IN THE COURT OF APPEAL (CRIMINAL DIVISION)
BETWEEN:

REGINA

Respondent

-and-

INFINITY S.A.

Appellant

RESPONDENT'S BUNDLE

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IN THE COURT OF APPEAL (CRIMINAL DIVISION)

REGINA

Respondent

v.

INFINITY S.A.

Appellant

1. Infinity S.A is a company registered in France, which provides English language tutoring services. Infinity conducts the bulk of its activities in France and other French-speaking countries, but conducts some of its meetings in London.

2. One of Infinity's employees, David, had a meeting in London in March 2019 with a French politician. During the meeting, David gave the French politician £1,500 in cash in an envelope. David's hope was that the payment would ensure that any tutoring being offered by the schools in her district would be given to Infinity, and, in particular, to him.

3. Both David and the company were charged with offences in the UK contrary to the Bribery Act 2010 ("BA 2010"):

    a. David was charged with an offence of bribery of a foreign public official, contrary to s.6 BA 2010.

    b. Infinity S.A. was charged with an offence of failing to prevent bribery, contrary to s.7 BA 2010.

4. David entered a guilty plea at the first opportunity. He received a suspended sentence because of his personal mitigation.

5. Infinity fought the matter to trial.

6. Evidence was heard about the activities of the company, and the following facts are, for the purposes of the appeal, agreed:

    a. Infinity is incorporated in France, and has offices in Boulogne, Paris, Marseille, Lyon and Toulouse.
    b. Infinity provides face-to-face tutoring in schools and colleges, teaching students English. One of Infinity's selling points is that many of its tutors are native English speakers.
    c. Infinity has about 80 employees, some full time, some part time. They all work in France, although some of them have homes in the UK.
    d. There are four directors, who hold board meetings once a month.
    e. Two of the directors live in the UK. As a result, it is convenient to hold the Board and management meetings in the UK for 6 months of the year.
    f. Those board meetings which are held in the UK are held in a serviced office block outside St Pancras station, rented just for the meeting.
    g. That serviced office block is also rented for six-monthly recruitment sessions, in which potential British employees are interviewed for jobs.
    h. Infinity has the following policies, last updated in November 2018:
        i. An Anti-Bribery policy, which prohibits any payments of bribes or 'sweeteners';
        ii. A strict policy prohibiting corporate hospitality or gifts;
        iii. A 'Whistle-blowing policy' which provides routes for employees to raise concerns about anything going on in the company.
    i. It is accepted that those policies meet the prevailing industry standards.
    j. The contracts of each employee include a term indicating that bribery is a matter of gross misconduct, and grounds for immediate dismissal.
    k. The staff are reminded of the policies each year when the entire company gets together for a 'working weekend'.

7. At the close of the Prosecution case, Counsel for Infinity made a submission of no case to answer, on the basis that the Prosecution could not show that Infinity was a '*relevant commercial organisation*' for the purposes of s.7(5) BA 2010. The

judge rejected that submission, ruling that the Prosecution had sufficient evidence, from the facts set out above, to demonstrate that the company met the test re the definition of a '*relevant commercial organisation*' in 7(5)(b).

8. Infinity conceded at trial, and for the purpose of the Appeal, that David was a person 'associated with' Infinity for the purposes of s.7 BA 2010. Infinity also conceded that David's acts had constituted a s.6 offence, and there was therefore no dispute that the requirements of s.7(3) BA 2010 were met.

9. Infinity did raise the defence of 'adequate procedures' at trial. It argued that it had in place adequate procedures designed to prevent persons associated with it from undertaking bribery, providing it with a defence under s.7(2) BA 2010.

10. The judge's direction to the jury, so far as it was relevant to 'adequate procedures' was in the following terms:

> *It is a defence for Infinity to prove that they had in place adequate procedures designed to prevent persons associated with the company from undertaking such conduct. 'Adequate' is a normal word in regular usage. You have heard much about the procedures in place at Infinity. You have heard about their Anti Bribery policy, which the witnesses, from both prosecution and defence, told you was standard in the industry. You have heard from both sides that their training regime was also, give or take a few particular features which do not matter, standard in the industry. The defence say that more could not reasonably have been done. The Prosecution say that those procedures plainly were not adequate; if they were, the bribery would not have occurred. You are entitled to take into account the fact that a bribe undeniably was paid in this case, and to use that information in your assessment of whether the procedures in place at Infinity were "adequate".*

11. Infinity were duly convicted by the jury and now appeal against that conviction on the following grounds:

> Ground 1: In light of the case of *Akzo Nobel NV v Competition Commission & Others* [2014] EWCA Civ 482, and on a "common sense" interpretation, the judge erred in concluding that the facts of this case could constitute 'carrying on a business or part of a business in any part of the UK'.

Ground 2: The judge's direction as to what constitutes adequate procedures rendered the defence illusory, in the manner described in *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153 at page 181. Following the comments of the House of Lords Select Committee on the Bribery Act in 2018, the jury should have been directed that the test was whether the procedures were reasonable in all the circumstances.

Moot problem set by:
Jennifer Carter-Manning QC
7 Bedford Row

31 May 2021

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
BETWEEN:

REGINA

Respondent

-and-

INFINITY S.A.

Appellant

RESPONDENT'S SKELETON ARGUMENT

Grounds of appeal

(1) In light of the case of *Akzo Nobel NV v Competition Commission & Others* [2014] EWCA Civ 482, and on a "common sense" interpretation, the judge erred in concluding that the facts of this case could constitute "carrying on a business or part of a business in any part of the UK".

(2) The judge's direction as to what constitutes adequate procedures rendered the defence illusory, in the manner described in *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153 at page 181. Following the comments of the House of Lords Select Committee on the Bribery Act in 2018, the jury should have been directed that the test was whether the procedures were reasonable in all the circumstances.

Ground 1

1. Having regard to the context, language, and purpose of section 7 of the Bribery Act 2010 ("BA 2010"), it is clear that Parliament intended the phrase "carrying on a business or part of a business in any part of the UK" to cover activities such as those carried out by Infinity S.A. in London.

Language

2. The language of section 7 BA 2010 is deliberately broad. A "relevant commercial organisation" is defined at section 7(5) as including "any… body corporate (wherever incorporated) which carries on a business, or part of a business, in any part of the United Kingdom" (emphasis added). That language evinces an intention to create broad jurisdictional coverage.

3. The breadth of this language can be contrasted with the language at section 86(1)(c) of the Enterprise Act 2002 ("EA 2002"). That provision, which establishes the limits of Competition Commission's enforcement powers, refers simply to "a person carrying on business in the United Kingdom". In *Akzo Nobel NV v Competition Commission & Others* ("*Akzo*") [2014] EWCA Civ 482, the Court of Appeal nonetheless held that section 86(1)(c) EA 2002 covered a Netherlands-incorporated parent company which strategically and operationally managed a subsidiary which transacted in the UK. The Court noted that "a corporation may carry on a business in one country even though its management… takes place entirely from another" [32]. The relevant company was thus "carrying on business" in *both* the Netherlands and the UK [33].

4. By analogy, Infinity S.A. is carrying on its business in both France and the UK. Half of Infinity S.A.'s central management operations take place in the UK, as do a substantial part of its recruitment activities. Both of those activities are constituent parts of carrying on a business for the purposes of section 7 BA 2010.

Purpose and context

5. The purpose of the BA 2010 is to incentivise corporations to take measures to combat bribery. That purpose is not jurisdiction-specific. Rather, Parliament intended to create rules which would have global effect. Much of the debate on the Bill thus focussed on its international impact, and it was introduced before its passage in the following terms (HC Deb 7 April 2010, vol 508, col 1010, emphasis added):

> *The Bill will help to promote high ethical standards in business and public life, in this country and abroad, and will send a clear message that bribery in all its manifestations will not, and should not, be tolerated.*

6. Section 7 in particular seeks to tackle *extra-jurisdictional* bribery. The following points compel that conclusion:

   a. In order for a corporation to be liable under section 7, a person associated with it must commit a specified offence. There are only two such offences, and one of them is bribery of a foreign public official (section 6). In other words, one of the two mischiefs that section 7 sets out to address is extra-jurisdictional bribery.

   b. The offence of bribery of a foreign public official can ordinarily only be committed by a person who has a 'close connection' with the UK, for example by virtue of their citizenship (section 12(4)). That requirement is *expressly*

omitted for the purposes of section 7 (section 7(3)(b)). As a result, Parliament intentionally made the jurisdictional scope of section 7 broader than that of other offences in the Act.

7. Section 7 is therefore designed to combat international bribery by creating a pre-requisite condition that companies wishing to carry on any part of their business in the UK must take adequate measures against bribery. If "carrying on a business or part of a business in any part of the UK" is too narrowly construed, that purpose will be fundamentally frustrated. Holding board meetings in the UK and recruiting British nationals from premises in the UK are precisely the types of activities which Parliament intended to be reserved to corporations which have taken safeguarding measures against bribery.

Ground 2

First Submission: The judge's direction as to what constitutes adequate procedures did not render the defence illusory.

8. The judge set out the statutory defence of 'adequate procedures' in the context of a bribe having been made. The fact that an offence contrary to section 6 BA 2010 was committed does not necessarily deprive Infinity S.A. of a defence:

    a. The Secretary of State has published guidance pursuant to section 9 BA 2010 on procedures that relevant commercial organisations should put in place to qualify for the defence under section 7(2). The guidance states that "*It is a full defence for an organisation to prove that despite a particular case of bribery it nevertheless had adequate procedures in place to prevent persons associated with it from bribing.*" (emphasis added) (Ministry of Justice, *The Bribery Act 2010 Guidance*, 2011, para 1).

    b. In addition, the SFO and the DPP have issued joint guidance for prosecutors on the Bribery Act. That guidance states: "*A single instance of bribery does not necessarily mean that an organisation's procedures are inadequate. For example, the actions of an agent or an employee may be wilfully contrary to very robust corporate contractual requirements, instructions or guidance.*" (CPS, *Bribery Act 2010: Joint prosecution guidance of the Director of the Serious Fraud Office and Director of Public Prosecutions*, 2011).

    c. The two sets of Guidelines make clear that a company which had in place anti-bribery policies which were sufficiently robust but did not in fact prevent bribery taking place may still be able to avail itself of this defence. This is in

recognition of the fact that no bribery prevention regime will be capable of preventing bribery at all times.

9. The judge never instructed that this incident of bribery is proof of the inadequacy of Infinity S.A.'s procedures. The judge reminded the jury of the *prosecution's* interpretation of the term, however she made clear that what constitutes 'adequate procedures' is a matter for the jury to decide. The jury were directed to interpret the word 'adequate' in the ordinary way without any particular slant being put on it at all by the judge. Therefore, the judge's direction did not deprive the defence of any substance.

Second Submission: The judge was not in error in directing the jury that the test was whether the procedures were adequate.

10. Notwithstanding the comments of the House of Lords Select Committee, the language of section 7(2) BA 2010 is clear and unambiguous: "*it is a defence for C to prove that C had in place adequate procedures designed to prevent persons associated with C from undertaking such conduct.*" Nothing in the section refers to the reasonableness of the procedures.

11. In this context there *is* a difference in meaning between 'adequate' procedures and procedures which are 'reasonable in all the circumstances':

    a. The term 'adequate' focusses on whether policies and procedures are effective in influencing actions and behaviour – i.e. it is outcome focussed.

    b. By contrast, the word 'reasonable' is input focussed. It has regard for, *inter alia,* the resources of the company.

12. The concept of reasonableness is ubiquitous in statute and case law (see, for example sections 45(2) and 46(3) Criminal Finances Act 2017). The omission of the term from section 7 BA 2010 is significant. It signifies that the legislature intended to set a higher bar for defendant companies.

13. In light of the above, the judge was right to defer to the judgement of Parliament, rather than import into section 7(2) BA 2010 her own (lower) standard.

Aislinn Kelly-Lyth Senior for the Respondent
Natalie O'Connell Junior for the Respondent
24th June 2021

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
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Respondent

-and-

INFINITY S.A.

