition that the corporation meets and continues to meet specific conditions under the DPA. DPAs are entered pursuant to Articles 157 and 159 of the Constitution, the National Prosecution Policy 2015, and the Diversion Policy 2019.

Although there seems to be no formal linkage made with the issuance of a DPA, there is a requirement for self-reporting within the Bribery Act (s.14(1)), which creates a mandatory obligation for a person in authority to report to the EACC within 24 hours any knowledge or suspicion of instances of bribery. Moreover, it is an offence to fail to report an offence under the Bribery Act (s.14(2)). However, the Department for Justice⁴⁹ has intimated that the duty has been challenged since it is not clear whether the reporting should be done before or after internal investigations have been undertaken. In addition, it notes that it is not clear which method of reporting should

48. *Financial Conduct Authority v. Macris*, [2017] UKSC 19

49. *op.cit*

used, whether reporting should be anonymous or not and whether feedback should be expected post-reporting.

As an alternative to DPAs, the Criminal Procedure Code provides for the use of plea bargaining (the Criminal Procedure (Plea Bargaining) Rules 2018 and Plea Agreement Guidelines 2019, respectively, providing a necessary degree of transparency in the use of such agreements). However, the Integrity Centre of the EACC⁵⁰ has commented that plea agreements have not been used extensively in relation to bribery cases because accused persons have found it difficult to plead guilty to an offence, which is an essential element of any plea bargain they wish to enter into. Therefore, it might be necessary for there to be a degree of sensitisation in relation to the concept of plea bargaining.

Ukraine

There is no specific provision under Ukrainian law that provides for DPAs. However, Article 96 of the Criminal Code provides that, when determining the level and nature of the penalty to be imposed on companies involved in corruption, the courts have to have cognisance of the degree of corruption crime committed, the level of implementation of criminal intent, the amount of damage caused by the crime, the nature and amount of unjustified benefits received which may have been received by the company and the measures taken by the company to prevent the crime. In this way, the behavioural characteristics of the company are similar to those which must be reflected upon by those negotiating a DPA in the United Kingdom. Thus, the penalty imposed in Ukraine might be regarded as tantamount to the provisions of a DPA were such agreements available as a mode of redress in Ukraine.

By way of a less formalised alternative to a DPA, the Criminal Procedure Code⁵¹ provides that a prosecutor and a suspected or accused person may conclude a special agreement on recognition of guilt under which they can determine the precise wording of the suspicion or accusation and its legal qualification under the appropriate section of the Criminal Code. Furthermore, they may determine the essential circumstances for the proper criminal proceeding and the unconditional recognition by a suspected or accused person of their guilt in committing the relevant crime. Finally, they can determine the obligations of a suspected or accused person in relation to collaboration in investigating the crime committed by another person (in cases where it was agreed), the conditions of a suspected or accused person's partial release from civil liability, in the form of compensating the state for damages caused by a crime committed by such a person, and the agreed punishment and consent of a suspected or accused person for their punishment or for declaring the agreed punishment and their further release from serving the sentence on the terms of probation.

Indonesia

DPAs are not available in Indonesia and nor are plea bargain agreements. Madril⁵² posits that the lack of formal debate within Indonesia of corporate corruption (which is the focal point of DPAs in other jurisdictions) has rendered discussions on DPAs somewhat moot. Furthermore, in relation to plea bargaining, Madril⁵³ suggests that the public configuration of corruption is that the punishment meted out should be as severe as the law provides and that in that sense a plea bargain arrangement would undermine the potential severity of the law.

