



PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN THE UNITED KINGDOM

March 2012

This Phase 3 Report on the United Kingdom by the OECD Working Group on Bribery evaluates and makes recommendations on the United Kingdom's implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions. It was adopted by the Working Group on 16 March 2012.

This document and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.

TABLE OF CONTENTS

EXECUTIVE SUMMARY	6
A. INTRODUCTION	7
1. The On-site Visit	7
2. Outline of the Report.....	7
3. Economic Background	7
4. Cases Involving the Bribery of Foreign Public Officials	8
B. IMPLEMENTATION AND APPLICATION BY THE UNITED KINGDOM OF THE CONVENTION AND THE 2009 RECOMMENDATIONS	9
1. Foreign Bribery Offence	9
a) Guidance to Commercial Organisations	9
b) Facilitation Payments	10
c) Hospitality and Promotional Expenditure	12
d) Element of Illegality under Written Law	14
2. Responsibility of Legal Persons	14
a) Liability of Legal Persons for Foreign Bribery under the Identification Theory	15
b) Liability of Legal Persons for Failure to Prevent Bribery	15
(i) Non-partnership Unincorporated Bodies	16
(ii) “Carrying on a Business or Part of a Business”	16
(iii) “Associated Persons”	17
3. Sanctions for Foreign Bribery and Related Offences	18
a) Criminal Sanctions	18
(i) Applicable Statutes and Guidelines	18
(ii) Sentence Reductions for Early Guilty Pleas	19
(iii) Plea Negotiations and Agreements	19
(iv) Transparency	21
b) Civil Sanctions	22
(i) Legal Basis of Civil Recovery Orders and Their Use in Foreign Bribery Cases	22
(ii) Lack of Transparency	22
c) Administrative Sanctions	25
d) Additional Remedies	25
(i) Corporate Monitors	25
(ii) Reparations and Compensation to Foreign Countries	26
4. Confiscation of the Bribe and the Proceeds of Bribery	27
5. Investigation and Prosecution of the Foreign Bribery Offence	27
a) Case Attribution and Assignment	27
(i) Attribution and Assignment of Cases to Criminal Law Enforcement Agencies	27
(ii) Cases Investigated by the Financial Services Authority	29
b) Commencement of Prosecutions	30

c)	Choice of Charges	30
(i)	General Considerations	31
(ii)	Double Jeopardy	31
(iii)	Self-Reporting by Companies	32
(iv)	Seeking Civil Recovery Orders when Criminal Sanctions Are Available	33
(v)	Proceedings against Related Natural and Legal Persons	34
d)	SFO Advice to Specific Companies.....	34
(i)	SFO Advice Concerning Specific Transactions.....	34
(ii)	SFO Opinions on Corporate Procedures to Prevent Bribery	35
e)	Article 5 of the Anti-Bribery Convention	36
(i)	Legal Status of Article 5 in UK Domestic Law	37
(ii)	Application of Article 5 to Relevant Actors and Stages of Foreign Bribery Investigations	37
(iii)	Article 5 and Shawcross Exercises	38
f)	BAE Al Yamamah and BAE Tanzania	39
g)	Resources and Priority	40
h)	National Crime Agency	41
i)	Obtaining Information from the National Audit Office	42
j)	Disclosure	42
6.	Money Laundering	42
7.	Accounting Requirements, External Audit, and Corporate Compliance and Ethics Programmes.....	43
a)	Accounting Standards	43
b)	External Auditors' Duty to Detect Foreign Bribery.....	44
c)	External Auditors' Duty to Report Foreign Bribery	44
d)	Corporate Compliance and Ethics Programmes	45
8.	Tax Measures for Combating Bribery.....	46
a)	Tax Deductibility of Bribes and Enforcement	46
b)	Detection of Bribery.....	47
c)	Sharing of Tax Information.....	47
9.	International Co-operation	48
a)	Extradition.....	48
b)	Mutual Legal Assistance Generally	49
c)	Ability to Provide MLA after Termination or Settlement.....	49
d)	Crown Dependencies and Overseas Territories	50
(i)	Application of the Convention to Crown Dependencies and Overseas Territories	50
(ii)	Jurisdiction to Prosecute Legal Persons Incorporated in the CDs and OTs.....	51
(iii)	Seeking MLA from Crown Dependencies and Overseas Territories.....	52
10.	Public Awareness and the Reporting of Foreign Bribery.....	52
a)	Efforts to Raise Awareness of Foreign Bribery	52
b)	Reporting of Foreign Bribery	54
c)	Whistleblowing and Whistleblower Protection	54
11.	Public Advantages.....	56
a)	Official Development Assistance.....	56
b)	Public Procurement	57
c)	Officially Supported Export Credits	58
C.	RECOMMENDATIONS AND ISSUES FOR FOLLOW-UP	60
1.	Recommendations of the Working Group.....	60
2.	Follow-up by the Working Group	64
	ANNEX 1 PREVIOUS WORKING GROUP RECOMMENDATIONS TO THE UNITED KINGDOM AND WORKING GROUP ASSESSMENT OF THEIR IMPLEMENTATION.....	65

ANNEX 2	PARTICIPANTS AT THE ON-SITE VISIT.....	70
ANNEX 3	LIST OF ABBREVIATIONS AND ACRONYMS.....	72
ANNEX 4	SUMMARY OF UK FOREIGN BRIBERY ENFORCEMENT ACTIONS.....	73
ANNEX 5	EXCERPTS OF LEGISLATION	76

EXECUTIVE SUMMARY

The Phase 3 report on the UK by the OECD Working Group on Bribery evaluates and makes recommendations on the UK's implementation and enforcement of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and related instruments. The report considers country-specific (vertical) issues arising from changes in the UK's legislative and institutional framework, as well as progress made since the UK's 2005 Phase 2 evaluation, 2008 Phase 2bis evaluation, and 2010 Phase 1ter evaluation. The report also focuses on key Group-wide (horizontal) issues, particularly enforcement.

The Working Group commends the UK for the significant increase in foreign bribery enforcement actions since Phases 2 and 2bis. The UK is encouraged to continue providing adequate resources and support to the SFO and other relevant law enforcement agencies so that they may continue improving their record of enforcement. The Working Group also commends the UK for publishing the Guidance to Commercial Organisations which led to the entry into force of the Bribery Act after the Phase 1ter evaluation. However, the Working Group is concerned that, to settle foreign bribery-related cases, UK authorities are increasingly relying on civil recovery orders which require less judicial oversight and are less transparent than criminal plea agreements. The low level of information on settlements made publicly available by UK authorities often does not permit a proper assessment of whether the sanctions imposed are effective, proportionate and dissuasive. This also misses an opportunity for the UK to provide guidance and raise public awareness on foreign bribery-related issues. It is equally concerning that the SFO has in some cases entered into confidentiality agreements with defendants that prevent the disclosure of key information after cases are settled.

The report identifies some additional concerns. Progress in extending the Convention to the UK's Overseas Territories has been slow. Some of these territories are considered offshore financial centres which may be used to facilitate corrupt transactions. The Working Group thus recommends that the UK promptly adopt a roadmap for remedying this deficiency. The Guidance to Commercial Organisations has helped increase awareness of foreign bribery issues, but the significance of "reasonable and proportionate" hospitality and promotional expenditures, including the reference to industry norms, needs to be clarified. UK policy should ensure that companies effectively move towards "zero tolerance" of facilitation payments. The SFO's process of giving advice to companies and accepting self-reports of wrongdoing also needs to be more transparent and better defined. The UK should continue to provide mutual legal assistance to other countries after settlements, where appropriate.

The report also notes several positive developments. The UK government, including through its overseas missions, has made substantial efforts to raise awareness of the Bribery Act and the foreign bribery offence. Coupled with the publicity surrounding the enactment of the Bribery Act, this has led to heightened awareness of foreign bribery-related issues in the UK. The Working Group also notes the UK's approach of requiring companies to compensate the country of a bribed official, although further refinements are recommended.

