The Bribery Act 2010: time to stand firm

The Bribery Act 2010 is due to come into force in April of this year. With it, the United Kingdom will have taken an important lead in the fight against corruption with a short, easily comprehensible Act, designed to punish those who engage in bribery, whether at home or abroad. It is therefore particularly unfortunate that a major London newspaper, the Evening Standard, should have chosen to engage in a concerted campaign to persuade Justice Secretary Kenneth Clarke that the Act should be repealed before it even comes into force. The campaign can be summarized as follows: “Yes, corruption is terrible – we know. But the Bribery Act goes too far. And moreover, particularly in a recession, we just can’t afford it.”

The first of these arguments is a massive understatement; the others are simply flawed. Corruption is not merely a regrettable evil; it kills. Children die when they are given unsafe medication, approved by a corrupt health official. Those living near an industrial complex die from a range of illnesses when those responsible for enforcing environmental protection laws are bought off. Yet others die from a lack of clean water and medical care because the oil revenues that could fund both have been diverted elsewhere. It is ironic that a newspaper which, rightly, devoted much of 2010 to raising awareness of the realities of poverty in London should have begun 2011 by seeking to undermine measures to bring about social justice elsewhere. The United Kingdom has stepped up to the plate to play its part to eradicate the severe harm that corruption causes; its leaders must not shrink back now.

Nor does the Act go too far. It has been argued that its provisions will prevent UK plc from offering the kind of corporate hospitality that is an established, harmless means of maintaining good relationships with clients. Businesses will, it is true, sometimes be compelled to take an honest look at the kind of hospitality that they provide and the motivations behind it. The definition of bribery under the Act is, however, clear: offering, promising or giving an advantage, financial or otherwise, to a person, either with the intention of inducing them to perform their duties in an improper manner or to reward them for already doing so. A corporate entertainment box at a football match or a Grand Prix race, to which representatives of several major clients are invited, is unlikely to induce them to perform their duties in an improper manner. In contrast, a weekend at an exclusive resort for one particular representative and their spouse is likely to have a rather more sinister motive. That experienced corporate executives are unable to tell the difference is simply implausible; it is therefore not surprising that the Director of the Serious Fraud Office (the agency to date responsible for enforcing the UK’s anti-corruption laws) confirmed in December 2010 that “sensible and proportionate hospitality will remain perfectly lawful under the Bribery Act when it comes into force”.

Nor can it rightly be claimed that the anti-corruption measures are a price that British business cannot afford. When the UK’s existing anti-corruption provisions were first extended, in 2002, to payments made abroad, British business survived. It will similarly survive the measures under the 2010 Act. As for the criminalization of so-called “facilitation payments”, only five
jurisdictions (albeit including the United States) permit these. No Member State of the European Union does so. Even in the United States, they are subject to considerable scrutiny, far from the carte blanche that some have suggested. Further, all jurisdictions outlaw the receipt of such payments, indicating a strong international consensus.

In fact, corruption carries significant costs, both direct and indirect, to corporations operating in areas affected by it. The World Bank’s estimate, often cited, is that it increases the cost of business transactions by 10%. This is equivalent to an additional tax of 10% - at a time when businesses loudly demand low levels of taxation, precisely in order to help them recover from the recession. To that 10% may be added such further costs as increased security to protect the corporation’s employees (as well as kidnap insurance for the expatriates): a consequence of the unrest that may arise when the local population are marginalized as corrupt practices divert the economic benefits of industry while permitting its degradation of their environment. The Niger Delta is a case in point. In the longer term, as history has already shown, hostility towards developed jurisdictions seen as having colluded in corruption may also have other consequences.

It is the failure to take a firm and principled stand against corruption, not the reverse, that we cannot afford. To quote Clarke’s former boss, Margaret Thatcher, this is no time to go wobbly.

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