50. *op.cit*

51. Section VI. Special Procedures for Criminal Proceedings, Chapter 35. Criminal Proceedings Based on Agreements

52. Virtual meeting with Oce Madril, Chair of the Centre for Anti-Corruption Studies, School of Law, Gadjah Mada University, April 2021

53. *ibid*

A process which is tantamount to plea bargaining is the concept of justice for a collaborator, whereby a defendant, who is not the main actor in a corruption case, is able to provide assistance to the authorities in relation to the corruption in exchange for a lower penalty. The Criminal Procedure Code (KUHP), which has been under review for a considerable period of time, contains (Article 199), a new procedure that has been likened to plea bargaining. The 'special path' procedure would enable a defendant to enter a guilty plea before a judge who would set the case down for a short hearing, the sentence for which would be reduced by a third of the maximum sentence for the offence. The proposed process would apply to offences that are subject to a term of imprisonment of up to seven years. However, given the possible sentence of life imprisonment that might be given in corruption cases, it is difficult to envisage whether or not the procedure would, or could, be applied in those cases. Such a determination can only be made once the legislative process is complete and the first case prosecuted under the legislation is brought to fruition.

b. UK Bribery Act: Focal Point 2 - Gifts and hospitality

It is difficult to reconcile the presence of gifts and hospitality with the absence of bribery in any commercial relationship which leads to the awarding of a contract. As intimated previously, when discussing the issue in relation to the UK Bribery Act, the House of Lords Select Committee argued that corporate hospitality could not be separated from the reality of conducting business but also conceded that the connection between the two might facilitate bribery. Therein lies an inherent difficulty with the issue of gifts and hospitality - any offer of corporate hospitality is made precisely to influence another party to engage with the organisation providing that hospitality. If that logic pertains, one might question the viability and validity of an Act designed to operate against bribery. In practice, the supposed necessity for corporate hospitality has led to a complex exploration of how this malign influence might be incorporated into the legislation.

Unfortunately, the UK Bribery Act does not define the meaning or scope of corporate hospitality. Instead, it relies upon the prosecution having to establish that the afforded hospitality was intended to be a bribe; that is, that it was intended to induce someone to abuse their position of trust. Furthermore, the prosecution is required to demonstrate that the hospitality was such that there was a clear intention to influence another's behaviour. Aside from the corollary, that all offers of hospitality are, tacitly or otherwise, driven by a desire to influence decision-making, many corporations' financial positions allow them to offer levels of hospitality which might ordinarily lead to accusations of bribery. The question is whether the hospitality offered was reasonable and proportionate, but those two concepts will naturally be determined by the organisation offering it and the sector in which the organisation sits. Thus, organisations placed within the lucrative banking or financial sector may naturally offer more lavish hospitality because the high-net-worth individuals with whom they engage will expect nothing less. Equally, organisations placed in less lucrative sectors might also embellish their standard of hospitality to impress a prospective client. The net effect of this ambiguity has been to create legislation which considers the potential bribery within the offers of corporate hospitality but is effectively undermined by the acceptance of such hospitality as an essential business function.

Moreover, corporations, in the absence of specificity in terms of what might be construed by the authorities as unreasonable or disproportionate, face the prospect of being prosecuted under the Bribery Act. Ironically, in relation to the demarcation of the level or nature of gifts, above which the potential for bribery might be indicated, the Bribery Act is silent. Accordingly, the responsibility for the reduction or mitigation of bribery is vested in the corporations. Where that responsibility is not undertaken diligently, the opportunity for bribery to occur increases and the overarching impact of the Bribery Act further diluted.

Ukraine

Within Ukraine, there is no definition of hospitality. Instead, the focus is on the provision of gifts, which are broadly defined under the Anti-Corruption Law. Unlike the UK Bribery Act, the Anti-Corruption Law expressly prohibits persons working within state or local government from obtaining gifts. Ironically, in partial reflection of the UK Bribery Act's position, that overarching restriction can be bypassed should the gift fall within 'accepted' notions of hospitality, although the notion of what is acceptable or not is not defined and is therefore a subjective judgment made by the offeror or recipient.

However, in a manner which the UK Bribery Act might usefully adopt, the Anti-Corruption Law restricts the value of individual gifts to a very moderate sum. In this way, there is clear demarcation of a level beyond which the propensity for the gift to be deemed a bribe increases. That degree of certainty is a core component missing from the UK Bribery Act. However, similarly to the UK Bribery Act, the context in which the gift was proffered is also considered, and there remains a possibility that individuals will have to run the gauntlet of determining whether their justification for providing a gift to an official will be viewed in the same way by a third party.