The report and its recommendations reflect findings of experts from France and South Africa and were adopted by the OECD Working Group on 16 March 2012. It is based on legislation and other materials provided by the UK and research conducted by the evaluation team. The report is also based on information obtained by the evaluation team during its three-day on-site visit to London on 18-20 October 2011, during which the team met representatives of the UK's public sector, judiciary, private sector and civil society. Within one year of the Working Group's approval of this report, the UK will make an oral follow-up report on its implementation of certain recommendations. It will further submit a written report on the implementation of all recommendations within two years.

A. INTRODUCTION

1. The On-site Visit

1. On 18-20 October 2011, a team from the OECD Working Group on Bribery in International Business Transactions (Working Group) visited London as part of the Phase 3 evaluation of the UK's implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Convention), the 2009 Recommendation for Further Combating the Bribery of Foreign Public Officials in International Business Transactions (2009 Anti-Bribery Recommendation) and the 2009 Recommendation of the Council on Tax Measures for Further Combating the Bribery of Foreign Public Officials in International Business Transactions (2009 Tax Recommendation). The evaluation is based on UK responses to a questionnaire, information gathered at the on-site visit and additional research.

2. The evaluation team was composed of lead examiners from France and South Africa as well as members of the OECD Secretariat.¹ Prior to the visit, the UK responded to the Phase 3 Questionnaire and supplementary questions, and provided relevant legislation and documents. The lead examiners also referred to the 2007 Mutual Evaluation Report by the Financial Action Task Force (FATF MER) and other public information. The on-site visit was well-attended. The lead examiners met representatives of the UK public and private sectors, legislature, civil society, and a selection of judges from the Court of Appeal, High Court, and Crown Court at Southwark with experience in hearing foreign bribery cases.² Media representatives were invited but did not attend. The lead examiners are grateful to the participants for their openness during the discussions and to the UK for its co-operation throughout the evaluation.

2. Outline of the Report

3. This report is structured as follows. Part B examines the UK's efforts to implement and enforce the Convention and the 2009 Recommendations, having regard to Group-wide and country-specific issues. Particular attention is paid to enforcement efforts and results, and weaknesses identified in previous evaluations. Part C sets out the Working Group's recommendations and issues for follow-up.

3. Economic Background

4. The UK is one of the most important international economic players in the Working Group. It has the 5th largest economy among the 39 Working Group members. London is one of the world's pre-eminent financial centres and a major capital market for companies in the UK and worldwide. UK multinational

1 France was represented by: Mr. Fabrice Wenger, Deputy Head of International Financial System and Summits Preparation Division, Ministry of Economy, Finance and Industry; Ms. Solène Dubois, Vice-Prosecutor of the Republic assigned to the Prosecutor General at the Court of Appeal in Paris; and Mr. Maurice de Thévenard, President of the Tribunal of First Instance in Bergerac. South Africa was represented by Ms. Vanessa Phala, Acting Chief Director, Department of Public Service and Administration; Mr. Gerhard Nel, Deputy Director of Public Prosecutions, National Prosecuting Authority; and Mr. Dumazi Marivate, Principal State Law Advisor, International Legal Relations, Department of Justice and Constitutional Development. The OECD Secretariat was represented by: Mr. Nicola Bonucci, Legal Directorate; and Mr. William Loo, Ms. Melissa Khemani and Mr. Chiawen Kiew, Anti-Corruption Division, Directorate for Financial and Enterprise Affairs.

2 See Annex 2 for a list of participants.

enterprises are global leaders in many sectors including financial services, defence, extractive industries, telecommunications, pharmaceuticals, and engineering. In terms of trade, the UK ranks 5th and 6th in the Working Group in imports and exports (goods and services) respectively.³ In 2010, the European Union and the US were the main trading partners in goods, accounting for over 60% of total imports and exports. Asia and Oceania accounted for 20% and 13% of total imports and exports respectively.⁴

5. UK companies have also invested heavily overseas. As of 2010, the UK had the second highest stock of outward foreign direct investment (FDI) among the 39 Working Group members. The bulk of outward FDI is in developed countries (82.3%). Nevertheless, the amount of FDI in developing countries, many of which have high levels of corruption, is very substantial in absolute terms.⁵ Small- and medium-sized enterprises (SMEs) play a significant role in the UK's economy, accounting for over 99% of enterprises, 59.1% of private sector employment, and more than half of GDP.⁶ Roughly 25-30% of all SMEs are exporters.⁷ Europe and North America are the main markets, but exports to Asia and Latin America are growing.⁸

4. Cases Involving the Bribery of Foreign Public Officials

6. The UK has stepped up its enforcement of foreign bribery laws in recent years. The Serious Fraud Office (SFO) is the main law enforcement agency responsible for foreign bribery cases. The SFO stated that it had 11 active bribery / corruption cases and a further 18 cases under consideration as of 31 January 2012. Since 2008, three individuals (*Tobiasen*, *Dougall* and *Messent*) and two companies (*Mabey & Johnson* and *Innospec*) have been convicted of foreign bribery. Two financial institutions (*Aon* and *Willis*) have been fined by their regulator for failure to adopt adequate corporate compliance measures to prevent bribery. Foreign bribery investigations have led to sanctions against one company (*BAE Tanzania*) for accounting-related misconduct, and to civil recovery orders under proceeds of crime legislation against four companies (*Balfour Beatty*, *DePuy International Ltd.*, *M.W. Kellogg* and *Macmillan*). The penalties in all of these cases were imposed following guilty pleas and/or settlement agreements between the defendant and the UK authorities. Annex 4 to this report contains a summary of the enforcement actions that have resulted in sanctions. As explained below, the full facts of several of these cases are not available. Consequently, it is unclear whether the sanctions imposed in these cases were effective, proportionate and dissuasive as required by the Convention. The UK questionnaire responses also provided information on several investigations that did not result in charges.

Commentary

The lead examiners commend the UK for publishing the Guidance to Commercial Organisations which led to the entry into force of the Bribery Act after the Phase Iter evaluation. They also commend the UK for its recent significant increase in foreign bribery enforcement actions, and urge the UK to sustain these efforts. However, the lead examiners are concerned over certain aspects of the UK's foreign bribery enforcement framework.

3 2010 statistics on GDP and trade (source: International Monetary Fund and World Trade Organisation).

4 Source: UK Trade Information (www.uktradeinfo.com).

5 Source: OECD.stat and UNCTADstat.

6 Department of Business Innovation and Skills (24 May 2011), *Statistical Release: Business Population Estimates for the UK and Regions 2010*; BBC News (23 July 2009), "Small Firms Want to Help Drive GDP".

7 Source: on-site visit participants; and UK Department of Business Innovation and Skills (March 2010), *Internationalisation of Innovative and High Growth SMEs*, p. 7

8 UK Trade and Industry, "From Surviving to Thriving: Doing Business Overseas", p. 4.

B. IMPLEMENTATION AND APPLICATION BY THE UNITED KINGDOM OF THE CONVENTION AND THE 2009 RECOMMENDATIONS

7. The Working Group has evaluated the UK on five occasions. In the 1999 Phase 1 evaluation, the Group expressed “serious concerns” over the UK’s foreign bribery legislation. Amendments to the law in 2001 led the Group to conduct a Phase 1bis evaluation in 2002. In the 2005 Phase 2 evaluation, the Working Group made further recommendations on the UK’s foreign bribery offence, corporate liability, and the investigation and prosecution of foreign bribery. In accordance with established procedures, the UK provided a Written Follow-up Report in 2007 on the implementation of these Recommendations. In December 2006, the UK discontinued a major foreign bribery investigation concerning the Al Yamamah arms sales contract involving BAE Systems and the government of Saudi Arabia. Consequently, the Working Group conducted a 2008 Phase 2bis evaluation focusing on certain issues raised in the earlier evaluations and matters arising from the Al Yamamah discontinuance. In December 2010, the UK provided a Written Follow-up Report on the implementation of the Phase 2bis Recommendations. The Working Group also simultaneously conducted a Phase 1ter evaluation of the UK’s Bribery Act 2010, which had been enacted in April 2010.