Appellant

RESPONDENT'S LIST OF AUTHORITIES

List of authorities

1. Bribery Act 2010, sections 6, 7, 9, 12

2. *Akzo Nobel NV v Competition Commission & Others* [2014] EWCA Civ 482 [20], [24]-[26], [32]-[36]

3. HC Deb 7 April 2010, vol 508, cols 1009 – 1014

4. Ministry of Justice, *The Bribery Act 2010 Guidance*, 2011, paras 1 and 9

5. CPS, *Bribery Act 2010: Joint prosecution guidance of the Director of the Serious Fraud Office and Director of Public Prosecutions*, 2011

6. Criminal Finances Act 2017, sections 45(2) and 46(3)

Aislinn Kelly-Lyth, Senior for the Respondent
Natalie O'Connell, Junior for the Respondent
24th June 2021

Bribery Act 2010

2010 CHAPTER 23

An Act to make provision about offences relating to bribery; and for connected purposes. [8th April 2010]

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

General bribery offences

1 Offences of bribing another person

(1) A person ("P") is guilty of an offence if either of the following cases applies.

(2) Case 1 is where—

(a) P offers, promises or gives a financial or other advantage to another person, and

(b) P intends the advantage—

(i) to induce a person to perform improperly a relevant function or activity, or

(ii) to reward a person for the improper performance of such a function or activity.

(3) Case 2 is where—

(a) P offers, promises or gives a financial or other advantage to another person, and

(b) P knows or believes that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity.

(4) In case 1 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.

Bribery of foreign public officials

6 Bribery of foreign public officials

(1) A person ("P") who bribes a foreign public official ("F") is guilty of an offence if P's intention is to influence F in F's capacity as a foreign public official.

(2) P must also intend to obtain or retain—

(a) business, or

(b) an advantage in the conduct of business.

(3) P bribes F if, and only if—

(a) directly or through a third party, P offers, promises or gives any financial or other advantage—

(i) to F, or

(ii) to another person at F's request or with F's assent or acquiescence, and

(b) F is neither permitted nor required by the written law applicable to F to be influenced in F's capacity as a foreign public official by the offer, promise or gift.

(4) References in this section to influencing F in F's capacity as a foreign public official mean influencing F in the performance of F's functions as such an official, which includes—

(a) any omission to exercise those functions, and

(b) any use of F's position as such an official, even if not within F's authority.

(5) "Foreign public official" means 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.

(6) "Public international organisation" means an organisation whose members are any of the following—

(a) countries or territories,

(b) governments of countries or territories,

(c) other public international organisations,

(d) a mixture of any of the above.

(7) For the purposes of subsection (3)(b), the written law applicable to F is—

(a) where the performance of the functions of F which P intends to influence would be subject to the law of any part of the United Kingdom, the law of that part of the United Kingdom,

(b) where paragraph (a) does not apply and F is an official or agent of a public international organisation, the applicable written rules of that organisation,

(c) where paragraphs (a) and (b) do not apply, the law of the country or territory in relation to which F is a foreign public official so far as that law is contained in—

(i) any written constitution, or provision made by or under legislation, applicable to the country or territory concerned, or

(ii) any judicial decision which is so applicable and is evidenced in published written sources.

(8) For the purposes of this section, a trade or profession is a business.

Failure of commercial organisations to prevent bribery

7 Failure of commercial organisations to prevent bribery

(1) A relevant commercial organisation ("C") is guilty of an offence under this section if a person ("A") associated with C bribes another person intending—

(a) to obtain or retain business for C, or

(b) to obtain or retain an advantage in the conduct of business for C.

(2) But it is a defence for C to prove that C had in place adequate procedures designed to prevent persons associated with C from undertaking such conduct.

(3) For the purposes of this section, A bribes another person if, and only if, A—

(a) is, or would be, guilty of an offence under section 1 or 6 (whether or not A has been prosecuted for such an offence), or

(b) would be guilty of such an offence if section 12(2)(c) and (4) were omitted.

(4) See section 8 for the meaning of a person associated with C and see section 9 for a duty on the Secretary of State to publish guidance.

(5) In this section—

"partnership" means—

(a) a partnership within the Partnership Act 1890, or

(b) a limited partnership registered under the Limited Partnerships Act 1907,

or a firm or entity of a similar character formed under the law of a country or territory outside the United Kingdom,

"relevant commercial organisation" means—

(a) 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),

(b) any other body corporate (wherever incorporated) which carries on a business, or part of a business, in any part of the United Kingdom,

(c) 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), or

(d) any other partnership (wherever formed) which carries on a business, or part of a business, in any part of the United Kingdom,

and, for the purposes of this section, a trade or profession is a business.

8 Meaning of associated person

(1) For the purposes of section 7, a person ("A") is associated with C if (disregarding any bribe under consideration) A is a person who performs services for or on behalf of C.

(2) The capacity in which A performs services for or on behalf of C does not matter.

(3) Accordingly A may (for example) be C's employee, agent or subsidiary.

(4) Whether or not A is a person who performs services for or on behalf of C is to be determined by reference to all the relevant circumstances and not merely by reference to the nature of the relationship between A and C.

(5) But if A is an employee of C, it is to be presumed unless the contrary is shown that A is a person who performs services for or on behalf of C.

9 Guidance about commercial organisations preventing bribery

(1) The Secretary of State must publish guidance about procedures that relevant commercial organisations can put in place to prevent persons associated with them from bribing as mentioned in section 7(1).

(2) The Secretary of State may, from time to time, publish revisions to guidance under this section or revised guidance.

(3) The Secretary of State must consult the Scottish Ministers **[**F1and the Department of Justice in Northern Ireland**]** before publishing anything under this section.

(4) Publication under this section is to be in such manner as the Secretary of State considers appropriate.

(5) Expressions used in this section have the same meaning as in section 7.

Textual Amendments

F1 Words in s. 9(3) inserted (18.10.2012) by The Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2012 (S.I. 2012/2595), arts. 1(2), **19(2)** (with arts. 24-28)

Prosecution and penalties

10 Consent to prosecution

(1) No proceedings for an offence under this Act may be instituted in England and Wales except by or with the consent of—

(a) the Director of Public Prosecutions,**[**F2or**]**

(b) the Director of the Serious Fraud Office F3...

F3(c) . . . . . .

(2) No proceedings for an offence under this Act may be instituted in Northern Ireland except by or with the consent of—

(a) the Director of Public Prosecutions for Northern Ireland, or

(b) the Director of the Serious Fraud Office.

(3) No proceedings for an offence under this Act may be instituted in England and Wales or Northern Ireland by a person—

(a) who is acting—

(i) under the direction or instruction of the Director of Public Prosecutions **[**F4or the Director of the Serious Fraud Office**]**, or

(ii) on behalf of such a Director, or

(b) to whom such a function has been assigned by such a Director,

except with the consent of the Director concerned to the institution of the proceedings.

(4) The Director of Public Prosecutions **[**F5and the Director of the Serious Fraud Office**]** must exercise personally any function under subsection (1), (2) or (3) of giving consent.

(5) The only exception is if—

(a) the Director concerned is unavailable, and

(b) there is another person who is designated in writing by the Director acting personally as the person who is authorised to exercise any such function when the Director is unavailable.

(6) In that case, the other person may exercise the function but must do so personally.

(7) Subsections (4) to (6) apply instead of any other provisions which would otherwise have enabled any function of the Director of Public Prosecutions **[**F6or the Director of the Serious Fraud Office**]** under subsection (1), (2) or (3) of giving consent to be exercised by a person other than the Director concerned.

(8) No proceedings for an offence under this Act may be instituted in Northern Ireland by virtue of section 36 of the Justice (Northern Ireland) Act 2002 (delegation of the functions of the Director of Public Prosecutions for Northern Ireland to persons other than the Deputy Director) except with the consent of the Director of Public Prosecutions for Northern Ireland to the institution of the proceedings.

(9) The Director of Public Prosecutions for Northern Ireland must exercise personally any function under subsection (2) or (8) of giving consent unless the function is exercised personally by the Deputy Director of Public Prosecutions for Northern Ireland by virtue of section 30(4) or (7) of the Act of 2002 (powers of Deputy Director to exercise functions of Director).

(10) Subsection (9) applies instead of section 36 of the Act of 2002 in relation to the functions of the Director of Public Prosecutions for Northern Ireland and the Deputy Director of Public Prosecutions for Northern Ireland under, or (as the case may be) by virtue of, subsections (2) and (8) above of giving consent.

Textual Amendments

F2 Word in s. 10(1)(a) inserted (27.3.2014) by The Public Bodies (Merger of the Director of Public Prosecutions and the Director of Revenue and Customs Prosecutions) Order 2014 (S.I. 2014/834), art. 1(1), **Sch. 2 para. 74(2)(a)**

F3 S. 10(1)(c) and preceding word omitted (27.3.2014) by virtue of The Public Bodies (Merger of the Director of Public Prosecutions and the Director of Revenue and Customs Prosecutions) Order 2014 (S.I. 2014/834), art. 1(1), **Sch. 2 para. 74(2)(b)**

F4 Words in s. 10(3)(a)(i) substituted (27.3.2014) by The Public Bodies (Merger of the Director of Public Prosecutions and the Director of Revenue and Customs Prosecutions) Order 2014 (S.I. 2014/834), art. 1(1), **Sch. 2 para. 74(3)**

F5 Words in s. 10(4) substituted (27.3.2014) by The Public Bodies (Merger of the Director of Public Prosecutions and the Director of Revenue and Customs Prosecutions) Order 2014 (S.I. 2014/834), art. 1(1), **Sch. 2 para. 74(4)**

F6 Words in s. 10(7) substituted (27.3.2014) by The Public Bodies (Merger of the Director of Public Prosecutions and the Director of Revenue and Customs Prosecutions) Order 2014 (S.I. 2014/834), art. 1(1), **Sch. 2 para. 74(5)**

11 Penalties

(1) An individual guilty of an offence under section 1, 2 or 6 is liable—

(a) on summary conviction, to imprisonment for a term not exceeding 12 months, or to a fine not exceeding the statutory maximum, or to both,

(b) on conviction on indictment, to imprisonment for a term not exceeding 10 years, or to a fine, or to both.

(2) Any other person guilty of an offence under section 1, 2 or 6 is liable—

(a) on summary conviction, to a fine not exceeding the statutory maximum,

(b) on conviction on indictment, to a fine.

(3) A person guilty of an offence under section 7 is liable on conviction on indictment to a fine.

(4) The reference in subsection (1)(a) to 12 months is to be read—

(a) in its application to England and Wales in relation to an offence committed before the commencement of **[**F7paragraph 24(2) of Schedule 22 to the Sentencing Act 2020**]**, and

(b) in its application to Northern Ireland,

as a reference to 6 months.

Textual Amendments

F7 Words in s. 11(4)(a) substituted (1.12.2020) by Sentencing Act 2020 (c. 17), s. 416(1), **Sch. 24 para. 443(1)** (with Sch. 24 para. 447, Sch. 27); S.I. 2020/1236, reg. 2

Other provisions about offences

12 Offences under this Act: territorial application

(1) An offence is committed under section 1, 2 or 6 in England and Wales, Scotland or Northern Ireland if any act or omission which forms part of the offence takes place in that part of the United Kingdom.

(2) Subsection (3) applies if—

(a) no act or omission which forms part of an offence under section 1, 2 or 6 takes place in the United Kingdom,

(b) a person's acts or omissions done or made outside the United Kingdom would form part of such an offence if done or made in the United Kingdom, and

(c) that person has a close connection with the United Kingdom.

(3) In such a case—

(a) the acts or omissions form part of the offence referred to in subsection (2)(a), and

(b) proceedings for the offence may be taken at any place in the United Kingdom.

(4) For the purposes of subsection (2)(c) a person has a close connection with the United Kingdom if, and only if, the person was one of the following at the time the acts or omissions concerned were done or made—

(a) a British citizen,

(b) a British overseas territories citizen,

(c) a British National (Overseas),

(d) a British Overseas citizen,

(e) a person who under the British Nationality Act 1981 was a British subject,

(f) a British protected person within the meaning of that Act,

(g) an individual ordinarily resident in the United Kingdom,

(h) a body incorporated under the law of any part of the United Kingdom,

(i) a Scottish partnership.

(5) An offence is committed under section 7 irrespective of whether the acts or omissions which form part of the offence take place in the United Kingdom or elsewhere.

(6) Where no act or omission which forms part of an offence under section 7 takes place in the United Kingdom, proceedings for the offence may be taken at any place in the United Kingdom.

(7) Subsection (8) applies if, by virtue of this section, proceedings for an offence are to be taken in Scotland against a person.