Indonesia

Indonesian legislation does not define gifts and hospitality but rather concerns itself with the notion of a 'gratification' which, as with legislation in Ukraine, is broadly defined in a manner which would include both financial reward and the types of corporate hospitality that might be expected under the UK Bribery Act. In Indonesia, however, there is no need to determine whether or not a gratification does or does not constitute bribery because it is or is not reasonable in all the circumstances. This is because, for any gratification to be deemed a bribe, there must be a demonstrable connection between the gratification and the actions of the recipient. Although this may pose some evidential difficulties for the authorities it does nevertheless remove the need for the providers and recipients of gratifications to establish, as is required under the UK Bribery Act for example, whether or not the gratification *per se* might constitute a bribe because of its intrinsic value. As a useful contingency, the Anti-Corruption Law does afford the recipient of a gratification, who may be unsure of its legality, the opportunity to report it to the Commission for the Eradication of Corruption (KPK) within thirty days of receipt. If it determines that it was a bribe, they retain the gratification but the recipient escapes prosecution. If it determines that it was not a bribe, it is returned to the recipient. Notably, there is only a need for a recipient to demonstrate that the gratification was not a bribe if its value falls above 10 million rupiahs (approximately €575). Thus, there is a very real danger of multiple bribes being paid under the 10 million rupiah threshold.⁵⁴

Kenya

As with both Ukraine and Indonesia, the Bribery Act in Kenya does not expressly define corporate hospitality and includes the notion of a gift within its definition of 'advantage'. The suggested rationale for the absence of corporate hospitality from the legislation is the fact that the private sector was deemed to have considered such hospitality as a normal business function and therefore not requiring legislative oversight. The notion of hospitality as a constituent of the private sector is of course replicated within the UK Bribery Act and arguably the same issues which face UK organisations will trouble Kenyan corporations. Thus, for example, a determination of whether

54. By way of example, one of the methodologies for money laundering utilises a number of individuals, known as 'smurfs', each of whom deposits sums of money into banks below the reporting threshold those banks adhere to. In this way, large volumes of illicit funds can be transferred without the authorities being aware.

hospitality constitutes a bribe depends on whether the evidence proffered was sufficient to demonstrate that it was given with the intention of inducing conduct on the part of the recipient which was not in good faith or involved abusing their position of trust. As with the UK Bribery Act, reaching that determination evidentially will be rendered more difficult by the prevalence and acceptance of corporate hospitality as a cultural norm. Interestingly, in other pieces of legislation (Leadership and Integrity Act 2012 and Public Officers and Ethics Act 2003, respectively) the receiving of gifts and hospitality by stipulated officers is strictly forbidden.

Thus, it appears that the corporate sector, because of its long-standing culture of offering and accepting corporate hospitality and gifts as an integral part of its business operations, has influenced the viability and reputation of legislation designed to root out bribery. Each jurisdiction which unquestioningly accommodates that culture without stricter guidance needs to embark upon a critical appraisal of the status quo and ensure that it renders the corporate world more accountable for its ostensibly commercial decisions in this regard. Bribery cannot be mitigated by the presence of legislation alone but requires the determined effort and active contribution of all sectors affected by bribery, including, in this context, the corporate sector.

c. The UK Bribery Act 2010: Focal Point 3 - Definition of a bribe

As has been noted above, the UK Bribery Act has been heralded as a simple, but not simplistic, piece of legislation, which clearly and concisely provides an all-encompassing document through which to identify and apply a limited number of provisions pertaining to bribery. Aside from its more widely acclaimed characteristics, such as its provisions on extraterritoriality, it is within the accessibility of its other provisions that its importance lies. The world in which bribery operates is by definition opaque, and that opacity has been increased by an assertion made by the corporate sector in particular that the provisions of legislation in jurisdictions lack clarity or precision and/or are subject to varying levels of interpretation. In contrast, the UK Bribery Act stipulates precisely what the offence of bribery consists of and therefore might offer other jurisdictions a template under which their own more complicated provisions might be revised.