8. This part of the report considers the UK’s approach to key horizontal issues identified by the Working Group for all Phase 3 evaluations. Consideration is also given to country-specific issues arising from the UK’s progress on implementing outstanding Working Group recommendations from previous evaluations, and from changes to the UK’s domestic legislative or institutional framework. This report is also the Working Group’s first opportunity to consider UK guidance on the Bribery Act issued in 2011, namely, the Guidance to Commercial Organisations (GCO) and Joint Prosecution Guidance (JPG) issued by the CPS and SFO. Discussions during this evaluation revealed some divergent interpretations of certain aspects of the GCO among the UK government, other on-site visit participants, and the lead examiners.

1. Foreign Bribery Offence

9. The Bribery Act 2010 was passed by the UK Parliament and received Royal Assent on 8 April 2010. The Bribery Act replaced the previous patchwork of bribery offences with a specific offence of bribery of foreign public officials (Section 6) and general bribery offences that cover bribery of domestic and foreign bribery (Sections 1 and 2). The Bribery Act also established a new offence of failure of commercial organisations to prevent bribery (Section 7). The Working Group’s UK Phase 1ter Report (para. 80) found that the Bribery Act broadly met the requirements of the Convention but that certain issues would be followed up in later evaluations.

a) Guidance to Commercial Organisations

10. Though enacted in April 2010, the Bribery Act only entered into force on 1 July 2011 pending the issuance of Guidance to Commercial Organisations (GCO). Section 9 of the Act required the Government to publish guidance about procedures that relevant commercial organisations can put in place to prevent persons associated with them from committing bribery. The government began a public consultation on the guidance in September 2010. Members of the private sector, legal profession, civil society and business organisations participated in the consultation process. After the consultation closed in November 2010, press reports suggested the issuance of the guidance was delayed due to the business sector’s concerns that the Act may hamper UK businesses,⁹ although the UK contests the accuracy of these reports. At the on-site visit, some civil society organisations stated that they were increasingly marginalised during this stage of the process. On 30 March 2011, the Ministry of Justice (MOJ) published

9 The Telegraph (14 January 2011), “Bribery Act to Be Reviewed after Business Fears”.

the GCO and a companion Quick Start Guide. The Serious Fraud Office (SFO) and the Director of Public Prosecutions (DPP) simultaneously issued a JPG on the Bribery Act.

11. The GCO comprises three sections. The first section contains an explanation of the Bribery Act's offences on issues such as facilitation payments, hospitality, promotional and business expenditure, jurisdiction, and liability of legal persons. The second part introduces six principles that inform procedures put in place by commercial organisations to prevent bribery. The last section contains 11 case studies illustrating the application of the six principles.

12. Participants at the on-site visit expressed a myriad of views on the GCO. Representatives from the MOJ, Crown Prosecution Service, and SFO explained that the GCO is not intended to be prescriptive and must be applied proportionately with due regard to, for example, a company's size, market, management structure, and risk profile. Prosecutors could consider whether an individual or corporate body had followed the guidance in the GCO when deciding if it is in the public interest to prosecute or not to prosecute. Representatives from the private sector and civil society largely agreed that the GCO could be helpful in developing anti-corruption compliance programmes and that the GCO does not provide a "safe harbour" under the Bribery Act. After the on-site visit, the MOJ explained at length that the purpose of the GCO is to encourage companies to prevent bribery, despite the concerns about the GCO described below. Additional comments on the GCO's impact on the development of corporate anti-corruption measures, awareness-raising and the interpretation of the Bribery Act are discussed later in this report.

13. The GCO does not have the force of law and is not binding on prosecutors or courts. The GCO states that "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" (para. 4). At the on-site visit, private sector representatives acknowledged that the GCO is not legally binding. UK officials stated that a company could be convicted under the Act even if it acts in accordance with the GCO. They added that an officially induced mistake of law is not a defence to a criminal offence in the UK. It remains to be seen what use the courts would make of the GCO. Judges consulted at the on-site visit stated that they believed the courts would make limited use of the GCO when interpreting the Act. In their view, the GCO was not issued by Parliament and is of comparable authority to an academic text. One judge stated that government statements about legislation are "normally not of great relevance". Another judge stated that the GCO was helpful but did not specify to whom. All of the judges agreed that each case that comes before the court must be judged on its own facts.

14. Even so, the GCO is a factor that prosecutors would consider in charging decisions. The Joint Prosecution Guidance (pp. 11-12) provides that "[p]rosecutors must take [the GCO] 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". It also notes that the GCO may be "helpful" in determining the policy rationale behind the offences in the Bribery Act. Section 9(2) of the Act provides that the GCO can be amended but there are currently no plans to do so since the GCO was issued only recently.

b) Facilitation Payments

15. The 2009 Anti-Bribery Recommendation (para. VI.ii) asks member countries to periodically review their policies and approach on small facilitation payments, and to encourage companies to prohibit or discourage the use of small facilitation payments in internal company controls, ethics and compliance programmes or measures, and in all cases accurately account for such payments in companies' books and financial records. The Bribery Act does not exempt facilitation payments and the illegality of facilitation payments was broadly understood by panellists at the on-site visit. Even so, a prosecutor may exercise discretion not to prosecute a case involving facilitation payments if warranted under the two-part test in the

Code for Crown Prosecutors. As explained below (p. 30), in deciding whether to bring a case, UK prosecutors should consider whether (1) there is sufficient evidence to provide a realistic prospect of conviction, and (2) whether a prosecution is in the public interest.

16. In exercising this discretion, the SFO has stated that it would consider six particular factors. These were initially described as a “six-step solution” in a June 2011 interview with the SFO Director¹⁰ and were added to the SFO website after the October 2011 on-site visit. In deciding whether to prosecute, the SFO would consider (1) whether the company has issued a clear policy regarding facilitation payments; (2) whether written guidance is available to relevant employees as to the procedure they should follow when asked to make such payments; (3) whether such procedures are being followed by employees; (4) if there is evidence that all such payments are being recorded by the company; (5) if there is evidence that proper action (collective or otherwise) is being taken to inform the appropriate authorities in the countries concerned that such payments are being demanded; and (6) whether the company is taking any practical steps it can to curtail the making of such payments. Taken together, these six factors imply that a company could continue making facilitation payments while avoiding prosecution if certain conditions are met.

17. In several speeches, the SFO Director stated that, to avoid prosecution, a company must also “generally move towards zero tolerance [of facilitation payments] over a period of time”, and report to the SFO their plans for doing so.¹¹ The SFO believes that, although facilitation payments were illegal under previous legislation, a period of adjustment is necessary given the scale of the problem and the introduction of broader corporate liability under the Bribery Act. However, the SFO has not developed firm criteria for assessing whether companies are indeed moving towards a “zero tolerance” policy within a reasonable timeframe. The SFO Director “recognise[d] that this may be a process that takes a few years but what matters is the end result”.¹² There was also no mechanism to monitor a company’s progress.

18. A further concern is consistency across different prosecuting agencies. As explained below, the Crown Prosecution Service (CPS) may also prosecute certain foreign bribery cases in England and Wales. The Joint Prosecution Guidance (pp. 8-9) applies to both the SFO and CPS. It sets out public interest factors that prosecutors should consider in deciding whether to prosecute a facilitation payment case, but it does not include the “six-step solution”. The Crown Office and Procurator Fiscal Service, which prosecutes foreign bribery cases in Scotland, also has not adopted the “six-step solution”.

19. Another challenge relates to the definitions of “facilitation payments”. The Joint Prosecution Guidance describes “facilitation payments” as “unofficial payments made to public officials in order to secure or expedite the performance of a routine or necessary action. [...] The payer of the facilitation payment usually already has a legal or other entitlement to the relevant action” (pp. 8-9). The GCO describes facilitation payments to be “small bribes to facilitate routine governmental action”, but does not refer to “necessity” or whether the payer is entitled to the governmental action (para. 44). The Quick Start Guide also does not require that such payments be “small” or “necessary” (p. 7). Though not legally binding, these different definitions may nevertheless cause prosecutorial discretion to be exercised inconsistently *viz.* facilitation payments. The UK explained that the GCO and the Quick Start Guide are intended for businesses and not prosecutors. For its part, the SFO stated that, when read as a whole, the different documents would not pose difficulties.

10 [TheBriberyAct.com](#) (9 June 2011).