(8) Such proceedings may be taken—

(a) in any sheriff court district in which the person is apprehended or in custody, or

(b) in such sheriff court district as the Lord Advocate may determine.

(9) In subsection (8) "sheriff court district" is to be read in accordance with section 307(1) of the Criminal Procedure (Scotland) Act 1995.

13 Defence for certain bribery offences etc.

(1) It is a defence for a person charged with a relevant bribery offence to prove that the person's conduct was necessary for—

(a) the proper exercise of any function of an intelligence service, or

(b) the proper exercise of any function of the armed forces when engaged on active service.

(2) The head of each intelligence service must ensure that the service has in place arrangements designed to ensure that any conduct of a member of the service which would otherwise be a relevant bribery offence is necessary for a purpose falling within subsection (1)(a).

(3) The Defence Council must ensure that the armed forces have in place arrangements designed to ensure that any conduct of—

(a) a member of the armed forces who is engaged on active service, or

One question that remains is how that protocol will apply, because assuming that Government amendment 7 is agreed to, the Attorney-General will still have a superintendence power over the director of the SFO. To make it absolutely clear, in the case of the SFO, that power applies not just to decisions on whether to prosecute but to decisions on whether to investigate. It is much broader than the power over the other directors. It was in that regard that all the trouble broke out about the BAE Systems case. The use of that power was threatened-

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although in the end it was technically never used-to induce the director of the SFO to call off the investigation of the BAES company's activities in Saudi Arabia with regard to the al-Yamamah case. That problem remains.

Amendment 1, tabled by the hon. Member for Huntingdon, would make the situation worse. It would replace superintendence with a direct decision-making power over investigations. I say to him-he knows this, as we discussed it in Committee-that that position has been fundamentally questioned internationally by the OECD and by respected international non-governmental organisations such as Transparency International. Confidence in the independence of a prosecution system is absolutely crucial to the main task of the Bill, which is to restore this country's reputation as one that fights corruption. That reputation has been tarnished by the events concerning the dealings of BAES in Saudi Arabia. If we go down his route, we will not succeed in restoring this country's reputation; we will continue with the present situation, in which we are slipping down the league, in terms of our international standing in the fight against corruption. However, it sounded like he was going to withdraw his amendment in favour of the Government amendment, which I hope is the case, because his amendment would be very damaging.

I turn briefly to the Government amendment. To paraphrase Douglas Adams, this amendment is mostly harmless. As the hon. Gentleman explained, it states that in cases where the director's discretion is engaged, the decision should be taken personally, as far as is practically possible, rather than delegated. As he said, at the moment, the number of cases concerned is quite small, so, in present circumstances, no great practical difficulty would be imposed on a director by the Government amendment.

I have one concern, however, about what will happen if there is an increase in the amount of work being done in this area. We all hope that an increase in work is not necessary because the Bill, when passed, will deter those who seek to make or receive bribes from doing so. However, it seems that there is a risk. One of the purposes of the Bill is to clarify the law, and it does that, which is why it is a good Bill and I support it. When passed, however, it might have one of two effects: it might make clearer to potential offenders what they should not do and result, therefore, in their not doing it, or-this is quite possible, and is part of the intention-it might make it easier for prosecutors to get a case together and bring it against offenders. If that is the route we take, we will end up with more cases, and I have a slight doubt about whether it is plausible in the longer term to use a director's personal discretion if there are 10 times more cases than now. However, with that caveat, I am happy not to oppose the Government amendment and very much urge the hon. Member for Huntingdon to withdraw amendment 1. If he does not, I shall oppose it.

The Parliamentary Under-Secretary of State for Justice (Claire Ward): We had a good opportunity in Committee to debate the important issues

relating to consent to prosecution. The hon. Member for Huntingdon (Mr. Djanogly) argued in Committee, as he has done here, that the offences under the Bill are sufficiently serious to justify vesting responsibility for consenting to a prosecution to the Attorney-General rather than to the director of the relevant prosecuting authority.

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Under existing prevention of corruption Acts, consent to prosecution is given by the Attorney-General, but those Acts were passed a century or more ago when there was no Director of Public Prosecutions or Serious Fraud Office. We are repealing those outdated Acts and starting with a clean sheet. In doing so, it is right and proper that we consider objectively whether consent to prosecution should be given by the Attorney-General or by the director of the relevant prosecuting authority. We have a choice that our predecessors did not have in 1889 and 1906.

The offences in the Bill will cover a wide range of conduct. I agree that some will be very serious, but others will be less so. On any objective examination of the issue, the offences in this Bill are not ones that require the Attorney-General's consent. To the extent that any given case engages issues of national security, the Attorney-General's superintending powers are such as to enable her to intervene. The hon. Member for Cambridge (David Howarth) is correct to highlight that.

2.45 pm

I accept, however, that the question of whether to consent to a prosecution for one of the offences in the Bill can give rise to more difficult and sensitive considerations than is normally the case. For this reason, I see an argument for special arrangements to apply in this instance. Government amendment 7 would therefore require that the function of consenting to a prosecution must be exercised personally by the director of the relevant prosecuting authority, and a director would not be able to delegate the function to other prosecutors.

That said, of course we need to make some provision for the function to be exercised where the director is unavailable-for example, if the director was incapacitated or out of the country for a considerable number of days. The amendment therefore enables the DPP, the director of the Serious Fraud Office and the director of Revenue and Customs Prosecution Office to nominate another person to act when the director is unavailable. In the case of the DPP for Northern Ireland, the amendment preserves the position whereby the deputy director has all the powers of the DPP, but neither the director nor deputy director will be able to delegate the consent function under the Bill to another person.

I welcome the comments by the hon. Member for Huntingdon that he is looking favourably upon Government amendment 7 and the similar views expressed by the hon. Member for Cambridge on behalf of the Liberal Democrats. We believe that the amendment is an equitable middle way on the issue, and on that basis I commend it to the House.

Mr. Djanogly: My comments and those of the hon. Member for Cambridge (David Howarth) reflect what we believe is a need for a wider debate on the role of the Attorney-General, but I must say to him that today is not the time or place for such a debate. I say to the Liberal Democrats that, just because the OECD and other states do not have an Attorney-General, or do not like the idea of having one, does not, to my mind, make the role of the Attorney-General redundant. I say to the Minister as well that, just because the Attorney-General has been there for 100 years, does not mean that the role is redundant. However, given where we are in the parliamentary timetable, we have decided not to request
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a Division on amendments 1 and 2, and we will be supporting the Government on amendment 7. I beg to ask leave to withdraw the amendment.

Amendment, by leave, withdrawn.

Amendment made: 7, page 6, line 35, leave out subsections (3) to (5) and insert-

'(3) No proceedings for an offence under this Act may be instituted in England and Wales or Northern Ireland by a person-

(a) who is acting-

(i) under the direction or instruction of the Director of Public Prosecutions, the Director of the Serious Fraud Office or the Director of Revenue and Customs Prosecutions, or

(ii) on behalf of such a Director, or

(b) to whom such a function has been assigned by such a Director,

except with the consent of the Director concerned to the institution of the proceedings.

(4) The Director of Public Prosecutions, the Director of the Serious Fraud Office and the Director of Revenue and Customs Prosecutions must exercise personally any function under subsection (1), (2) or (3) of giving consent.

(5) The only exception is if-

(a) the Director concerned is unavailable, and

(b) there is another person who is designated in writing by the Director acting personally as the person who is authorised to exercise any such function when the Director is unavailable.

(6) In that case, the other person may exercise the function but must do so personally.

(7) Subsections (4) to (6) apply instead of any other provisions which would otherwise have enabled any function of the Director of Public Prosecutions, the Director of the Serious Fraud Office or the Director of Revenue and Customs Prosecutions under subsection (1), (2) or (3) of giving consent to be exercised by a person other than the Director concerned.

(8) No proceedings for an offence under this Act may be instituted in Northern Ireland by virtue of section 36 of the Justice (Northern Ireland) Act 2002 (delegation of the functions of the Director of Public Prosecutions for Northern Ireland to persons other than the Deputy Director) except with the consent of the Director of Public Prosecutions for Northern Ireland to the institution of the proceedings.

(9) The Director of Public Prosecutions for Northern Ireland must exercise personally any function under subsection (2) or (8) of giving consent unless the function is exercised personally by the Deputy Director of Public Prosecutions for Northern Ireland by virtue of section 30(4) or (7) of the Act of 2002 (powers of Deputy Director to exercise functions of Director).

(10) Subsection (9) applies instead of section 36 of the Act of 2002 in relation to the functions of the Director of Public Prosecutions for Northern Ireland and the Deputy Director of Public Prosecutions for Northern Ireland under, or (as the case may be) by virtue of, subsections (2) and (8) above of giving consent.'.- *(Claire Ward.)*

Third Reading

2.48 pm

Claire Ward: I beg to move, That the Bill be now read the Third time.

This Bill will bring about a much-needed overhaul of our criminal law as it applies to bribery. With the Bill on the statue book, we can be proud that United Kingdom law in this area will provide a benchmark for other countries, and with it this country will set the gold
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standard-I used that term in Committee-for our international comparators. The Bill will help to promote high ethical standards in business and public life, in this country and abroad, and will send a clear message that bribery in all its manifestations will not, and should not, be tolerated.

The Bill will be good for business; often commercial organisations bear the burden of the added costs of doing business in countries where bribery is prevalent. The Bill will also be good for developing countries by helping to ensure that aid and trade benefits those whom it is intended to benefit, and not corrupt officials. The Bill will be good for this country's international reputation, by demonstrating our ongoing commitment to upholding high standards of probity in business and public life. Finally, the Bill will be good for Parliament, demonstrating the value of pre-legislative scrutiny in forging a broad consensus for reform. The Bill has taken a considerable time finally to reach this point, but I believe that it has achieved a broad consensus across the House and that, in reaching that consensus, this House has produced a Bill that is worthy of setting that gold standard.

I want to take this opportunity to thank all those, particularly in the business sector, who have been available for discussion and to ensure that we had an opportunity to get the Bill right. I also want to thank Opposition parties for their co-operation-for the most part-and those of my officials who have ensured the smooth progression of the Bill. I am grateful to hon. Members for helping us to build what has generally been a consensus, which has now brought the Bill to the threshold of Royal Assent. I am proud, as the Member of Parliament for Watford and as a Minister, to have brought the Bill through to Royal Assent. On that basis I commend it to the House.

2.51 pm

Mr. Djanogly: Bribery is a crime that undercuts competitiveness, derails honest companies and distorts the marketplace. Those who bribe and those who are bribed, whether in commercial organisations or governmental institutions, are thereby diminished by their actions, such that their legitimacy is called into question and the confidence of consumers and the public is weakened. Bribery also undermines the societies in which bribes are made.

With this Bill, Parliament is no longer accepting the excuse of local practice; rather, it is tying our flag to the highest levels of intentional probity. This is welcomed by the Conservatives. However, it is clear that in recent years, under this Labour Government's watch, the UK has fallen behind the standards of combating bribery that we have seen in other western countries, and our reputation has not been improved as a result. Conservatives therefore fully back the Bill and, in particular, are pleased that its implementation will finally make the UK compliant with the 1997 OECD anti-bribery convention. Notwithstanding our unhappiness with the delayed process, we have supported the Bill throughout the course of its journey through Parliament.

Without doubt, the outstanding feature of the Bill has been the delay in its arrival. Plans to update and rework our patchwork of antiquated laws have been mooted since the mid-1990s. As far back as 1998, the
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Law Commission reviewed the UK's corruption laws and formulated a draft Bill that was designed to replace all or parts of the existing relevant legal provisions on corruption and, at the same time, incorporate the common law offence of bribery. What followed was an almost pantomime-like to-ing and fro-ing by the Government when, until recently and in the dying days of this Parliament, we were presented with this Bill. The unacceptable rush that we faced to push the Bill through, in only a few weeks, is hardly an example of thoughtful or effective government.

The Bill before us today is largely based on a set of proposals developed by the Law Commission, in its 2008 report entitled "Reforming Bribery", which has subsequently been reviewed in this House and the other place. The debate in the other place focused mainly on the legal aspects of the Bill, while we attempted in Committee to stress test the practical application of certain provisions in the Bill. The sum total is a Bill that we generally think is considered and well thought out. It is a Bill that I hope will provide a coherent and comprehensive framework of criminal law-one that makes it abundantly clear that bribery has no place in this country and that it will not be tolerated in our commercial or other dealings with the rest of the world.