Ironically, that alleged clarity of approach is undermined by the absence in the UK Bribery Act of a definition of a 'bribe', with the offences of 'bribing' having to be construed under the broad heading of 'financial or other advantage'. However, that too, remains undefined in the Act such that there may be a wide degree of variance in terms of what amount would meet the financial advantage and of what the 'other advantage' might consist. In that sense, the difficulties posed to the corporate sector in relation to the parameters of gifts and hospitality might also pertain here. Given that the acts of bribing outlined in the Act depend in large part upon satisfying the existence of a financial or other advantage, this is an unnecessary lacuna in the legislative framework.

Ukraine

In Ukraine, the legal notions of 'bribe' and 'bribery' are noticeably absent, having been replaced with the notion of 'unjustified benefits'. These are given a deceptively limited definitional range, including money or other property, non-pecuniary assets and services. However, non-pecuniary assets could involve any non-financial item and the Anti-Corruption Law also specifies '*any other benefits of a non-pecuniary or intangible nature*' which likewise comprise a potentially large range of items.

Indonesia

In common with the UK Bribery Act, Indonesia's Anti-Bribery Law does not define 'bribe' but does define 'bribery'. Similarly, however, to the UK Bribery Act, which aligns bribery with the notion of 'financial or other advantage' but does not define either with precision, the Anti-Bribery Law aligns the act of bribery with behaviour 'contrary to the public interest' but does not define the term and is therefore arguably subject to a degree of redundancy in practice. One point of divergence from the UK Bribery Act is that the Anti-Corruption Law does not criminalise bribery in the private sector which ironically is the conduit for a good deal of bribery. However, the Indonesian Criminal Code indirectly legislates against such bribery by regarding such actions as constituting fraud.

Kenya

As is the case with the UK Bribery Act, the Bribery Act in Kenya is silent as to the definition of a 'bribe' or indeed 'bribery', electing instead to focus, as the UK Bribery Act does, upon the notion of what the act of bribery might involve, and allowing for the inference to be drawn that the notion of a bribe and bribery may be determined in consequence. As with the UK Bribery Act, bribery offences refer to a 'financial or other advantage' but unlike the UK legislation, the Bribery Act in Kenya does provide a broad definition of 'advantage' (to include, for example, money, a gift or fee).

7. The UK Bribery Act 2010 - Broader applicability?

As noted above, the UK Bribery Act has long been held up as a best practice exemplar for other jurisdictions considering the creation, amendment or improvement of their own anti-bribery legislation. The viability of utilising the Bribery Act as a template or model for other jurisdictions lies primarily in its simplicity; that is, its relatively few provisions and the concise and simple characteristics of those provisions. It defines clearly and succinctly what constitutes offering a bribe, receiving a bribe, bribing foreign public officials and the corporate failure to prevent bribery, respectively. To apply the Bribery Act, whether in terms of structure or the nature of its provisions, to another jurisdiction presupposes that the lack of effective legislation is the only or primary reason for the continued presence or persistence of bribery and corruption.

In that context, it is clear that in Ukraine, for example, there exists a feeling of impunity on the part of those engaging in bribery and corruption and a societal grudging acceptance of bribery and corruption as part of the status quo. This latter state of affairs has led to a disinclination by the public to report offences. Moreover, if offences are reported, the standard of pre-trial investigation is poor. Another problem is the lack of judges, which has led to only a small number of cases, from the surfeit of cases awaiting trial, being proceeded with in court.⁵⁵

Furthermore, the National Agency on Corruption Prevention⁵⁶ has argued that corrupt judges and lawyers may manipulate the system and prolong the hearings in corruption cases to the point where the statute of limitations applies and the case is dismissed.