11 Speech of SFO Director to Russia Legal Seminar 2011 (9 June 2011). See also the Director’s speeches dated 21 June 2011 and 3 March 2011.

12 Speech of SFO Director to Russia Legal Seminar 2011 (9 June 2011).

Commentary

The UK stated that facilitation payments have always been illegal in the UK under the Bribery Act and its predecessors. However, whether a specific facilitation payment case is prosecuted depends on the exercise of prosecutorial discretion. One key factor in deciding how discretion would be exercised is whether a company is “moving towards zero tolerance” of facilitation payments “over a period of time”. To ensure the effectiveness of this approach, the lead examiners recommend that the UK adopt firm criteria for assessing whether companies are indeed moving towards a “zero tolerance” policy within a reasonable timeframe. In line with the 2009 Anti-Bribery Recommendation, the UK should ensure prosecutorial discretion is exercised coherently by co-ordinating its approach on facilitation payments with other UK prosecuting agencies, such as the CPS and the Scottish Crown Office and Procurator Fiscal Service. After the on-site visit, the SFO undertook to do so. In addition, the lead examiners recommend that the UK use a consistent definition of facilitation payments, including in the JPG, GCO and Quick Start Guide. Finally, the Working Group should follow up the UK’s treatment of facilitation payment cases as practice develops.

c) Hospitality and Promotional Expenditure

20. The Bribery Act does not explicitly refer to “hospitality and promotional expenditures” and there are no express exceptions for such payments to the Section 1 and 6 offences. As the guidance points out, there may be direct evidence that hospitality or promotional expenditures are in fact bribes. Such payments may be considered bribes if it can be shown that the intent of these payments was to improperly influence a decision-maker to grant an undue business advantage. The issue is how to distinguish between bribes from legitimate hospitality and promotional expenditures intended to establish cordial relations, improve the image of a commercial organisation, or to promote products or services. An important factor in making this distinction is whether the expenditure is “reasonable and proportionate” (para. 26). The amount of the expenditure is not determinative, but may indicate whether the intention in providing the hospitality was improper.

21. Of concern are hypothetical examples in the GCO that seek to illustrate “reasonable and proportionate” payments. For example, the GCO (para. 31) states that “[f]lights and accommodation to allow foreign public officials to meet with senior executives of a UK commercial organisation in New York as a matter of genuine mutual convenience, and some reasonable hospitality for the individuals *and his or her partner*, such as fine dining and attendance at a baseball match are facts that are, in themselves unlikely to raise the necessary inferences.” The UK points out that the GCO provides that additional factors may be considered in determining whether hospitality and promotional expenditures are improper. The UK also states that the examples provided in the GCO are intended to deal with high-risk scenarios and are not intended to suggest that such hospitality or promotional expenditures will not attract liability in any circumstances. As the GCO points out, the facts of each case will be paramount. Even so, panellists at the on-site visit (UK officials excepted) unanimously agreed that this example presented an unadvisable, high-risk activity under almost all circumstances.

22. Another example concerns payments to establish “cordial relations”. In Case Study 4 (p. 36), a firm of engineers “maintains a programme of annual events providing entertainment, quality dining and attendance at various sporting occasions, as an expression of appreciation of its long association with its business partners.” The firm pays for the costs of travel and accommodation for foreign public officials, but not for private clients. According to the GCO, factors to be considered include “clear[ing] with the relevant public body so that it is clear who and what the hospitality is for,” and “approval by an appropriately senior level of management”. In particular, one factor to also consider is “that any hospitality should reflect a desire to cement good relations and show appreciation”, and that promotional expenditures

“seek to improve the image of [the firm] as a commercial organisation, to better present its products or services, or establish cordial relations”. In the view of the examiners, some of these motivations may be allowable for private sector clients. However, entertainment to public officials of the type described in order to “show appreciation,” “establish cordial relations” and “improve the image of a commercial organisation” presents a high risk of corruption. The UK states that all of the Case Studies in the GCO are intended to show how bribery risks are created and mitigated.

23. Public statements by the UK government and SFO may be interpreted so as to suggest a lenient interpretation of “reasonable and proportionate”. The Secretary of Justice has stated that, “The [GCO] makes clear that no one is going to try to stop businesses getting to know their clients by taking them to events like Wimbledon, Twickenham or the Grand Prix. Reasonable hospitality to meet, network and improve relationships with customers is a normal part of business.”¹³ The SFO Director has said that, “When we are talking about senior individuals in large pension funds or Sovereign Wealth Funds, then you would not expect to put them up at very modest hotels after travelling economy. It is not how it is done.”¹⁴ Though some of these activities may be allowable in the private sector depending on the industry and circumstances, these examples fail to note that the risk of corruption substantially increases where the recipient is a public official.

24. Another concern is that the GCO (para. 30) states that whether hospitality and promotional expenditures are “commensurate with the reasonable and proportionate norms for the particular industry” is another factor in assessing its propriety. There are two problems with this approach. First, customary industry standards developed over time may permit a high level of entertainment and gifts that are improperly used to influence official decision-making. Second, neither the GCO nor government representatives at the on-site visit could articulate how the government intends to assess industry standards. It is thus unclear how prosecutors would evaluate whether hospitality and promotional expenditures are “reasonable and proportionate”. In response, the UK points out that the GCO specifically warns commercial organisations that simply providing hospitality or promotional or other similar expenditures which is commensurate with sector norms is not of itself evidence that no bribe was paid if there is other evidence to the contrary, particularly if the norms in question are extravagant. But as explained below, the UK has not provided information how to evaluate sector norms.

25. Representatives from the MOJ and the SFO further explained that the GCO is not legally binding and that courts will ultimately interpret the Act. However, cases are unlikely to reach the courts for some time. Many cases will likely be settled out of court. Certain issues may also not be litigated because of the exercise of discretion not to prosecute. In the meantime, many businesses, especially SMEs, will rely on the GCO to develop policies on hospitality. The lenient illustrations and explanations in the GCO may lead these businesses to inadequately address the risk of corruption.

Commentary

The lead examiners welcome the UK’s efforts to address the issue of hospitality and promotional expenditures. Nevertheless, they recommend that the UK clarify the significance of “reasonable and proportionate” in the GCO, including the reference to industry norms. In addition, the UK should amend the GCO (including paragraph 31 and Case Study 4) to note the high risk of bribery posed by the illustrations. The Working Group should also follow up the UK’s treatment of hospitality payments as practice develops.

13 Statement of Kenneth Clarke, Lord Chancellor and Secretary of State for Justice (31 March 2011).

14 SFO Director’s Speech to Debevoise & Plimpton LLP (21 June 2011).

d) Element of Illegality under Written Law

26. Commentary 8 on the Convention states that it is not an offence under the Convention “if the advantage was permitted or required by the written law or regulation of the foreign public official’s country, including case law.” Section 6(3)(b) of the Bribery Act puts the onus on the prosecution to show that the foreign public official is neither permitted nor required by the written law applicable to the official to be influenced by an advantage given, offered or promised to him/her (Section 6(3)(b)). This provision differs slightly from Commentary 8 as it focuses on whether the influence on the official – not the advantage – is permitted or required by the written law (Phase 1ter paras. 29 and 82). The UK explained that the provision was meant to allow situations such as a fast-track service (*e.g.* visas) in return for a payment to a foreign official, or “offset situations” where a public official must consider an offset commitment to a third person during a procurement procedure. Because of the differences between Commentary 8 of the Convention and Section 6(3)(b) of the Bribery Act, the Working Group stated in Phase 1ter (para. 82) that it would further examine whether the written law exception addresses its policy goals.

27. In practice, this written law exception may have limited application. The SFO has stated publicly at least twice that it had never come across a written law that would excuse a Section 6 offence.¹⁵ At the on-site visit, one private sector lawyer stated that he could not see when the situation contemplated by the exception would arise. Another stated that “offset situations”, which the exception is meant to address, are not always found in written law.

28. At the same time, if the defendant intends to argue the exception at trial, then the prosecution faces two obstacles. First, the exception requires the prosecutor to show the absence of legality, *i.e.*, to prove a negative. Second, he/she may need to adduce evidence to prove the law of a non-UK jurisdiction. At the on-site visit, the SFO stated that expert testimony on foreign law would be tendered. Nevertheless, this could be difficult in cases where the bribe was paid in a jurisdiction that may not have an established legal profession or jurisprudence.