However, as rushed as the Bill has been, it is vital that it should be implemented only after full consultation with business and the preparation of appropriate guidance. We were pleased to receive the Minister's assurances on that point in Committee. Although we have decided not to move further amendments, providing for a business advisory service, this is certainly an area that we will wish to explore further in government, even if on a non-statutory basis.

David Howarth: The hon. Gentleman will remember from Committee that I thought that he was on to quite a good idea with that proposal, although how it would work is a different question. However, will he go further and take up the points, which I was sorry to see him take up in Committee in the way that he did, about facilitation payments and other forms of bribery that have euphemistic names?

Mr. Deputy Speaker: Order. I hate to intervene on the hon. Gentleman so late in his career in this House, but he is inviting the hon. Member for Huntingdon (Mr. Djanogly) to go outside the scope of the Third Reading debate.

Mr. Djanogly: I take your advice on such matters, Mr. Deputy Speaker.

We welcome the Government amendment today, which will ensure that the prosecutorial power held in the hands of the directors of the Serious Fraud Office and Her Majesty's Revenue and Customs, and the Director of Public Prosecutions cannot easily be delegated to others in those organisations. We did not believe that the delegation of that important power would be appropriate in all but the most limited circumstances.

The debate that has been had on the Bill has shone a light on the extent to which improper behaviour can so easily pervade business affairs. In an international context, it seems that the old adage, "When in Rome", has applied all too readily to acts of bribery in foreign lands. The Bill will place the UK at the head of a
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groundswell of international opinion that states that such behaviour will not be permitted; yet Conservatives believe that this should be seen only as the beginning, and not as the end of the process. The Bill is but one weapon in an arsenal to arm the UK in the fight against corruption. It will provide a framework of offences, but it will not, in itself, action anti-corruption measures. The Bill will not, in itself, issue prosecutions, create a healthy modern

corporate culture or ensure that British companies are not undermined internationally by corrupt foreign competitors. In recent weeks the SFO has publicly announced cases in which it is investigating alleged acts of corruption. It must be hoped that the Bill will give the SFO and other prosecutors in future the necessary clarity to increase those investigations.

We decided not to move our amendments to provide for an annual strategy report, but the proper allocation of resources, and the monitoring of the Bill's implementation and development over the coming years will be important to ensure that it is up to the challenge of ensuring that the UK meets and beats global corruption in a way that has been seriously lacking during Labour's time in government. There is a large corporate responsibility role for business in playing its part too, and the next Conservative Government look forward to working with business on implementing this important agenda for Britain.

2.57 pm

David Howarth: I, too, very much welcome the Bill. The hon. Member for Huntingdon (Mr. Djanogly) is right to say that it has taken a long time to reach this stage, although he is not right to say that the Bill has been particularly rushed, given the vast amount of discussion about previous versions of the reform, both in the Joint Committee of both Houses and in the other place. Although some Bills in the wash-up have been ill-served by the process, I am not particularly concerned about the amount of scrutiny that this Bill has had. We have come out with a good Bill.

The hon. Gentleman is also right that the most important purpose of the Bill is to restore this country's reputation, which was affected badly by some recent bribery cases. It remains to be seen whether the Government-whichever Government we have after the election-will still be fully committed to the fight against bribery. Using the tools that the Bill provides, it will be easier for prosecutors to build their cases, but they will be able to do so only if the Government-whoever they are-provide them with the resources that they need. However, it remains the case that the Government currently do not fund the SFO directly for its corruption work. Rather, the SFO is using resources from other parts of its funding to take that work forward. That must change. Equally, it is not right for the SFO to have to ask the Government for case-by-case funding-that is a constitutional matter that needs to be changed-although the underlying fact is that there will be an improvement for the SFO under the terms of the Bill.

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The old law was extremely confusing. The idea that, in some circumstances, possibly-it was never entirely clear-a principal agent relationship needed to be established before a bribery offence could be proven always seemed entirely unjustified to people in the field. In fact, that is why there were many cases in which it was stated that that relationship was not required. The

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Bill makes it entirely clear that the old law relating to principal and agent has gone, whatever doubts there might have been about it, and that new, clear definitions of bribery have now been included in the law.

That is the first good thing that the Bill does. The second is to introduce an offence of bribing a foreign official, which this country-unlike many others around the world-has hitherto lacked. The provision is drafted in such a way as to make it clear that it is the standards of this country that count. Under the terms of the Bill, it will not be possible to say that we can bribe people because it is okay to do so in another culture. That will not be allowed. The standards that will apply are not vague cultural standards; they will be the written law of another state. There was some debate in Committee about whether businesses would be able to follow this part of the Bill, but I am sure that they will be able to do so. It will be their responsibility to ensure that they are complying with the law of the other state, with whose public officials they are dealing.

I very much welcome the Bill. In some of the debates, I was dismayed by the stance being taken by businesses. I understand their worries, but, in the interests of the reputation of this country and of British business, it would not be right-or even profitable-to question this country's position on the fight against bribery. In the relationship between the next Government, whoever they are, and business, I hope that the people in power will make it absolutely clear to business that its position will not be tolerated if it is likely to undermine the provisions of the Bill, which I am glad to support.

3.2 pm

Mr. William Cash (Stone): I strongly support the Bill, but I would like to make one point that relates to a Bill that I introduced a couple of years ago: the International Development (Anti-corruption Audit) Bill. I speak as the chairman of several all-party groups on matters relating to the third world and developing nations, including Uganda and Kenya, and to the sanitation of water. At that time, I had a lot of discussions with people from the National Audit Office, the Public Accounts Committee and the Department for International Development. It emerged that there was a problem elsewhere in the world, and I know that this Bill addresses that problem, as does the OECD report.

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I wonder, however, whether there will be sufficient sanctions in place for those who engage in bribery and corruption in third-world countries and elsewhere. This is not just a problem for the third world; it is found in the European Union and all other parts of the world. I am worried about what might happen if we do not have a sufficient degree of sanction in relation to the aid that we give, in terms of any restrictions that might be imposed after a warning has been given. If a Government have been given an opportunity to correct their behaviour and they simply do not do so, we might be left with a problem.

We can deal with this issue as a matter of domestic law here in the UK, and I know that the CBI, the Federation of Small Businesses and other organisations have been engaged in consultations with the Minister about how the guidance will operate. These problems will, however, have a serious impact, because so much of this goes on in those countries where the aid money does not reach the people who really need it. At that level, it is essential that the provisions in the Bill relate to what goes on in the countries concerned. If we cannot stop the corruption happening there by using our powers under the International Development Act 2002-which could be amended-I do not think that we will be able to solve the problem.

Perhaps it will never be possible for the whole problem of bribery and corruption to be solved; it has been going on since the world began. The fact is, however, that the Bill does not go quite far enough in tackling the inability of those people to receive the money that is intended for their benefit. The other side of the coin is the necessity to stimulate self-help and enterprise, thereby building up the economies of those countries.

I have had discussions with the hon. Member for City of York (Hugh Bayley) and others who deal with those countries that are prone to bribery and corruption as a way of life. I have also discussed these matters with Transparency International, and with the Global Infrastructure Anti-Corruption Centre, and I have no doubt that they have what the House of Commons Library note describes as

> "impressive anti-bribery strategies on their websites",

but I am not convinced that we have grappled with this enough. I do not think that we have quite got there, although I do support the Bill.

Question put and agreed to.

Bill accordingly read the Third time and passed, with amendments.

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Northern Ireland Assembly Members Bill [*Lords*]

Considered in Committee

[Sir Alan Haselhurst *in the Chair*]

Clause 1

SALARIES AND ALLOWANCES

Question proposed, That the clause stand part of the Bill.

3.7 pm

The Minister of State, Northern Ireland Office (Paul Goggins): There are only three clauses to this small Bill, and clause 1 contains the key provisions. Subsection (3) amends section 47 of the Northern Ireland Act 1998 to enable the Northern Ireland Assembly to delegate the determination of salaries and allowances to an outside body. That is expressly forbidden by the current legislation. The Speaker of the Assembly has confirmed that, after Royal Assent, legislation will be introduced in the Assembly and a new system put in place for setting allowances and salaries after the next Assembly elections in May 2011.

Subsection (5) reflects amendments made in another place and ensures that, if a Member of the Assembly receives a salary as a Member of Parliament or as a Member of the European Parliament, they will not receive any salary as a Member of the Assembly. This is seen as a step along the road to ending dual mandates in Northern Ireland. The other subsections in clause 1 are largely technical and consequential, and I hope that the whole House will continue to give the Bill the support that it gave on Second Reading.

Mr. Laurence Robertson (Tewkesbury) (Con): We welcome the Bill. We have had various discussions on clause 1, which, as the Minister says, contains most of the meat of the Bill. We welcome the fact that the Northern Ireland Assembly is to gain the competence to set up a body for the independent setting of salaries and allowances. This will bring it more into line with what happens in Scotland and Wales.

We are also pleased that the Government met us halfway on the second part of the Bill, which deals with preventing anyone who is a parliamentarian elsewhere from receiving a full salary in the Assembly. It is important to move towards the end of double-jobbing, and we feel that it would be better to achieve that through consensus.

We have three basic objections. The money side of the matter, which the Bill addresses, is perhaps the least important, but it is none the less an important matter. There is also the question of whether people who are elected to the Northern Ireland Assembly can spend sufficient time in this place, as the work here becomes more onerous by the day. I am sure that it does in the Assembly as well, and it is difficult, if not impossible, to be in two places at once.

Mr. William Cash (Stone) (Con): Does my hon. Friend concede that in the context of devolution in the United Kingdom, it is inevitable and necessary to have people who are representative of both the devolved Assembly,

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particularly with its enhanced powers and responsibilities, and of this House? Does he accept that it would not be inconsistent-in principle, at any rate, and I am not speaking for anybody else-to say that if people are doing two jobs, which is always more onerous, and doing them efficiently, there is something odd about not giving them the status of being paid for both jobs, even if it is something less than they might have expected?

Mr. Robertson: I understand my hon. Friend's point. As I say, the money side is probably not the issue that concerns us most of all. Over the last few years, the Minister and I have worked together on many Committees, not only on primary legislation but on Statutory Instrument Committees upstairs, and sometimes they have clashed with meetings of the Assembly. I think that 15 of the 17 Northern Ireland Members of Parliament also sit in the Northern Ireland Assembly, which has meant that they have not always been able to be present in Committee. I found that particularly difficult. The people with experience of and real expertise about life in Northern Ireland are the people who live there, but if they are in the Assembly and cannot physically get to Westminster, it creates a difficulty, about which we are concerned.

There is a further point about what has come to be called double-jobbing. There is potential for a conflict of interest. Is it right for people to sit in this House and make rules and regulations for the running of the Northern Ireland Assembly if they actually sit in that Assembly?

We support the Bill as far as it goes, but we would have preferred it to go a little further in certain respects. We recognise that parliamentary time has become extremely short and that the Government see this as a small, but important, Bill. As such, we are happy to support it.

Mr. Alistair Carmichael (Orkney and Shetland) (LD): I do not intend to detain the House for long. As far as the provisions on the regulation of expenses for the Assembly are concerned, there has never been any contention among the parties. In that respect, clause 1 is wholly unremarkable.

