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BRIBERY REFORM IN THE UK: ADDITIONAL POINTS AND REFERENCES

1. Although the Law Commission's implementation record is about 65-70% overall (reports enacted in whole or in part), its record in criminal law is higher: perhaps 80-90%.
2. The 'adequate systems' defence: some pointers:
 - (a) The OECD has placed emphasis not just on the nature of payments, contracts or other arrangements, but also on the adequacy of hiring policy, alongside education of employees/agents, and supervision of the same. Helpfully, the Chair of the OECD prefers to use the Latin, speaking of 'culpa in eligendo, instruendo et custodiendo'. Clearly, there may be difficulties in doing background and other checks if, for example, overseas agents must be hired at short notice.
 - (b) The 'adequate systems' defence could also prove problematic in joint venture cases, perhaps particularly if the partner's trading status is dependent on (un)official approval from the very Government officials who award the contracts sought. At the very least, the (compliant) terms on which the UK company does business must be made perfectly clear to the joint venture partner.
3. The scenario: the legal possibilities:
 - (a) **The Ukrainian subsidiary and/or its Senior Executive is charged with corruption under Ukrainian law.**

- (b) **The UK company is charged under clause 7.** First, this will involve having to show that the bribe was paid on behalf of the UK firm, not on behalf its subsidiary. Before breathing a sigh of relief, remember that these cases will be before a jury. If the judge finds there is evidence on which the jury could find that the payment was made on behalf of the UK company, the judge will turn the issue over to the jury. The jury may, in a 'bad' case, not be too concerned with the niceties of company law, even when explained by best QCs money can buy! However, secondly, the prosecution will have to show that there was a negligent failure to prevent the bribery by someone whose responsibility it was to prevent it. 'Adequate systems' issues, along with the whistleblower's evidence, are likely to be important here. Finally, of course, as discussed above, the UK company may seek to prove adequate system. However, if it loses on the negligence issue, it is likely to have a weak case for adequate system. It must be kept in mind that the cost of an investigation is likely to mean that the authorities will not proceed under clause 7 in respect solely of so-called grease or facilitation payments. The cost is likely to be regarded as disproportionate to the benefit.
- (c) **The US takes jurisdiction under FCPA.** In such a case, of course, there would be a defence that a payment was only a facilitation payment. The issue is whether, given that the UK company only has an office in the US, the US would take jurisdiction.

4. References:

- (a) Law Commission No. 313 (**Reforming Bribery**, 2008).
- (b) Robert Baldwin, 'The New Punitive Regulation' (2004) Modern LR 349.
- (c) www.riskadvisory.net (January 2009).
- (d) www.conservatives.com/News/Speeches/2008/12/

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