...Ukraine and Indonesia provisions (tabled as they are under a plethora of legislation) require such a high degree of interpretation of key definitions and phraseology that the task of determining to whom the law applies and in what context and verifying the interpretation of terms within the disparate pieces of the legislative framework renders the task of ascribing and proceeding against acts of bribery more complex than it need be...

The National Agency on Corruption Prevention⁵⁷ has also argued that there are cases where a public official has been charged with corruption offences but is nevertheless permitted to remain in their post, and cases in which an official who receives a bribe to provide a service but is not officially permitted to perform that service will be proceeded against for fraud (for which the sentence is lower) rather than for corruption.

Those points notwithstanding however, analysis of the legislative provisions within Indonesia and Ukraine indicates a degree of comparability with the Bribery Act even if the provisions are drafted differently.

However, it is also clear that Ukraine and Indonesia are operating in the broader context of widespread levels of corruption and complex legal and political spheres which have sustained and/or facilitated that corruption environment and upon which a direct application in the form of newly drafted legislation of the UK Bribery Act's provisions would be difficult if not impossible to achieve.

55. Virtual meeting with Ivan Presniakov, Deputy Head of the National Agency on Corruption Prevention, Ukraine, March 2021

56. *ibid*

57. *ibid*

Conversely, many of the Bribery Act's unique characteristics already feature in the legal frameworks of Kenya, Indonesia and Ukraine. In a linear world, direct application of the Bribery Act would arguably be preferable so that one might define a 'bribe', a 'gift', 'hospitality' and a 'public official' in an identical way. However, in the real world wherein different legal traditions⁵⁸ pertain and different political and cultural norms reside, the best that can be hoped for or achieved are respective national frameworks which create as logical and simple a manifestation of bribery offences, and of the elements ('bribe' and so on) of which they are comprised, as possible. Thus, the fact that Ukraine does not define 'bribe' or 'bribery' but elects instead to utilise a broad concept of 'unjustified benefits' reflects an historical tradition whereby bribes used to be considered in relation to monetary value rather than the provision of a service. As the National Agency on Corruption Prevention⁵⁹ has noted, it was deemed less complicated to create a new term that would encompass both types of activity than it would be to redefine the term 'bribery'. In that context, efforts should perhaps be focused upon clarification of existing legislative frameworks rather than the wholesale creation of new legislative frameworks.

In broad terms, legislation is created in order to successfully facilitate the proffering of charges against an individual who has breached the sections of that legislation. For most areas provided for by legislation, there is little if any detailed scrutiny of the legislation's impact on the issue it covers. Thus, legislation on homicide tends not be judged on the number of homicides detected but rather the extent to which the framing of the legislation incorporates all of the potential manifestations of homicide.

...in relation to anti-bribery or anti-corruption legislation, relatively little focus is placed upon the extent to which the legislation does, or does not, encompass the range and scope of the myriad ways in which bribery and corruption might be manifested.

Conversely, there is a tendency within jurisdictions to calculate the success or otherwise of their legislation on the basis of the number of prosecutions brought, and/or the nature and range and length of sentences imposed and/or, more indirectly, the number of plea-bargaining agreements entered into or number of DPAs concluded. If these were the key determinants, it is arguable that the UK Bribery Act would not be regarded as the success its advocates proclaim for it has seen relatively few prosecutions of corporations and relatively few DPAs. Moreover, these have been primarily for breaches of section 7 rather than the section 1, 2 and 6 offences.

Moreover, it may very well be the case that the type and level of sentencing reflects judicial determinations rather than an inadequacy of the legislation in terms of sentencing. Thus, for example, in Ukraine, available penalties under the legislation range from fines and the confiscation of property to a term of imprisonment of up to 12 years. However, a study by Khavronuk,⁶⁰ which examined the disposition of sentences for corruption crimes between 2014 and 2020, noted that the number of people given fines quadrupled and the number of people sentenced to imprisonment halved. In 2020 alone, 82 per cent of 939 convicted persons received a fine and only 4 per cent a term of imprisonment.