In common with the hon. Member for Tewkesbury (Mr. Robertson), I would have preferred the provisions on double-jobbing to have gone a little further. It is a mark of the maturity of devolution in Northern Ireland, as well as in Wales and Scotland, that we can now countenance that. It is an issue that we should approach with rather greater confidence than we have apparently done. That said, the compromise we have achieved-compromise in the sense that everybody gets what nobody wants-is a workable staging post that should accelerate the withering on the vine of double-jobbing

Mr. Cash: On what the hon. Gentleman described rather pejoratively as double-jobbing, and in the context of the constitutional arrangements between ourselves and the Assemblies he mentioned, I am sure that he recognises that if we are to have anything other than complete independence, some functions

Neutral Citation Number: [2014] EWCA Civ 482

Case No: C3/2013/2403

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COMPETITION APPEAL TRIBUNAL
The Hon Mr Justice Norris, William Allan, Prof Gavin Reid
1204/4/813

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Monday 14th April 2014

Before :

LORD JUSTICE RICHARDS
LORD JUSTICE BEATSON
and
LORD JUSTICE BRIGGS

- -

Between :

AKZO NOBEL N.V.	**Appellant**
- and -	
COMPETITION COMMISSION & ORS	**Respondent**
METLAC HOLDING S.R.L.	**Intervener**

- -

(Transcript of the Handed Down Judgment of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

- -

TIM WARD QC and ALISTAIR LINDSAY
(instructed by **SLAUGHTER AND MAY**) for the **APPELLANT**
DANIEL BEARD QC and ROB WILLIAMS
(instructed by **THE TREASURY SOLICITOR**) for the **RESPONDENT**
ROMANO SUBIOTTO QC and MARIO SIRAGUSA
(instructed by **CLEARY GOTTLIEB STEEN & HAMILTON LLP**) for the **INTERVENER**

Hearing dates : Tuesday 25th March 2014

- -

Judgment

Lord Justice Briggs :

1. This appeal from the Competition Appeal Tribunal raises questions of interpretation and application to particular facts of Section 86(1) of the Enterprise Act 2002 ("the Act"). Section 86(1) seeks to identify the circumstances in which an enforcement order made under Chapter 4 of the Act may extend to conduct outside the United Kingdom. It provides as follows:

> "(1) An enforcement order may extend to a person's conduct outside the United Kingdom if (and only if) he is –
>
> (a) a United Kingdom national;
>
> (b) a body incorporated under the law of the United Kingdom or of any part of the United Kingdom; or
>
> (c) a person carrying on business in the United Kingdom."

2. The enforcement order in issue in these proceedings was one which the Competition Commission proposed to make (in the absence of receiving satisfactory undertakings) to prohibit completion of the indirect acquisition by Akzo Nobel N.V. ("Akzo Nobel") of 51% of the shares of Metlac Holding S.R.L. ("Metlac Holding"), following an investigation of the proposed transaction by the Commission, on a reference by the Office of Fair Trading, and a report by the Commission dated 21st December 2012 ("the Report"). In bare outline the Commission concluded that the proposed transaction would, if carried into effect, result in the creation of a relevant merger situation which might be expected to result in a substantial lessening of competition ("SLC") within the United Kingdom market for the supply of metal packaging coatings for beer and beverages ("B&B"): see Section 36(1) of the Act. Having decided that this would give rise to an anti-competitive outcome within the meaning of Section 36(2), the Commission concluded in its Report that the only remedy likely to be effective was prohibition of the transaction.

3. Akzo Nobel is incorporated in the Netherlands. Metlac Holding is incorporated in Italy. The proposed share acquisition arose from the exercise of an option to purchase the 51% shareholding held by Akzo Nobel's wholly-owned subsidiary Akzo Nobel Coatings International BV ("ANCI"), also incorporated in the Netherlands, which had been granted by members of the Italian Bocchio family. ANCI already owned the remaining 49% of the shares of Metlac Holding. Completion of the transaction triggered by the exercise of the option would not involve any conduct within the United Kingdom by any of the parties to that transaction.

4. The Akzo Nobel Group of companies, of which Akzo Nobel is the ultimate parent company, enjoys a substantial share in the UK market for metal packaging coatings for B&B. Metlac S.P.A, another Italian company, owned as to 55.56% by Metlac Holding and 44.44% by another subsidiary of Akzo Nobel had a smaller but significant share of the same UK market. The Commission's conclusion that there was an SLC arose from its perception that the merger between those two participants in that UK market would give rise to a loss of both actual and potential competition.

5. Akzo Nobel applied for a review of the decision of the Commission on a number of separate grounds. They were all rejected by the Competition Appeal Tribunal (Norris J, Mr William Allan and Professor Gavin Reid) by its judgment of 21st June 2013. Akzo Nobel's appeal to this court has been limited to what is in substance a single ground (although pursued under two limbs), namely that the Commission had no jurisdiction to make an enforcement order against it, because the conduct to be prohibited was conduct outside the United Kingdom and because it was not a person carrying on business in the United Kingdom within the meaning of Section 86(1)(c). The two limbs of Akzo Nobel's appeal are:

   i) That the Tribunal's conclusion that Akzo Nobel was a person carrying on business in the United Kingdom involved an error of law; and

   ii) That the Tribunal based its conclusion upon a factual analysis which was not to be found in the Commission's Report.

6. Most of the written and oral argument presented to this court focused upon limb (i). We were told that this was the first occasion upon which the Commission had ever sought to make an enforcement order against a foreign company in relation to its conduct outside the United Kingdom, so that the issue of interpretation of Section 86(1)(c) was both novel and of general importance.

The Facts

7. It is unnecessary to recite, or even summarise, the findings of fact which led the Commission to conclude that the proposed transaction would create a relevant merger situation resulting in an SLC. Although aspects of that conclusion were challenged in Akzo Nobel's appeal to the Tribunal, those issues have not been pursued on this appeal. Nor is it necessary to set out the reasons why the Commission considered that prohibition of the transaction was the only remedy likely to be effective. The only factual findings relevant to this appeal are those which relate to the question whether Akzo Nobel is (and was at the time of the Report) a person carrying on business in the United Kingdom within Section 86(1)(c).

8. It is to be noted in that context that it is not a requirement of Section 86(1)(c) that the UK business of the target of an enforcement order must be, or even be related to, the business which gives rise to the actual or threatened SLC. Section 86(1) identifies three criteria, any one of which is sufficient to render the target amenable to the Commission's regulatory jurisdiction. I mention this because the Commission's focus upon the Akzo Nobel Group's activities in the UK was understandably directed to its activity in the metal packaging coatings market, rather than its activities in the UK generally.

9. I have taken the following summary of the relevant facts from sections 3 and 11 of the Report. Parts of the passages from which I have drawn my summary have, throughout the proceedings, been treated as commercially confidential. I have endeavoured as far as possible to avoid trespassing upon that confidence, and the outcome of this appeal does not depend upon a detailed description or analysis of those matters. It means however that my summary of the relevant facts is, in certain

respects, less than complete, and less detailed than I would have preferred, had I been unconstrained in that respect.

10. The Akzo Nobel Group had a global business in the manufacture and sale of metal packaging coatings. Its five operational sites in Europe included two in the UK, at Birmingham and Hull. The Group had entered the manufacture and supply of metal packaging coatings in January 2008 by reason of its acquisition of ICI, a large and well-known UK-based chemical group.

11. By 2011, the Akzo-Nobel Group divided its business into three operational divisions called Business Areas, namely Performance Coatings, Decorative Paints and Speciality Chemicals, which each accounted for approximately one-third of the Group's 2011 turnover. Each of those Business Areas was further divided into Business Units ("BUs"), which were further divided into sub-Units ("SBUs"). Depending on the specific activities and customers served, the organisation of those BUs and SBUs was either by market or by geography. The Performance Coatings Business Area included the following BUs: Industrial Coatings; Automotive & Aerospace Coatings; Marine & Protective Coatings, Powder Coatings, Industrial Coatings and Wood Finishes & Adhesives. The Industrial Coatings BU includes an SBU called Akzo Nobel Packaging Coatings ("ANPC").

12. Like most modern corporate groups, the Akzo Nobel Group consisted of a parent holding company and a large number of subsidiary companies, including a number of subsidiaries incorporated and carrying on business in the UK. The results of all its operating subsidiaries are consolidated in the accounts of Akzo Nobel itself, and that company's annual report sets out the overall strategy of the Group's business, describing its activities and strategic ambitions by reference to each of its three Business Areas.

13. In accordance with Dutch law, Akzo Nobel operated a two-tier corporate management structure, consisting of a Board of Management which reported to an independent Supervisory Board. The Board of Management was responsible for management of the company. The company had appointed senior managers together with the Board of Management, collectively known as the Executive Committee ("ExCo"), as the organisational body responsible for the day-to-day management of the whole Group and for its strategic direction. ExCo included members who had responsibilities for specific Business Areas, and responsibilities for specific countries or regions.

14. Under the heading "Carrying On Business" the Commission made specific findings about the management structure of the Akzo Nobel Group from which it is convenient to quote the following extracts:

> "11.90 We understand that within the Akzo Nobel Group there are a number of wholly owned subsidiaries which are incorporated in different countries. We saw sales contracts entered into by some of these companies relating to the supply of metal packaging coatings products in the UK (and correspondence between these companies and their customers) but, in our view, neither the identity of the contracting entity nor the corporate structure reflected how in

substance strategic and operational decisions were made within the Akzo Nobel Group. We noted that Akzo Nobel's business activities, such as its activities in the metal packaging coatings industry are organised by Business Areas (BAs), Business Units (BUs) and Sub-Business Units (SBUs). For example, Akzo Nobel's metal packaging coatings business activities were organised by the SBU ANPG, which Akzo Nobel told us did not have separate corporate identity as a legal entity (Akzo Nobel also told us that the relevant BU did not have separate legal identity). The subsidiaries within the Group sit within these Business Units…

11.91 Akzo Nobel told us that depending on the specific activities and customers served, the organisation of the SBUs and BUs is either by market or by geography.... We therefore recognised that there was a distinction between the corporate structure of Akzo Nobel and the operational structure of the Group. In our view these arrangements, which are common among large corporate groups, reflected a structure in which the decision-making is centralised within the Group.

11.93 These contractual arrangements (*set out in a confidential paragraph*) reflected the situation which we considered was not unusual for a Group structure of a multi-national company. While certain aspects of the contractual arrangements are at subsidiary level, we noted that the purchasing arrangements had significant aspects which were centralised.

11.95 We considered the organisation of the Group and the involvement of Akzo Nobel NV to assess the decision-making arrangements within the Group. Akzo Nobel told us that Akzo Nobel NV has only a peripheral involvement in directing strategy for the UK… The four members of Akzo Nobel NV's Board of Management and the four leaders with functional expertise have responsibility for day-to-day management of the company, the Executive Committee (ExCo). ExCo manages the company's day-to-day operations.

11.97 In our view these arrangements (*a reference to a confidential section*) show that the participation of Akzo Nobel NV through ExCo was extensive and includes the approval of operational decisions. We therefore did not accept that Akzo Nobel NV had

only a peripheral involvement in directing strategy for the UK.

11.98 The arrangements described by Akzo Nobel in its submission to us and in the Authority Schedule (*another confidential document*) are complex. The Group carries out operations in the UK and business operations are part of a SBU, BU and BA. We have observed that Akzo Nobel NV has structures in place such that the operations of the Group's various business activities are ultimately controlled by it. While appreciating that there are several steps of upward referral before the functional member of ExCo or Akzo Nobel NV takes a decision, the structure in place, in our view, is one in which the operations within the Group are centrally monitored and directed which limits autonomy within the BUs and SBUs in practice. In our view, the organisational structure and arrangements we have described above, including the relevant business units, is the means through which Akzo Nobel NV carries on business, including in the UK."

15. Save perhaps for the last sentence, the quoted passages from the Commission's Report consist entirely of findings of fact. They are not, and indeed could not be, the subject matter of challenge in this court, otherwise than on *Edwards v Bairstow* rationality grounds. There has been no such challenge.

16. The Commission's Report made no specific findings about the legal ownership of the businesses within the Akzo Nobel Group or, in particular, of the Group's businesses within the UK. I shall assume in favour of the Appellant that those businesses were, for the most part, owned by the Group's wholly-owned UK subsidiaries, rather than owned by, or held on trust for, their ultimate parent Akzo Nobel.

17. Whereas the Articles of Association of a typical UK incorporated company provide that its business is to be managed by its board of directors, it is clear from the Commission's findings that responsibility for the management of the businesses of all the Group's UK subsidiaries, both in strategic and operational (i.e. day-to-day) terms, rested with ExCo, an organ of the Akzo Nobel parent company.

18. For present purposes it matters not whether this wholesale transfer of responsibility for management from subsidiaries to ultimate parent was achieved by delegation by individual subsidiary boards of directors, alteration to their Articles of Association, or simply by the decision-making of 100% of the subsidiary's shareholders, as permitted by English law in relation to solvent companies: see *Multinational Gas & Petrochemical Co v Multinational Gas & Petrochemical Services Limited* [1983] Ch 258. However achieved, the result that Akzo Nobel itself (through its organ ExCo) managed the businesses of all its UK subsidiaries is a cardinal fact which, incidentally, distinguishes the operations of the Akzo Nobel Group from the traditional basis upon which shareholders may influence the management of the businesses of their companies, namely by voting at general meetings and securing the

appointment of directors of their choice, who are themselves charged with the management of the company's business. Although a departure from tradition, there is nothing at all unusual about the centralised group management structure which I have described. As the Commission noted, it is how most modern international corporate groups are managed.