29. Judges at the on-site visit explained some procedural aspects of the written law exception. The prosecution has the onus to show that the foreign public official is neither permitted nor required by the written law applicable to the official to be influenced by the advantage. After a case is scheduled for trial, a judge would hold a pre-trial case management meeting. As a matter of procedure, the defendant would be asked during the meeting to indicate whether he/she intends to raise the written law exception as an issue at trial.

Commentary

The written law exception in Section 6 of the Bribery Act may have limited application in practice. Nevertheless, the lead examiners are concerned that the exception may undermine the effectiveness of the offence. They recommend that the Working Group follow up this issue as practice develops.

2. Responsibility of Legal Persons

30. For offences prior to the Bribery Act, legal persons may be held liable for foreign bribery under the “identification theory”. Mabey & Johnson and Innospec were convicted on this basis. Under the Bribery Act, legal persons may be liable for foreign bribery under Section 1 or 6 of the Bribery Act, again

15 Speeches by Robert Amaee, then-Head of SFO Anti-corruption Domain (14 October 2010), and Richard Alderman, SFO Director (4 October 2010).

under the identification theory. Section 7 creates a new corporate offence of failure to prevent foreign bribery. The Phase 1ter Report (para. 80) found that this new offence follows the approach described in Annex I of the 2009 Anti-Bribery Recommendation. Section 7 also provides a defence of adequate procedures to prevent bribery. The GCO provides guidance to commercial organisations on how to prevent bribery, similar to Annex II of the 2009 Anti-Bribery Recommendation. This part of the report will focus on issues identified for follow-up in the Phase 1ter Report and additional issues raised by the GCO.

a) *Liability of Legal Persons for Foreign Bribery under the Identification Theory*

31. Legal persons may be held liable for foreign bribery under Sections 1 or 6 of the Bribery Act through the application of the “identification theory.” Under that doctrine, a legal person is liable if its “directing mind” possesses the *mens rea* (e.g. guilty intention) to commit the crime.

32. Since 2005, the Working Group has repeatedly criticised the use of the identification theory for imposing liability against legal persons for foreign bribery (Phase 2 paras. 75-76, 195-206). Two particular shortcomings have been noted. First, a legal person’s “directing mind” includes only members of the board of directors, a managing director, and perhaps other superior officers. Liability would not result from foreign bribery committed by a regional manager, relatively senior management, a salesperson or an agent. Therefore, the theory is unlikely ever to result in liability to a large company with decentralised operations, or operations away from the corporate head office.

33. A second shortcoming is that the identification theory does not permit the creation of a corporate *mens rea* by aggregating the states of mind of different people in the company. Liability depends on proving a culpable act and intent by a single representative of the company. This can be challenging, since multinational companies have complex decision-making structures where it is often difficult to identify one individual decision-maker within a management chain.

34. The SFO has readily admitted the problems with the identification theory.¹⁶ The convictions in *Mabey & Johnson* and *Innospec* also did not dispel concerns about the theory. As the Working Group noted, both cases involved board-level complicity. The convictions also resulted from guilty pleas at trial, and hence the legal issues of concern were not argued by the litigants and settled by a court.¹⁷ However, Section 7 of the Bribery Act introduced an additional offence of failure to prevent bribery which does not require the identification theory to establish liability. As prosecutors begin to rely on this new provision, concerns over the identification theory may recede.

b) *Liability of Legal Persons for Failure to Prevent Bribery*

35. Section 7 of the Bribery Act imposes liability on commercial organisations for failure to prevent bribery. The prosecution is required to prove beyond a reasonable doubt that a person associated with the commercial organisation has committed bribery under Section 1 or 6 of the Act. The prosecution must also show that the bribery was committed with the intention of obtaining or retaining business or an advantage in the conduct of business for the commercial organisation. The onus then shifts to the defendant to prove on a balance of probabilities that it had adequate procedures to prevent persons associated with it from committing bribery. The expression “commercial organisations” is defined as incorporated bodies and partnerships that were either formed in the UK, or carry on a business, or part of a business, in the UK. Although sweeping in its language, several issues may narrow the application of Section 7.

16 See Phase 2bis Report, para. 75; SFO Director’s speeches to Higher School of Economics, Moscow (15 March 2011) and London School of Economics discussion event (30 March 2011), among others.

17 Working Group’s Summary and Conclusions on the UK’s Phase 2bis Written Follow-Up Report, para. 3 (23 May 2011).

(i) *Non-partnership Unincorporated Bodies*

36. Unlike the offences under Sections 1 and 6, Section 7 does not apply to non-partnership unincorporated bodies (e.g. trusts and unincorporated associations and certain charities). Such entities may be prosecuted under Section 1 or 6 using the identification doctrine, though this could be difficult in practice. To obtain a conviction, the prosecutor must prove the individual guilt of each of the persons with an appropriate level of authority who is involved in the unincorporated enterprise (Phase 1ter, para. 39).

(ii) *“Carrying on a Business or Part of a Business”*

37. One much discussed issue is when a foreign, non-UK company attracts Section 7 jurisdiction. Section 7 applies to an incorporated body or a partnership that “carries on a business, or part of a business, in any part of the United Kingdom.” Where the body or partnership was incorporated or formed is immaterial. By contrast, Sections 1 and 6 only apply to bodies incorporated in the UK.

38. The GCO seeks to narrow the interpretation of “carrying on a business or part of a business”. It states that a “common sense approach” should be applied, and that business must have a “demonstrable business presence” to fall within the ambit of Section 7. However, the UK Government does not expect a “mere” UK stock listing or having a UK subsidiary, in itself, to be insufficient (para. 36).

39. On his part, the SFO Director has stated repeatedly that he would not apply an overly “technical” interpretation to the term “carrying on business”. Jurisdiction based solely on a stock listing is “unlikely”. However, jurisdiction could be applied to companies that have “economic engagement” with the UK (i.e., trading, raising finance, carrying out corporate functions, or dealing with numerous stakeholders in the UK).¹⁸ At the on-site visit, the SFO explained that “carrying on a business” should be understood to be “buying and selling” in the UK. After the on-site visit, the SFO added that each case would be evaluated on its own facts according to the Code for Crown Prosecutors and the likely approach of the criminal courts. The SFO does not consider itself bound by the opinions of other Government departments and agencies.

40. Prosecutorial discretion may provide further limits. The SFO Director has stated publicly that the SFO’s priority is to target foreign companies that, by committing foreign bribery, deprive an “ethical” UK company of a business opportunity. The SFO has declined to investigate foreign companies that do not meet this criterion.¹⁹ After the on-site visit, the SFO explained that this approach allows it to choose which allegations to pursue, given its limited resources and difficulties in obtaining evidence and co-operation. The SFO stated that allegations that it does not pursue are referred to other jurisdictions where possible.

41. Despite the GCO and SFO statements, private sector participants at the on-site visit expressed confusion over the scope of Section 7 jurisdiction over non-UK companies. This issue will likely require determination by the courts.

Commentary

The lead examiners recommend that the Working Group follow up the interpretation of “carries on a business, or part of a business, in any part of the United Kingdom” in Section 7 of the Bribery Act. In their view, the jurisdiction of Section 7 should be exercised in a manner that creates a level playing field among companies from all Parties to the Convention.

18 SFO Director’s speech to Salans (7 April 2011).

19 The SFO Director’s speech to Russia Legal Seminar 2011 (9 June 2011) and the SFO Director’s post on www.fcpaprofessor.com (29 November 2011).

(iii) “Associated Persons”

42. Liability under Section 7 arises only if a person “associated” with a commercial organisation commits bribery to obtain or retain business or a business advantage for the organisation. Section 8 of the Bribery Act defines an “associated person” as “a person who performs services for or on behalf of” the commercial organisation “disregarding any bribe under consideration”. All relevant circumstances must be taken into account, and not merely the nature of the relationship between the person and the organisation. No reference is made to the capacity in which the individual performs the services, although an employee is presumed to be an associated person. An “associated person” may be a natural person or a legal person.