58. The United Kingdom and Kenya operate under a 'common law' system whereby legislation is interpreted and applied by the courts and precedents created in cases. Ukraine and Indonesia operate under a 'civil law' system where civil and criminal codes predominate and form the basis of decisions reached by the courts.

59. Virtual meeting with Ivan Presniakov, Deputy Head of the National Agency on Corruption Prevention, Ukraine, March 2021

60. Information provided, following a virtual meeting, by Mikola Khavronuk, Professor of the Department of Criminal Law and Criminal Procedure Law, National University of Kyiv, March 2021

Those observations notwithstanding, the most important feature of bribery legislation within any jurisdiction is the degree to which it is relatively simple to decipher, such that the nature of malfeasance is clearly delineated and the persons who fall within its ambit are identified and the route for subsequent prosecution is unambiguous. The value of the Bribery Act to the UK is the fact that the UK is perceived to have adopted a firm and unequivocal approach to the act of bribery, both domestically and internationally. Kenya, Indonesia and Ukraine should similarly pursue the simplification of their legislative frameworks as a means of improving their enforceability and effectiveness.



8. Conclusions

This analysis has shown that there was a significant, if sometimes broad, synergy between the approach taken by each jurisdiction to the issue of bribery and/or corruption. The points of departure tended to relate to the variance in definition of the same basic concepts, the restrictive parameters of legal traditions and the societal and political drivers and consequences of bribery and corruption, rather than to any lack of understanding of the nature and impact of bribery and corruption.

In that sense, the oft-stated notion that the UK Bribery Act provides the ideal and transferable legislative framework through which other jurisdictions, including those featured in this study, might more effectively mitigate the impact of bribery and corruption is overstated or underestimates the complexity of such issues in those jurisdictions. The countries considered in this analysis have differing legislative architecture and legal traditions. Their laws reveal a tendency to attempt to incorporate all potential activities where bribery might feature and all prospective individuals who might conceivably matter, into the ambit of their legislation. Moreover, the various potential offences and offenders are located within disparate laws and codes which have developed in tandem with the agencies and government sectors in which those respective actors and potential offences operate. Thus, the adoption of the philosophy and dynamics of the UK Bribery Act into the legislative architecture of other jurisdictions should be done cautiously.⁶¹

As is ever the case, legislation alone does not prevent or mitigate the issues it supposedly governs and thus bribery cannot be solved by the provision and implementation of any piece of legislation. What is crucial is that the provisions of the governing legislation detail clearly and concisely what types of behaviour constitute bribery. A useful indicator of the efficacy of bribery legislation within each of the jurisdictions involves posing a simple question at the outset: 'Do the actions of Person A constitute bribery?' The answer to the question will reflect the effectiveness of the legislation. Thus, under the UK Bribery Act, in the first instance, Person A's actions would constitute bribery if, for example, under Section 1 (bribing another person), Person A offers a bribe or promises to give a bribe to another person. In the other jurisdictions (save for Kenya which has, as noted above, modelled its Bribery Act upon the UK Bribery Act) that question could not be addressed until Person A had first been placed into a category of employment, within a sector of employment and a determination made subsequently as to which Law or Code would most appropriately apply. The longer approach taken in Ukraine and Indonesia does not automatically negate the effectiveness of the legislative architecture or mean that individuals may escape liability. However, this elongated approach may be a drawback.

Accordingly, the UK Bribery Act provides a good example of precisely what bribery consists of and how offences of bribery can be constructed. In addition, other jurisdictions might consider recalibrating their various pieces of legislation into one consolidated document. In this way, the definitions and scope of bribery in disparate pieces of legislation could be configured into one clear, concise and universally applicable document. Naturally, in the context of differing legal and cultural traditions, the distinctions in terms of the development, pace and scope of legislative frameworks, and the complex socio-political environments that exist within respective jurisdictions, it is far