19. In his excellent and concise submissions on this appeal, Mr. Tim Ward QC sought to characterise the management structure found to have existed by the Commission as limited to "monitoring and directing" activities and decisions carried out by other entities in the Akzo Nobel Group, leaving the substance of management to other entities in the Group, including the UK subsidiaries. While it is true that the Commission used the phrase "centrally monitored and directed" (in paragraph 11.98 of its Report), a reading of the Report as a whole and in particular the passages which I have quoted from it, make it clear that responsibility for management of the group's business together with actual strategic and operational management were all vested in and carried out by ExCo, and that the residual responsibility of individual subsidiaries consisted of such relatively low-level matters as ExCo permitted, by way of delegation, together with each subsidiary's audit and accounts. This is particularly apparent from the confidential Authority Schedule issued by ExCo, available both to the Commission, the Tribunal and to this court during the hearing of the appeal, but from which it would be inappropriate for me to quote. It is also apparent from the Commission's specific rejection of Akzo Nobel's submission that its involvement in directing strategy for the UK businesses was only peripheral: see paragraphs 11.95 and 11.97 quoted above.

Section 86 in its Context

20. The innocent-sounding phrase "carrying on business in the United Kingdom" has been much used in UK legislation and, indeed, by the English courts as an analytical tool. The industry of Mr. Ward and his team suggested that it appeared no less than 135 times in UK legislation going back as far as 1854. It has been in use within competition legislation since the 1940s, having originally appeared in the Monopolies and Restrictive Practices Act 1948. Like any phrase in a statute or other legal document, it must be read in context, having regard both to the general purposes of the legislation in question, and to the specific purpose for its inclusion, so far as that can be ascertained. A phrase may have a natural or ordinary meaning which admits of no ambiguity. Sometimes, as in the present case, ambiguity only appears when an apparently simple phrase has to be applied to particular facts.

21. The phrase "carrying on business in the UK" is not specifically defined in the Act, but some assistance is obtainable from the definitions in section 129. In section 129(1):

> ""Business" includes a professional practice and includes any other undertaking which is carried on for gain or reward or which is an undertaking in the course of which goods or services are supplied otherwise than free of charge;"

Section 129(3):

> "References in this Part to a person carrying on business include references to a person carrying on business in partnership with one or more other persons."

22. More generally, there was a sharp debate between counsel as to the consequences of the requirement to construe legislation purposively. Mr. Daniel Beard QC for the Commission, supported by Mr. Romano Subiotto QC for Metlac (intervening to oppose Akzo Nobel's appeal) submitted that the phrase "carrying on business" in the United Kingdom should be liberally construed, so as to bring within its boundary all those targets of appropriate enforcement action necessary to ensure that the Commission could fashion and impose effective remedies for SLCs falling within its investigatory purview. It would, they submitted, be a negation of Chapter 4 of the Act headed "Enforcement" for Section 86 to be narrowly construed, in particular because of the Commission's duty, enshrined in Section 36(3), to have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the SLC and any adverse effects resulting from it.

23. For his part Mr. Ward submitted that Section 86 was designed to implement, in the regulatory context, the common law requirement that English jurisdiction is confined to persons and activities within the UK, rather than extended in breach of comity to persons and conduct in other jurisdictions. Section 86(1) was, he submitted, a deliberate limiting provision plainly designed to confine the reach of the regulatory jurisdiction of the Commission within bounds which respected international comity, and should therefore be construed with that purpose in mind. In particular, he submitted that it should not be construed so as to bring within the class of targets of an enforcement order persons (whether individual or corporate) with no presence or place of business in the UK, whose participation in UK business was confined entirely to conduct outside the UK.

24. It is in my judgment appropriate to have regard both to the wider general purposes of the Act in providing an effective regulatory regime to deal with anticipated or actual anti-competitive outcomes (see Section 36(2)), and to the specific purpose of Section 86(1), which is plainly to set boundaries to the class of persons who may, in relation to their behaviour outside the UK, be targets for enforcement orders. But neither of those purposes leads to a conclusion that Section 86(1) should either be broadly or narrowly construed. It must be interpreted with the fulfilment of both those purposes in mind so that, in particular, an interpretation which was destructive of either of them should be rejected, and an interpretation which gives best effect to both of them adopted if possible.

25. In that context I accept Mr. Ward's submission that international comity forms part of the reason why Parliament may be supposed to have thought it necessary to limit the class of targets of an enforcement order, in relation to conduct outside the United Kingdom. But it cannot be supposed that Parliament intended to apply a purely common law notion of comity, such as that set out in the note to Section 128 in *Bennion* on Statutory Interpretation (5th Edition):

> "*The principle of comity* An Act is taken to be for the governance of the territory to which it extends, that is the territory throughout which it is law. Other territories are governed by their own law. The principle of comity between

> nations requires that each sovereign state should be exclusively allowed to govern its own territory. So an Act does not usually apply to acts or omissions taking place outside its territory, whether they involve foreigners or Britons."

It is obvious that this cannot have been the intention behind Section 86(1) since it is in terms intended to permit three classes of persons to be subjected to regulatory control in respect of their conduct outside the UK.

26. Rather, it seems to me that Section 86(1) performs in relation to this regulatory jurisdiction a function often to be found in statutory provisions which give the English courts jurisdiction over the affairs of foreign individuals or companies, namely to set out connecting factors between targets of regulatory action and the UK which make it appropriate, rather than exorbitant, for the particular jurisdiction in question to be exercised over them in relation to conduct outside the UK. The connecting factors in the present case are UK nationality, incorporation under UK law and carrying on business in the UK. If any one or more of those connecting factors is shown to exist in relation to a person, then Parliament must be taken to have decided, notwithstanding the dictates of international comity, that it is appropriate to confer upon the Commission jurisdiction to make enforcement orders regulating that person's conduct outside the UK.

27. Mr. Ward laboured long and hard to persuade us that the phrase "carrying on business in the UK" had been habitually treated as synonymous with, or as a proxy for, the common law requirement that jurisdiction over a corporate body depended upon it having some 'presence' within the territory of the court exercising jurisdiction. He relied mainly on the well-known asbestosis case of *Adams v Cape Industries PLC* [1990] Ch 433, and in particular its analysis of what was described as "the *Okura* line of cases" of which the leading example was the Court of Appeal's decision in *Okura & Co Limited v Forsbacka Jernverks Aktiebolag* [1914] 1KB 715. The *Adams* case was itself about the question whether Cape Industries PLC and an associate company Capasco had established a sufficient presence in the USA to enable default judgments against them obtained in the USA to be enforced in England. The *Okura* line of cases relied upon by way of analogy were concerned with the question whether a foreign corporation had established a sufficient presence in England to render it susceptible to the English court's jurisdiction. Giving the judgment of the Court of Appeal, Slade LJ identified as the "most helpful guidance" in determining whether a foreign corporation is "here" so as to be amenable to the jurisdiction of our courts the following passage from the judgment of Buckley LJ in the *Okura* case itself, at pages 718-9:

> "The point to be considered is, do the facts show that this corporation is carrying on its business in this country? In determining that question, three matters have to be considered. First, the acts relied on as showing that the corporation is carrying on business in this country must have continued for sufficiently substantial period of time. That is the case here. Next, it is essential that these acts should have been done at some fixed place of business. If the acts relied on in this case amount to a carrying on of a business, there is no doubt that those acts were done at a fixed place of business. The third

> essential, and one which it is always more difficult to satisfy, is that the corporation must be 'here' by a person who carries on business for the corporation in this country. It is not enough to show that the corporation has an agent here; he must be an agent who does the corporation's business for the corporation in this country. This involves the still more difficult question, what is meant exactly by the expression 'doing business?'"

Slade LJ continued:

> "It is clear that (special statutory provision apart) a minimum requirement which must be satisfied if a foreign trading corporation is to be amenable at common law to service within the jurisdiction is that it must carry on business at a place within the jurisdiction: see *The Theodohos* [1977] 2 Lloyd's Rep. 428, 430, *per* Brandon J."

28. Mr. Ward submitted that, by parity of reasoning, the use of a 'carry on business in the UK' test for the Commission's jurisdiction should at least require it to be shown that the target company was itself present within the UK and carrying out some business activity here. That could not, he said, be achieved simply by attributing to a foreign parent the business activities of its UK subsidiaries. That much was also established in *Adams v Cape Industries*, accepted by the Tribunal and is common ground in this court. Nor could it be established if the only participation of the parent company in the English business consisted of acts of supervision and management carried out abroad.

29. Mr. Ward sought to bolster his submission by reference first to *The San Paulo (Brazilian) Railway Company Limited v Carter (Surveyor of Taxes)* [1896] AC 31, a case about the statutory test for corporate liability to income tax, and secondly to *SSL International PLC v TTK LIG Limited* [2012] 1WLR 1842, a case about whether a company had established a sufficient presence within England to enable service to be effected on one of its directors while temporarily within the jurisdiction. It fell squarely within the *Okura* line of cases. He submitted that, in both of them, the concept of carrying on business within the jurisdiction was treated as synonymous with presence here.

30. In my judgment, none of those cases lead to or even support the conclusion for which Mr. Ward contends. I agree with the Tribunal that the starting point is that Parliament could have, but did not, specify a 'presence' test in Section 86(1)(c) of the Act. It could have used one or more of the principles relating to 'presence' set out by Slade LJ at page 530-1 in the *Adams* case, which are firmly focussed upon the requirement that the foreign company has established and maintained a fixed place of business of its own within the jurisdiction, and carried on its own business from such premises. Instead, Section 86(1)(c) imposes a simple carrying on business requirement which, neither expressly nor by necessary implication, requires it to be shown that the target company's participation in the carrying on of that business is itself carried out within the UK.

31. Secondly, the attempt to show by reference to the *Okura* line of cases that presence here is a necessary characteristic of carrying on business here strikes me as an

illegitimate form of reverse engineering. While it may be that carrying on business here is a characteristic of corporate presence here, the opposite does not follow. Presence requires the additional element of a permanent place of business here from which the business is carried on.

32. Thirdly, Lord Davey's analysis of the facts in the *San Paulo Railway* case illustrates that a corporation may carry on a business in one country even though its management of it takes place entirely from another. The railway company was registered in England and its central management and control was exercised entirely from England, but its trading activities consisted of the running of a railway in Brazil. He said:

> "It is clear to my mind that the direction and supreme control of the appellant company's business is vested in the board of directors in London, who appoint the agents and officials abroad, and either by general orders or by particular directions control or may control their duties, remuneration, and conduct, and to whom any question of policy or any contract or other matter may, and if deemed of sufficient importance I suppose would, be referred for their decision. The business is therefore in very truth carried on, in, and from the United Kingdom, although the actual operations of the company are in Brazil, and in that sense the business is also carried on in that country." (*my underlining*)

33. Applying that analogy to Akzo Nobel, its central management activity is carried on in the Netherlands, but a substantial part of the managed business is transacted in the UK. It may fairly be described as carrying on business both in the Netherlands and in the UK.

34. For present purposes, the critical question is whether the exercise of the strategic and operational management and control of a manufacturing and sales business, a substantial part of which is unmistakably carried on within the UK, amounts to carrying on business in the UK, where that management and control itself takes place elsewhere. I have in that context found Section 129(1) and (3) of the Act to be of significant assistance. Section 129(1) defines business as including a money making undertaking, rather than merely an activity other than pleasure. The effect of section 129(3) is that every partner is to be treated as carrying on a partnership business. Suppose that the business of an unincorporated partnership is or includes manufacturing and trading in the UK, and that responsibility for strategic and operational management of the business lies with a partner who (or which) carries out those activities entirely abroad. In my judgment that managing partner would be carrying on business within the UK even if he, she or it never entered the UK or established a presence here. Taken together, those definitions show that it is legitimate to approach Section 86(1)(c) by asking (i) is there a business being carried on in (or partly in) the UK? (ii) is the target person sufficiently involved in that business that it can be said to be carrying it on, whether alone or with others? If the answers to those two questions are affirmative, then the target falls within Section 86(1)(c). I agree again with the Tribunal that it would cast the net too wide to say that any involvement in such a business, such as the supply of goods to it from abroad,

amounts to carrying it on. What does or does not amount to carrying it on in any particular case will be a fact-intensive question.