43. The Phase 1ter Report identified two limitations to the definition of an “associated person”. First, if an associated person is a legal person (*e.g.* a subsidiary), then the prosecution must apply the identification theory to show that the legal associated person committed “bribery”. This could be difficult given the obstacles posed by the identification theory described above. Second, the Bribery Act disregards the payment of bribes in determining whether the associated person performed services for or on behalf of the commercial organisation (Section 8(1)). Thus, a shell company or an agent retained by the company who performs no service other than to pay a bribe would not be an “associated person”. The UK responds that Section 8(1) is intended to prevent circumstances in which a bribe is orchestrated from the corporate centre being presented as a failure to prevent bribery. In such situations, the commercial organisation could be prosecuted under Sections 1 or 6 of the Bribery Act. Alternatively, reliance could be placed on conduct on the part of an individual “associated person”. This individual could be, for example, the agent or an employee in the organisation who participates in the offence by knowingly establishing the shell company or by hiring the agent to pay the bribe.

44. The GCO (paras. 37-43) also deals with the scope of “associated persons”. Under the Bribery Act, the “associated person” must commit bribery intending to obtain or retain business or an advantage in the conduct of business for the commercial organisation. According to the GCO, “[t]he fact that an organisation benefits indirectly from a bribe is very unlikely, in itself, to amount to proof of the specific intention required by the offence”. In other words, if a subsidiary wins a contract because its employees commit bribery, then the parent company is likely not liable even if the contract generates revenues or profits that are eventually paid to the parent as dividends or loans. The same analysis applies to bribery committed by joint ventures. Yet, Section 7 of the Bribery Act, on its face, does not give greater weight to direct benefits over indirect ones. The parent company could be held liable under Sections 1 or 6 through the identification theory. However, this could be challenging, given the identification theory’s well-known limitations (Phase 1ter, paras. 37 and 45). The UK responds by pointing out that the accrual of benefits from bribery cannot, of *itself*, be determinative of the commission of an offence, as this would clearly result in too wide a scope of liability. Prosecutors will assess all the evidence when assessing the relationship between the various actors in unethical conduct.

45. Prosecutorial discretion creates further limits in practice. The SFO Director has stated publicly that prospective joint ventures are expected to “reflect the anti corruption culture that [the SFO is] expecting to see”. However, existing joint ventures may be “locked into very detailed contractual arrangements” that prevent them from taking all the compliance measures necessary.²⁰ Prosecution of the latter category of cases may therefore be less likely.

20 SFO Director’s Speech to the Royal Aeronautical Society (27 January 2011).

Commentary

The lead examiners consider that the GCO seeks to limit the scope of “associated persons” by stating that an organisation which benefits indirectly from a bribe is very unlikely, in itself, to amount to proof of the specific intention required by the offence. The Bribery Act, on the other hand, does not deal with the evidentiary weight of indirect benefits. The approach in the GCO may affect how the Bribery Act is enforced and how companies craft adequate procedures to address the risk of associated persons. The exercise of prosecutorial discretion may also limit the scope of “associated persons”. The SFO has stated that it may therefore be less likely to prosecute existing joint ventures that lack the expected anti-corruption culture.

The lead examiners are concerned that the phrase “associated person” may be interpreted restrictively to exclude foreign bribery that is committed through subsidiaries and joint ventures. The Section 7 offence should also be enforced equally against all joint ventures, including ones that were created before but continue to exist after the enactment of the Bribery Act. The lead examiners therefore recommend that the UK clarify the significance of indirect benefits in the GCO. The SFO should also not distinguish between joint ventures that were created before and after the Bribery Act in the exercise of prosecutorial discretion. Finally, the Working Group should follow up the operation of corporate liability under the Bribery Act as practice develops, especially in cases involving subsidiaries and joint ventures.

3. Sanctions for Foreign Bribery and Related Offences

46. In the UK, criminal, civil and administrative sanctions are available – and have been used – in foreign bribery and related cases. This section of the report considers the legal framework for each type of sanction and its application in practice (Phase 2 paras. 228-236 and Follow-up Issue 8(a)). This includes the use of plea negotiations, co-operative witnesses and deferred prosecution of companies (Phase 2bis Follow-up Issue 8(c)). The section also examines corporate monitors and reparations to a foreign state. Phase 2 Recommendation 7(a) also suggested that the UK consider adopting a regime of additional administrative or civil sanctions for legal persons that engage in foreign bribery. Exclusion from public procurement is considered in a separate section at p. 56.

47. As noted at p. 8, the UK has sanctioned a significant number of individuals and companies resulting from investigations into foreign bribery and related misconduct. Since August 2008, these investigations have produced five criminal convictions for foreign bribery and one for false accounting, four civil settlements, and two administrative fines for inadequate corporate internal controls to prevent bribery.

a) Criminal Sanctions

48. To date, criminal sanctions for foreign bribery have been imposed against three individuals (*Tobiasen*, *Dougall* and *Messent*) and two companies (*Mabey & Johnson* and *Innospec*). A sixth foreign bribery investigation (*BAE Tanzania*) led to a conviction for failure to keep sufficient accounting records but not foreign bribery. All six convictions resulted from guilty pleas, not trials.

(i) Applicable Statutes and Guidelines

49. Under the Bribery Act, natural persons are punishable for foreign bribery by up to 10 years’ imprisonment, an unlimited fine, or both. Legal persons that commit or fail to prevent foreign bribery are punishable by an unlimited fine. However, the five foreign bribery convictions mentioned above were prosecuted under the Prevention of Corruption Act 1906 which provided a punishment of up to 7 years’

imprisonment, an unlimited fine, or both.²¹ False accounting under Section 17 of the Theft Act 1968 is subject to the same maximum punishment. Failure to keep adequate accounting records is also punishable under Section 386 of the Companies Act 2006 (and its predecessor Section 221 of the Companies Act 1985) by up to two years' imprisonment and/or an unlimited fine.

50. A court must consider certain factors when imposing sentence. Some factors are prescribed by statute, such as the seriousness of the offence and the harm intended or foreseen.²² A sentencing court must also follow guidelines issued by the Sentencing Guidelines Council unless "it would be contrary to the interests of justice to do so".²³ At the time of this report, guidelines on sentencing offences under the Bribery Act were being developed. Case law provides further guidance. In *Innospec* (paras. 30 and 32), the court stated that foreign bribery is "at the top end of serious corporate offending", and that a fine comparable to what would be imposed in other jurisdictions (e.g. US) for the same crime would be the starting point.

(ii) *Sentence Reductions for Early Guilty Pleas*

51. A sentence may be reduced if a defendant pleads guilty rather than contest the matter at trial. Guidelines provide that a sentence should be discounted by one third for a plea at the first reasonable opportunity, one quarter after a trial date is set, and one tenth just before or during a trial. If the "prosecution case is overwhelming", then a plea at the earliest opportunity would generally result in a 20% reduction. The court must state that a reduction has been applied and what the sentence would have been without the discount.²⁴

52. Concerns have been expressed that sentence reductions under this scheme are too short to provide defendants with an incentive to enter early guilty pleas. In Phase 2bis (para. 235), the SFO stated that sentences upon conviction for fraud were only three years' imprisonment on average. Since the maximum reduction is one-third, sentences are on average reduced by only 12 months, which is not sufficient to induce defendants to plead early. The SFO Director recently reiterated this view.²⁵ The Bribery Act increased the maximum penalty for foreign bribery from seven to ten years' imprisonment. Whether this would raise the sentences imposed remains to be seen. In 2011, the UK public opposed increases to the discount rates for guilty pleas, fearing that overly lenient sentences would result.²⁶

(iii) *Plea Negotiations and Agreements*

53. A defendant in the UK may negotiate and reach an agreement with the prosecutor on particular matters before entering a guilty plea and being sentenced. In Crown Court, a plea agreement may take a combination of one or more of three forms. First, it may be an agreement to plead guilty to *some of the charges* in one or more indictment on the basis of the facts as alleged by the prosecution. The prosecutor

21 Bribery Act Section 7; Public Bodies Corrupt Practices Act 1889; Prevention of Corruption Act 1906.

22 Criminal Justice Act 2003 Sections 153, 142(1) and 143(1).

23 Criminal Justice Act 2003 Sections 167 and 172; Coroners and Justice Act 2009 Section 125.

24 Criminal Justice Act 2003 Sections 144(1) and 174(2); Sentencing Guidelines Council (2004), *Reduction in Sentence for a Guilty Plea* (as revised in 2007) paras. 2.4, 3.1, 5.2-5.5. Similar provisions apply in Scotland.