61. For example, Article 3 of the Law of Ukraine on Preventing Corruption details those subjects covered by the Law. These include, for example, '...persons authorized to perform the functions of the state or local self-government: President of Ukraine, Chairman of the Verkhovna Rada of Ukraine, his First Deputy and Deputy, Prime Minister of Ukraine, First Vice Prime Minister of Ukraine, Vice Prime Minister of Ukraine, Ministers, other heads of central executive bodies that are not part of the Cabinet of Ministers of Ukraine and their deputies, Head of the Security Service of Ukraine, Prosecutor General, Governor of the National Bank of Ukraine, his First Deputy and Deputy, Chairman and other members of the Accounting Chamber, Commissioner for the Protection of the State Language, Chairman of the Verkhovna Rada of the Autonomous Republic of Crimea, Chairman of the Council of Ministers of the Autonomous Republic of Crimea;'

easier to posit a unitary approach than it is to deliver it. Conversely, not to suggest the potential adoption of an approach which might assist in the tackling of bribery would seem to be counter-intuitive and counter-productive. Indeed, it is clear that, despite the aforementioned jurisdictional experiences and traditions, efforts have continued to be made in those countries to deal with the issue of bribery. That in itself is arguably testimony to the continuing need to offer prospective new modes of engagement with bribery, notwithstanding the practical difficulties that might pertain in their incorporation or adaptation.

Taken altogether, the various acts that constitute bribery across different pieces of legislation in the countries analysed offer a comprehensive approach to the problem. Thus, any law reform effort needs to consider the breadth and depth of the various definitions that exist across all of the existing legislation. This would leave little room for doubt in any given allegation of bribery and related offences.

Conversely, it is imperative that as much ambiguity as to the meaning of terms as possible is removed. Thus, if the receipt or provision of 'gifts' is deemed an offence or part of an offence, the legislation should clearly define precisely what a 'gift' is. Where such terms are defined broadly, or with a few generic examples only, it is difficult to prove whether or not a particular item is or is not a gift in any given circumstance. This might lead to prosecutions over the provision of a gift which the recipient might reasonably not have deemed to fall under the legislation. Conversely, it might lead to gifts being provided as part of a bribe but about which it might be argued in court do not fall within the generic definition provided in the legislation.

Whenever legislation, in relation to any subject, requires or permits interpretation of the meaning and scope of its provisions, difficulties in implementation and application undoubtedly follow. Bribery is too common and too destructive an issue for any further advantage to be afforded, by complex or unclear legislative provisions, to those who seek to utilise and benefit from its manifestation. In this sense, the UK Bribery Act constitutes a 'one-stop shop' approach to the prosecution of bribery. It removes, for the most part, any issues of ambiguity in terms of the meaning and construction of bribery, of the range of parties that can be involved in the act of bribery, of the extraterritorial ambit of the act of bribery and of the role of the private sector in mitigating the impact of bribery upon its operations. It is in its relatively simple construction and remit that the strength of the UK Bribery Act resonates. It is the overarching philosophy of that less complex approach, rather than the precise structure and content of the Act, which is to be commended to other jurisdictions, including Ukraine and Indonesia. In this context, it is not the case that the UK Bribery Act is better than other jurisdictions' legislation, which, as the study suggests, is incredibly comprehensive, but rather that, where comprehensive becomes complex, it is arguably difficult for parties to see the bribery 'wood' amongst the legislative 'trees'.

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Annex 2 - Persons interviewed

Ukraine

1. Mykola Khavronuk, Professor of the Department of Criminal Law and Criminal Procedure Law, National University of Kyiv
2. Ivan Presniakov, Deputy Head of the National Agency on Corruption Prevention

Kenya

1. Carole Nyaga, Senior State Counsel, Department of Justice
2. David Too, Director Legal Services and Asset Recovery, Integrity Centre, Ethics and Anti-Corruption Commission

Indonesia

1. Oce Madril, Chair of the Centre for Anti-Corruption Studies, School of Law, Gadjah Mada University
2. Adnan Topan Husodo, Coordinator, Indonesian Corruption Watch

Annex 3 - About the author

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