35. That approach seems to me to give proper effect to the purposes both of the Act as a whole and of Section 86(1) in particular. In enables the Commission to regulate the behaviour abroad of a person engaged in the carrying on a business here. I consider that conducting strategic and operational management of a business carried on here clearly amounts to carrying it on, because it supplies an appropriate connecting factor between the manager and the UK to justify the exercise of jurisdiction over it, even if that manager performs its role offshore. Were that not so, modern methods of communication would permit effortless evasion of the Commission's regulatory jurisdiction, which Parliament is unlikely to have intended.

36. In the present case, the substantial UK manufacturing and trading business of the Akzo Nobel group may well be carried on in premises owned or leased by one or more UK-incorporated subsidiaries, and the manufacturing and trading processes may be undertaken by employees of one or more of those subsidiaries. The profits of the UK business may be accounted for as profits of one or more of those subsidiaries. In all those respects the UK subsidiaries are themselves engaged in the carrying on of that business. But the business is nonetheless managed both strategically and operationally by Akzo Nobel, so that, like the offshore managing partner, it is also carrying on business in the UK.

37. This is not to attribute the activities of Akzo Nobel's UK incorporated subsidiaries as its activities. That would be, as the Tribunal held, and as is common ground, an inappropriate departure from principles of separate corporate identity, flowing from *Salomon v Salomon* [1897] AC 22, and applied in this context in *Adams v Cape Industries*. It is simply the consequence of the Commission's careful focus on the nature and extent of the Akzo Nobel parent company's involvement in the conduct of the UK business, through its organ ExCo, as set out in the passages from the Report which I have summarised and from which I have quoted. By contrast, if all that the parent company of a subsidiary carrying on business in the UK did was to exercise its rights as shareholder in the traditional fashion, leaving the entire management of the business to the subsidiary's directors, the parent would not solely on that account be carrying on the business at all.

38. It follows that neither the Commission nor the Tribunal made any error of law in its analysis of the question whether Akzo Nobel NV carried on business in the UK, so that the first limb of Akzo Nobel's grounds of appeal must be rejected.

Did the Tribunal depart from the Commission's findings of fact?

39. I can take this second limb of the grounds of appeal shortly, and it did not occupy much time during argument. Mr. Ward's submission that the Tribunal had departed from the Commission's findings of fact was focussed on paragraphs 113 and 114 of the Tribunal's judgment, from which I have extracted the passages criticised:

> "113. …The Commission's central conclusion was that the organisational and decision-making structure of the AN

> Group is based upon its functional units rather than its operating subsidiaries. Strategic decisions are made within the functional units, as evidenced by the absence of a strategic plan for subsidiaries. Contracting decisions are likewise made within the functional units:… Similarly, other operational decisions are made within the functional units. Taken together, we are satisfied that the Commission was entitled, as a matter of law, to conclude that these activities constitute the carrying on of business within the functional units and that that activity extends to the UK.
>
> 114. An important aspect of the Commission's unchallenged decision is that, based on the Authority Schedule, decision-making within the AN Group is centralised through ExCo, which is an organ of Akzo Nobel itself. It might be said that that decision is at variance with the distribution of decision-making authority between ExCo and the functional units. That issue is not, however, open to Akzo Nobel in a challenge based solely on an error of law. In that context, it is important to appreciate that the language of section 86(1)(c) cannot be applied to a group of companies; it necessitates that the business activities are attributed to a legal person, or persons, within the group. The activities of Akzo Nobel's functional units must be attributed to a legal person. Neither the ANPG SBU, nor the Industrial Coatings BU have separate legal personality so that the activities of those units cannot be attributed, for the purpose of section 86(1)(c), to them. They must, be attributed either to Akzo Nobel itself or to the subsidiaries that are located within the units. In determining which of those attributions is correct, the Commission is in our judgment entitled, as a matter of law (consistently with section 86(1)(c) and without violating the *Salomon* principles), to consider, on the basis of the evidence available to it, whether the decisions made within the functional units are properly to be regarded as decisions made by the organs of the subsidiaries or decisions made by the functional units that are implemented through the subsidiaries. If the latter, then it may be the case – and this will be a matter for factual assessment – that the decisions of the functional units are in reality those of the ultimate holding company."

40. Mr. Ward submitted that it was wrong for the Tribunal to treat the Commission as having decided, as a matter of fact, that the strategic and operational decision-making in relation to the activities of the Group's functional units was to be attributed, via ExCo, to Akzo Nobel. In my judgment that is precisely what the Commission decided, as can readily be seen by comparing those extracted parts of the Tribunal's

judgment with the parts of the Report which I have summarised, and from which I have quoted at the beginning of this judgment.

41. My only slight criticism, which is immaterial for present purposes, is about what appears to have been an implicit assumption by the Tribunal that those decision-making activities had to be attributed, by a binary decision, either to the parent Akzo Nobel or to its subsidiaries. Even if they had been shared between them, Akzo Nobel's share of that activity would still have justified the conclusion that it was carrying on business in the UK. But the Commission did indeed find that the decision-making rested with ExCo, an organ of Akzo Nobel, even if no such simple all-or-nothing choice had to be made. That finding is, as I have said, not challenged on the grounds of irrationality.

42. For those reasons I would dismiss this appeal.

Lord Justice Beatson :

43. I agree.

Lord Justice Richards :

44. I also agree.

45.

Ministry of JUSTICE

THE BRIBERY ACT 2010

Guidance

about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing (section 9 of the Bribery Act 2010)

Foreword

Bribery blights lives. Its immediate victims include firms that lose out unfairly. The wider victims are government and society, undermined by a weakened rule of law and damaged social and economic development. At stake is the principle of free and fair competition, which stands diminished by each bribe offered or accepted.

Tackling this scourge is a priority for anyone who cares about the future of business, the developing world or international trade. That is why the entry into force of the Bribery Act on 1 July 2011 is an important step forward for both the UK and UK plc. In line with the Act's statutory requirements, I am publishing this guidance to help organisations understand the legislation and deal with the risks of bribery. My aim is that it offers clarity on how the law will operate.

Readers of this document will be aware that the Act creates offences of offering or receiving bribes, bribery of foreign public officials and of failure to prevent a bribe being paid on an organisation's behalf. These are certainly tough rules. But readers should understand too that they are directed at making life difficult for the mavericks responsible for corruption, not unduly burdening the vast majority of decent, law-abiding firms.

I have listened carefully to business representatives to ensure the Act is implemented in a workable way – especially for small firms that have limited resources. And, as I hope this guidance shows, combating the risks of bribery is largely about common sense, not burdensome procedures. The core principle it sets out is proportionality. It also offers case study examples that help illuminate the application of the Act. Rest assured – no one wants to stop firms getting to know their clients by taking them to events like Wimbledon or the Grand Prix. Separately, we are publishing non-statutory 'quick start' guidance. I encourage small businesses to turn to this for a concise introduction to how they can meet the requirements of the law.

Ultimately, the Bribery Act matters for Britain because our existing legislation is out of date. In updating our rules, I say to our international partners that the UK wants to play a leading

role in stamping out corruption and supporting trade-led international development. But I would argue too that the Act is directly beneficial for business. That's because it creates clarity and a level playing field, helping to align trading nations around decent standards. It also establishes a statutory defence: organisations which have adequate procedures in place to prevent bribery are in a stronger position if isolated incidents have occurred in spite of their efforts.

Some have asked whether business can afford this legislation – especially at a time of economic recovery. But the choice is a false one. We don't have to decide between tackling corruption and supporting growth. Addressing bribery is good for business because it creates the conditions for free markets to flourish.

Everyone agrees bribery is wrong and that rules need reform. In implementing this Act, we are striking a blow for the rule of law and growth of trade. I commend this guidance to you as a helping hand in doing business competitively and fairly.

Kenneth Clarke
Secretary of State for Justice
March 2011

Introduction

1 The Bribery Act 2010 received Royal Assent on 8 April 2010. A full copy of the Act and its Explanatory Notes can be accessed at: www.opsi.gov.uk/acts/acts2010/ukpga_20100023_en_1
The Act creates a new offence under section 7 which can be committed by commercial organisations[1] which fail to prevent persons associated with them from committing bribery on their behalf. It is a full defence for an organisation to prove that despite a particular case of bribery it nevertheless had adequate procedures in place to prevent persons associated with it from bribing. Section 9 of the Act requires the Secretary of State to publish guidance about procedures which commercial organisations can put in place to prevent persons associated with them from bribing. This document sets out that guidance.

2 The Act extends to England & Wales, Scotland and Northern Ireland. This guidance is for use in all parts of the United Kingdom. In accordance with section 9(3) of the Act, the Scottish Ministers have been consulted regarding the content of this guidance. The Northern Ireland Assembly has also been consulted.

3 This guidance explains the policy behind section 7 and is intended to help commercial organisations of all sizes and sectors understand what sorts of procedures they can put in place to prevent bribery as mentioned in section 7(1).

4 The guidance is designed to be of general application and is formulated around six guiding principles, each followed by commentary and examples. The guidance is not prescriptive and is not a one-size-fits-all document. The question of whether an organisation had adequate procedures in place to prevent bribery in the context of a particular prosecution is a matter that can only be resolved by the courts taking into account the particular facts and circumstances of the case. The onus will remain on the organisation, in any case where it seeks to rely on the defence, to prove that it had adequate procedures in place to prevent bribery. However, departures from the suggested procedures contained within the guidance will not of itself give rise to a presumption that an organisation does not have adequate procedures.

5 If your organisation is small or medium sized the application of the principles is likely to suggest procedures that are different from those that may be right for a large multinational organisation. The guidance suggests certain procedures, but they may not all be applicable to your circumstances. Sometimes, you may have alternatives in place that are also adequate.

1 See paragraph 35 below on the definition of the phrase 'commercial organisation'.

6 As the principles make clear commercial organisations should adopt a risk-based approach to managing bribery risks. Procedures should be proportionate to the risks faced by an organisation. No policies or procedures are capable of detecting and preventing all bribery. A risk-based approach will, however, serve to focus the effort where it is needed and will have most impact. A risk-based approach recognises that the bribery threat to organisations varies across jurisdictions, business sectors, business partners and transactions.

7 The language used in this guidance reflects its non-prescriptive nature. The six principles are intended to be of general application and are therefore expressed in neutral but affirmative language. The commentary following each of the principles is expressed more broadly.

8 All terms used in this guidance have the same meaning as in the Bribery Act 2010. Any examples of particular types of conduct are provided for illustrative purposes only and do not constitute exhaustive lists of relevant conduct.

Government policy and Section 7 of the Bribery Act

9 Bribery undermines democracy and the rule of law and poses very serious threats to sustained economic progress in developing and emerging economies and to the proper operation of free markets more generally. The Bribery Act 2010 is intended to respond to these threats and to the extremely broad range of ways that bribery can be committed. It does this by providing robust offences, enhanced sentencing powers for the courts (raising the maximum sentence for bribery committed by an individual from 7 to 10 years imprisonment) and wide jurisdictional powers (see paragraphs 15 and 16 on page 9).

10 The Act contains two general offences covering the offering, promising or giving of a bribe (active bribery) and the requesting, agreeing to receive or accepting of a bribe (passive bribery) at sections 1 and 2 respectively. It also sets out two further offences which specifically address commercial bribery. Section 6 of the Act creates an offence relating to bribery of a foreign public official in order to obtain or retain business or an advantage in the conduct of business[2], and section 7 creates a new form of corporate liability for failing to prevent bribery on behalf of a commercial organisation. More detail about the sections 1, 6 and 7 offences is provided under the separate headings below.

11 The objective of the Act is not to bring the full force of the criminal law to bear upon well run commercial organisations that experience an isolated incident of bribery on their behalf. So in order to achieve an appropriate balance, section 7 provides a full defence. This is in recognition of the fact that no bribery prevention regime will be capable of preventing bribery at all times. However, the defence is also included in order to encourage commercial organisations to put procedures in place to prevent bribery by persons associated with them.

12 The application of bribery prevention procedures by commercial organisations is of significant interest to those investigating bribery and is relevant if an organisation wishes to report an incident of bribery to the prosecution authorities – for example to the Serious Fraud Office (SFO) which operates a policy in England and Wales and Northern Ireland of co-operation with commercial organisations that self-refer incidents of bribery (see 'Approach of the SFO to dealing with overseas corruption' on the SFO website). The commercial organisation's willingness to co-operate with an investigation under the Bribery Act and to make a full disclosure will also be taken into account in any decision as to whether it is appropriate to commence criminal proceedings.