25 Financial Times (7 August 2011), "Plea bargaining uncertainty hits SFO drive"; International Development Committee (30 November 2011), *Financial Crime and Development*, HC 847, Ev-12.

26 Almandras, S. (19 May 2011), "Reduction in Sentence for a Guilty Plea", House of Commons Library SN/HA/5974; The Guardian (29 June 2011), "Kenneth Clarke faces fresh battle over sentencing and legal aid reforms".

agrees to withdraw the remaining charges. Second, the defendant may agree to plead guilty and to be sentenced on the basis of an agreed set of facts (an *agreed basis of plea*). Third, in cases of serious or complex fraud or corruption, the defendant may agree to plead guilty based on an agreed basis of plea accompanied by a *joint submission* by the defence and prosecution on the *appropriate sentence range*.²⁷

54. A sentence may also be reduced if a defendant agrees to co-operate with the authorities (known as providing “Queen’s evidence”). A court may consider the extent and nature of the assistance given by a defendant when sentencing the defendant. Alternatively, prosecutors may grant a co-operating defendant immunity from prosecution, or undertake not to use the information provided in a subsequent proceeding against the defendant.²⁸

55. Certain rules and principles govern the plea negotiation process. Prosecutors must ensure that plea agreements are reasonable, fair and just. The charge must reflect the seriousness and extent of the offending; give the court adequate sentencing powers; and enable the court, the public and the victim to have confidence in the outcome. The facts described in the basis of plea must not be misleading or untrue. The procedure should command public and judicial confidence. Plea agreements are generally required to be in writing. There should be safeguards to ensure that defendants are not improperly pressured. The prosecutor must not agree to matters that are not in the plea agreement and not made known to the court.²⁹

56. The court plays a key role in plea agreements to protect the public interest. If the judge is not satisfied with the factual basis of the guilty plea, he/she may request an evidentiary hearing to assess the facts in question. Most importantly, the court decides the sentence to be imposed. In foreign bribery cases, the defendant and the prosecution can make a joint submission on the appropriate sentencing range, but they cannot agree on or submit a specific sentence.³⁰

57. It has been said that this prohibition against an agreement and joint submission of a specific sentence discourages plea negotiations. This is because a defendant in the UK who reaches a plea agreement with the prosecution cannot be reasonably certain of the sentence that is ultimately imposed. The SFO Director and a former Attorney-General have publicly expressed this view.³¹ Many participants at the on-site visit concurred. The SFO sought to overcome this limitation in two recent foreign bribery cases (*Innospec* and *Dougall*) by agreeing with the defendants to seek specific sentences. It was harshly criticised by the court in both instances. The UK government is considering a legislative proposal to introduce deferred prosecution agreements that would allow the judiciary to become involved at an earlier

27 Code for Crown Prosecutors, paras. 10.1-10.7; Consolidated Criminal Practice Direction, IV.45; Attorney General’s Guidelines on Plea Discussion in Cases of Serious or Complex Fraud.

28 Serious Organised Crime Prevention Act 2005, Sections 71-74. Similar provisions apply in Scotland (Police, Public Order and Criminal Justice (Scotland) Act 2006, Sections 91-96). Unlike in some parties to the Convention, immunity is discretionary; a co-operating offender is not entitled to immunity as of right.

29 Code for Crown Prosecutor, Chapter 10; AG Guidelines on Plea Discussion.

30 *R. v. Underwood* (2004), [2004] EWCA Crim, 1 Cr. App. R. 13, para. 6; Consolidated Criminal Practice Direction, para. IV.45.24; AG Guidelines on Acceptance of Plea, paras. C10, D9-D11, and E5; *R. v. Newton* (1983), 77 Cr. App. R. 13; *R. v. Innospec*; *R. v. Dougall*.

31 The Telegraph (5 January 2011), “Lord Goldsmith Urges Plea Bargaining in Bribery Cases”; SFO Director’s Speech to the Higher School of Economics, Moscow (15 March 2011).

stage.³² Some on-site visit participants also proposed US-style guidelines that would prescribe the lengths of sentences in Bribery Act cases, but the judges appeared unreceptive to this idea.

Commentary

Experience in other jurisdictions shows that plea negotiations, deferred prosecution agreements and plea agreements, when allowed under a country's legal system, can be useful for resolving foreign bribery enforcement actions. The lead examiners therefore recommend the UK to pursue legislative and other efforts that could lead to greater use of these measures in appropriate cases. They also recommend that the Working Group follow up developments in the UK in these areas.

(iv) *Transparency*

58. When a guilty plea is entered after plea negotiations, the court must receive relevant materials from the parties, including the plea agreement, sentencing submission(s), all material provided by the prosecution to the defence and vice versa, minutes of meetings, and correspondence between the parties. Reasons for sentence are delivered in open court.³³

59. Unfortunately, only a small portion of these materials are readily available to the public. Of the six foreign bribery-related convictions, the court's sentencing remarks are publicly available in two cases (*Innospec* and *BAE Tanzania*) and the plea agreement in only one case (*BAE Tanzania*). The SFO published its written submissions to the court (opening notes) only in *BAE Tanzania*. The opening note in *Mabey & Johnson* was initially made public but was later ordered removed by a court because of pending prosecutions against other individuals. The SFO issues press releases summarising the facts and outcome of resolved cases, but these are usually very brief. For instance, the press releases in many cases indicated the penalties imposed but not the value of the bribes paid and contracts obtained. The UK provided to the lead examiners the opening note in a third case (*Messent*) and a transcript of the sentence hearing in *Mabey & Johnson*. However, these documents are not on the SFO's website. The decision of a judicial review of the charging decision in *BAE Tanzania* was available on the website of an NGO but not that of the SFO.

60. In some cases, it is unclear how the amount of the penalties agreed between the SFO and the defendant was arrived at. In *Mabey & Johnson*, the defendant paid bribes of GBP 570 792 to officials in Jamaica and Ghana to secure contracts worth GBP 34 million. The defendant was also found guilty of breaching UN sanctions against Iraq. The SFO agreed to total financial penalties of just GBP 6.6 million because of the company's inability to pay.³⁴ It is unclear how the figure was calculated. In *BAE Tanzania*, the insufficient accounting records concerned payments of USD 12.4 million to a third party agent to secure a GBP 40 million contract. The plea agreement set the financial penalties (fine and *ex gratia* payment to Tanzania) at GBP 30 million. The SFO Director has stated that the figure was based on the contract obtained by BAE,³⁵ but more precise information was not available.

32 The proposed judicial involvement would be in addition to the current practice of indicative sentencing by a court. A recent report also recommended earlier judicial oversight (Transparency International UK (2012), *Detering and Punishing Corporate Bribery: An Evaluation of UK Corporate Plea Agreements and Civil Recovery in Overseas Bribery Cases*, Recommendation 22.

33 AG Guidelines on Plea Discussions paras. B4 and E4.

34 Transcript of Sentence Hearing in *Mabey & Johnson*.

35 House of Commons International Development Committee (30 November 2011), *Financial Crime and Development*, HC 847, Ev-12.

61. To conclude, the lead examiners cannot assess whether the sanctions imposed in these cases are effective, proportionate and dissuasive absent information such as the court's reasons for sentence, the plea agreement, the agreed basis of plea, and the prosecution's opening note. At the on-site visit, representatives of civil society, lawyers and academics agreed that the SFO's plea negotiations and agreements are not sufficiently transparent. In their view, publishing additional information would enhance the SFO's accountability and transparency, and give the public and private sector better insight into SFO practice and policy. In addition to demonstrating that the sanctions imposed are effective, proportionate and dissuasive, making public additional information would also help to increase transparency, raise public awareness, and increase the deterrent impact. The SFO stated that it is precluded from disclosing certain information in some cases, because it had entered into confidentiality agreements with the defendants. This is discussed in greater detail at p. 22.