2 Conduct amounting to bribery of a foreign public official could also be charged under section 1 of the Act. It will be for prosecutors to select the most appropriate charge.

13 In order to be liable under section 7 a commercial organisation must have failed to prevent conduct that would amount to the commission of an offence under sections 1 or 6, but it is irrelevant whether a person has been convicted of such an offence. Where the prosecution cannot prove beyond reasonable doubt that a sections 1 or 6 offence has been committed the section 7 offence will not be triggered.

14 The section 7 offence is in addition to, and does not displace, liability which might arise under sections 1 or 6 of the Act where the commercial organisation itself commits an offence by virtue of the common law 'identification' principle.[3]

Jurisdiction

15 Section 12 of the Act provides that the courts will have jurisdiction over the sections 1, 2[4] or 6 offences committed in the UK, but they will also have jurisdiction over offences committed outside the UK where the person committing them has a close connection with the UK by virtue of being a British national or ordinarily resident in the UK, a body incorporated in the UK or a Scottish partnership.

16 However, as regards section 7, the requirement of a close connection with the UK does not apply. Section 7(3) makes clear that a commercial organisation can be liable for conduct amounting to a section 1 or 6 offence on the part of a person who is neither a UK national or resident in the UK, nor a body incorporated or formed in the UK. In addition, section 12(5) provides that it does not matter whether the acts or omissions which form part of the section 7 offence take part in the UK or elsewhere. So, provided the organisation is incorporated or formed in the UK, or that the organisation carries on a business or part of a business in the UK (wherever in the world it may be incorporated or formed) then UK courts will have jurisdiction (see more on this at paragraphs 34 to 36).

3 See section 5 and Schedule 1 to the Interpretation Act 1978 which provides that the word 'person' where used in an Act includes bodies corporate and unincorporate. Note also the common law 'identification principle' as defined by cases such as Tesco Supermarkets v Nattrass [1972] AC 153 which provides that corporate liability arises only where the offence is committed by a natural person who is the directing mind or will of the organisation.

4 Although this particular offence is not relevant for the purposes of section 7.

The six principles

The Government considers that procedures put in place by commercial organisations wishing to prevent bribery being committed on their behalf should be informed by six principles. These are set out below. Commentary and guidance on what procedures the application of the principles may produce accompanies each principle.

These principles are not prescriptive. They are intended to be flexible and outcome focussed, allowing for the huge variety of circumstances that commercial organisations find themselves in. Small organisations will, for example, face different challenges to those faced by large multi-national enterprises. Accordingly, the detail of how organisations might apply these principles, taken as a whole, will vary, but the outcome should always be robust and effective anti-bribery procedures.

As set out in more detail below, bribery prevention procedures should be proportionate to risk. Although commercial organisations with entirely domestic operations may require bribery prevention procedures, we believe that as a general proposition they will face lower risks of bribery on their behalf by associated persons than the risks that operate in foreign markets. In any event procedures put in place to mitigate domestic bribery risks are likely to be similar if not the same as those designed to mitigate those associated with foreign markets.

A series of case studies based on hypothetical scenarios is provided at Appendix A. These are designed to illustrate the application of the principles for small, medium and large organisations.

Bribery Act 2010: Joint Prosecution Guidance of The Director of the Serious Fraud Office and The Director of Public Prosecutions

Reviewed September 2019 | *Legal Guidance*

The Code for Crown Prosecutors

The Code for Crown Prosecutors is a public document, issued by the Director of Public Prosecutions that sets out the general principles Crown Prosecutors should follow when they make decisions on cases.

Continue reading

Prosecution guidance

This guidance assists our prosecutors when they are making decisions about cases.

the organisation carries out its business or part of its business in the UK, courts in the UK will have jurisdiction, irrespective of where in the world the acts or omissions which form part of the offence may be committed.

The offence is not a substantive bribery offence. It does not involve vicarious liability and it does not replace or remove direct corporate liability for bribery. If it can be proved that someone representing the corporate 'directing mind' bribes or receives a bribe or encourages or assists someone else to do so then it may be appropriate to charge the organisation with a section 1 or 6 offence in the alternative or in addition to any offence under section 7 (or a section 2 offence if the offence relates to being bribed).

The defence of adequate procedures

It is a defence if a relevant commercial organisation can show it had adequate procedures in place to prevent persons associated with it from bribing. The standard of proof the defendant would need to discharge in order to prove the defence is on the balance of probabilities. Whether the procedures are adequate will ultimately be a matter for the courts to decide on a case by case basis.

As stated in the Code (4.6) prosecutors must consider what the defence case may be, and how it is likely to affect the prospects of conviction, under the evidential stage. Clearly, the defence under s7(2) of adequate procedures is likely to be highly relevant when considering whether there is sufficient evidence to provide a realistic prospect of conviction.

Prosecutors must look carefully at all the circumstances in which the alleged bribe occurred including the adequacy of any anti-bribery procedures. A single instance of bribery does not necessarily mean that an organisation's procedures are inadequate. For example, the actions of an agent or an employee may be wilfully contrary to very robust corporate contractual requirements, instructions or guidance.

Section 9 Guidance

Section 9 of the Act requires the Secretary of State to publish guidance on procedures that relevant commercial organisations can put in place to prevent bribery by persons associated with them. "*Guidance about commercial organisations preventing bribery (section 9 of the Bribery Act 2010)*" has been published by the Ministry of Justice. Prosecutors must take it into account when considering whether the procedures put in place by commercial organisations are adequate to prevent persons performing services for or on their behalf from bribing.

Criminal Finances Act 2017

2017 CHAPTER 22

An Act to amend the Proceeds of Crime Act 2002; make provision in connection with terrorist property; create corporate offences for cases where a person associated with a body corporate or partnership facilitates the commission by another person of a tax evasion offence; and for connected purposes.

[27th April 2017]

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Extent

Preamble: United Kingdom

PART 1

PROCEEDS OF CRIME

CHAPTER 1

INVESTIGATIONS

Unexplained wealth orders: England and Wales and Northern Ireland

Failure of relevant bodies to prevent tax evasion facilitation offences by associated persons

Law In Force

45 Failure to prevent facilitation of UK tax evasion offences

(1) A relevant body (B) is guilty of an offence if a person commits a UK tax evasion facilitation offence when acting in the capacity of a person associated with B.

(2) It is a defence for B to prove that, when the UK tax evasion facilitation offence was committed—

(a) B had in place such prevention procedures as it was reasonable in all the circumstances to expect B to have in place, or

(b) it was not reasonable in all the circumstances to expect B to have any prevention procedures in place.

(3) In subsection (2) "prevention procedures" means procedures designed to prevent persons acting in the capacity of a person associated with B from committing UK tax evasion facilitation offences.

(4) In this Part "UK tax evasion offence" means—

(a) an offence of cheating the public revenue, or

(b) an offence under the law of any part of the United Kingdom consisting of being knowingly concerned in, or in taking steps with a view to, the fraudulent evasion of a tax.

(5) In this Part "UK tax evasion facilitation offence" means an offence under the law of any part of the United Kingdom consisting of—

(a) being knowingly concerned in, or in taking steps with a view to, the fraudulent evasion of a tax by another person,

(b) aiding, abetting, counselling or procuring the commission of a UK tax evasion offence, or

(c) being involved art and part in the commission of an offence consisting of being knowingly concerned in, or in taking steps with a view to, the fraudulent evasion of a tax.

(6) Conduct carried out with a view to the fraudulent evasion of tax by another person is not to be regarded as a UK tax evasion facilitation offence by virtue of subsection (5)(a) unless the other person has committed a UK tax evasion offence facilitated by that conduct.

(7) For the purposes of this section "tax" means a tax imposed under the law of any part of the United Kingdom, including national insurance contributions under—

(a) Part 1 of the Social Security Contributions and Benefits Act 1992, or

(b) Part 1 of the Social Security Contributions and Benefits (Northern Ireland) Act 1992.

(8) A relevant body guilty of an offence under this section is liable—

(a) on conviction on indictment, to a fine;

(b) on summary conviction in England and Wales, to a fine;

(c) on summary conviction in Scotland or Northern Ireland, to a fine not exceeding the statutory maximum.

Commencement

Pt 3 s. 45(1)-(8)(c): April 27, 2017 for the limited purpose of enabling the exercise of any power to make provision by subordinate legislation; September 30, 2017 otherwise (SI 2017/739 reg. 3; 2017 c. 22 Pt 4 s. 58(5), Pt 4 s. 58(6)(d))

Extent

Pt 3 s. 45-(8)(c): United Kingdom

Law In Force

46 Failure to prevent facilitation of foreign tax evasion offences

(1) A relevant body (B) is guilty of an offence if at any time—

(a) a person commits a foreign tax evasion facilitation offence when acting in the capacity of a person associated with B, and

(b) any of the conditions in subsection (2) is satisfied.

(2) The conditions are—

(a) that B is a body incorporated, or a partnership formed, under the law of any part of the United Kingdom;

(b) that B carries on business or part of a business in the United Kingdom;

(c) that any conduct constituting part of the foreign tax evasion facilitation offence takes place in the United Kingdom;

and in paragraph (b) "business" includes an undertaking.

(3) It is a defence for B to prove that, when the foreign tax evasion facilitation offence was committed—

(a) B had in place such prevention procedures as it was reasonable in all the circumstances to expect B to have in place, or

(b) it was not reasonable in all the circumstances to expect B to have any prevention procedures in place.

(4) In subsection (3) "prevention procedures" means procedures designed to prevent persons acting in the capacity of a person associated with B from committing foreign tax evasion facilitation offences under the law of the foreign country concerned.

(5) In this Part "foreign tax evasion offence" means conduct which—

(a) amounts to an offence under the law of a foreign country,

(b) relates to a breach of a duty relating to a tax imposed under the law of that country, and

(c) would be regarded by the courts of any part of the United Kingdom as amounting to being knowingly concerned in, or in taking steps with a view to, the fraudulent evasion of that tax.

(6) In this Part "foreign tax evasion facilitation offence" means conduct which—

(a) amounts to an offence under the law of a foreign country,

(b) relates to the commission by another person of a foreign tax evasion offence under that law, and

(c) would, if the foreign tax evasion offence were a UK tax evasion offence, amount to a UK tax evasion facilitation offence (see section 45(5) and (6)).

(7) A relevant body guilty of an offence under this section is liable—

(a) on conviction on indictment, to a fine;

(b) on summary conviction in England and Wales, to a fine;

(c) on summary conviction in Scotland or Northern Ireland, to a fine not exceeding the statutory maximum.

Commencement

Pt 3 s. 46(1)-(7)(c): April 27, 2017 for the limited purpose of enabling the exercise of any power to make provision by subordinate legislation; September 30, 2017 otherwise (SI 2017/739 reg. 3; 2017 c. 22 Pt 4 s. 58(5), Pt 4 s. 58(6)(d))

Extent

Pt 3 s. 46-(7)(c): United Kingdom

Guidance about prevention procedures

Law In Force

47 Guidance about preventing facilitation of tax evasion offences

(1) The Chancellor of the Exchequer ("the Chancellor") must prepare and publish guidance about procedures that relevant bodies can put in place to prevent persons acting in the capacity of an associated person from committing UK tax evasion facilitation offences or foreign tax evasion facilitation offences.

(2) The Chancellor may from time to time prepare and publish new or revised guidance to add to or replace existing guidance published by the Chancellor under this section.

(3) The Chancellor must consult the Scottish Ministers, the Welsh Ministers and the Department of Justice in Northern Ireland when preparing any guidance to be published under this section.

(4) Guidance prepared and published under this section does not come into operation except in accordance with regulations made by the Chancellor by statutory instrument.

(5) A statutory instrument containing such regulations is subject to annulment in pursuance of a resolution of either House of Parliament.

(6) Where for the purposes of subsection (5) a copy of a statutory instrument containing such regulations is laid before Parliament the Chancellor must also lay a copy of the guidance to which the regulations relate.

(7) The Chancellor may approve guidance prepared by any other person if it relates to any matters within the scope of subsection (1).

(8) Approval under subsection (7)—

(a) must be given in writing, and

(b) may only be given on the condition that the person who prepared it publishes the approved guidance while it remains in operation as approved guidance.