Commentary

The lead examiners consider that, whenever the UK authorities conclude a foreign bribery enforcement action via a criminal plea agreement, they should make public as much information as possible to demonstrate that the sanctions imposed are effective, proportionate and dissuasive.

b) Civil Sanctions

(i) Legal Basis of Civil Recovery Orders and Their Use in Foreign Bribery Cases

62. In July 2008, the SFO and CPS acquired the power to apply for civil recovery orders under the Proceeds of Crime Act 2002 (POCA). Such orders permit the recovery of "property obtained through unlawful conduct". A criminal conviction is not required; the applicant only has to show on a balance of probabilities that the property sought to be recovered is property obtained through unlawful conduct. If the property has been disposed of, the court cannot impose a fine against an individual in lieu of recovery.³⁶ A civil recovery order relating to foreign bribery does not trigger automatic exclusion from public procurement (see p. 56).

63. Since *Innospec*, the SFO has resolved foreign bribery-related enforcement actions against corporate defendants exclusively through civil recovery orders. (*BAE Tanzania* was sentenced after *Innospec* but pursuant to a plea agreement before.) In *M.W. Kellogg* and *DePuy*, the unlawful conduct underpinning the civil recovery orders was foreign bribery. The factual bases for the orders in *Macmillan* and *Balfour Beatty* are not completely clear, as explained below. In January 2012, the SFO obtained an order to recover dividends from shareholders that were proceeds from an offence unrelated to foreign bribery. That case is discussed in a later section at p. 27.

(ii) Lack of Transparency

64. A principal concern is the paucity of publicly available information on the foreign bribery cases conducted by the SFO that have been settled through civil recovery orders. At the on-site visit, representatives of the private bar, judiciary and civil society voiced concerns on this issue. During this evaluation, the UK provided some additional but not all requested information.

65. The SFO has settled foreign bribery enforcement actions through *consent* civil recovery orders (POCA Section 276(1)). Under this process, the SFO and the defendant agree on the order's amount and other terms. The order is then drawn up, signed by a High Court Judge and entered in the court registry.

36 Serious Crime Act 2007, Section 74; POCA Sections 241 and 304; Phase 2*bis* para. 92.

Unlike a criminal plea agreement, there is no court hearing. A Judge does not assess the factual basis of the order, or determine the amount that the defendant should pay. The judges and the SFO at the on-site visit described the procedure as “a paper process”. The SFO and the defendant can thus dictate the terms of the settlement. Defendants therefore have the certainty in the outcome of settlement negotiations that is unavailable in the criminal plea negotiation process described above.

66. The disadvantage of reduced judicial scrutiny is that there is even less transparency with consent civil recovery orders than cases resolved through criminal plea agreements. When a consent civil recovery order is issued, there are no reasons issued by a judge. There are no rules requiring the plea agreement, basis of plea and other documents to be filed with the court. The SFO has not published settlement agreements, court orders or other court documents. In all cases so far, the only information that is readily available to the public is a press release issued by the SFO after the settlement was reached.

67. Unfortunately, these press releases generally do not describe all of the key facts in the case. In *Balfour Beatty*, the press release stated that the unlawful conduct related to “inaccurate accounting records arising from certain payment irregularities” associated with the execution of a construction contract in a foreign country. There is no explanation of the purpose and recipient of the payments, whether foreign (or even domestic) public officials received all or part of the payments, or how the accounting records were inaccurate. In *Macmillan*, the defendant bid for contracts to supply education material to governments in East and West Africa. The press release asserted that the contract tender process was “susceptible” to corruption and that it was “impossible to be sure” the awards of contracts were “not accompanied by a corrupt relationship”. It then concluded that “it was plain that the Company may have received revenue that had been derived from unlawful conduct”. The press release did not explain the factual basis for these statements. It also fell short of saying affirmatively that foreign bribery had been committed. In separate proceedings before the World Bank which predated the UK settlement, Macmillan admitted unequivocally that bribery had been committed.³⁷

68. There are also many questions concerning how the amount of a civil recovery order is determined. The press releases in *Macmillan* and *M.W. Kellogg* did not disclose the value of the bribes paid or contracts won due to bribery. In *Balfour Beatty*, there was no information on the value of the improperly recorded payments or the contract to which they relate. Furthermore, the defendant did not receive any gains “in legal terms”, according to the UK’s questionnaire responses. This raises questions about the order’s legal basis, since civil recovery orders can only apply to “property obtained through unlawful conduct”. When questioned further, the SFO explained that the settlement amount of GBP 2.25 million in *Balfour Beatty* was reached because “between GBP 2 and 2.5 million could be traced back to unlawful conduct.” The agreed figure was obtained “by pushing the relevant legislation to its limit.”

69. The press releases also only vaguely outline the considerations in reaching the settlement terms without explaining precisely how these considerations affected the order’s amount. In *DePuy*, bribery-tainted contracts generated GBP 14.8 million in revenues that was considered “unlawfully obtained property”. Yet, the consent civil recovery order was for only GBP 4.829 million. The press release asserted without elaboration that “it would not be appropriate or possible in the particular circumstances of this case to apply for recovery of the full amount of the unlawfully obtained property.” The defendant was also sanctioned in other jurisdictions for the same conduct. However, the press release did not suggest whether or how these sanctions affected the amount of the UK order. While reviewing this draft report, the UK commented that the penalty in *DePuy* was indeed reduced to give credit to the sanctions imposed in other jurisdictions. However, there remains no explanation how this “credit” led to the value of the UK order.

37 World Bank (2010), “The World Bank Group Debars Macmillan Limited for Corruption in World Bank-supported Education Project in Southern Sudan”, Press Release No. 2010/370/INT.

70. Non-governmental participants at the on-site visit broadly shared similar concerns about the lack of transparency. The views described above on plea negotiations and agreements (p. 22) apply even more so to the SFO's civil settlements. A recent study by an NGO also recommended greater transparency and guidance on how the amount of civil settlements is determined.³⁸

71. In reply, the SFO explained that it is unable to disclose more information in some cases (such as *Balfour Beatty*) because the settlement agreement includes confidentiality clauses.³⁹ The SFO stated that there may be insufficient evidence in these cases, or the cost of proceedings may outweigh the severity of the additional sanction. It must therefore choose between accepting the confidentiality clause, or not reaching a settlement at all, in which case "it is likely that no further action would be taken against the company." Despite the UK's explanation, doubts remain over why the SFO would not consider civil or criminal proceedings against a defendant if the settlement negotiations fail over the confidentiality clause.

72. The SFO further argues that civil settlements "are by their very nature private disputes between the parties and the information disclosed by one side to the other is confidential." However, this overlooks the fact that the conduct underlying these consent civil recovery orders is foreign bribery and related misconduct. These are therefore not private disputes but criminal matters about which the public has an interest and a right to be fully informed. The Working Group also requires the information to determine whether these settlements are consistent with the Convention.

73. After the on-site, the UK stated that it considered itself more transparent than many other parties to the Convention. For example, it makes public information such as the names of defendants and countries involved in its foreign bribery enforcement actions. Nevertheless, it should be noted that this information does not assist in assessing whether SFO settlements are consistent with the Convention.

Commentary

The lead examiners are extremely concerned that many key details about the SFO's civil settlements of foreign bribery cases remain private. SFO press releases about these settlements contain skeletal information. Confidentiality agreements with a defendant may also prevent full disclosure. The lead examiners repeatedly requested but did not receive information on how the precise amounts of the civil recovery orders were calculated. They therefore could not ascertain whether the sanctions in these cases are consistent with the Convention. In short, the settlement process is opaque, lacks accountability, and thus fails to instil public and judicial confidence.

The lead examiners therefore recommend that the UK authorities, where appropriate and in conformity with the applicable procedural rules, make public in a more detailed manner sufficient information for determining whether civil settlements of foreign bribery cases are consistent with the Convention. This should include all of the key facts, court documents, and the settlement agreement in each case.

The UK authorities should also avoid confidentiality agreements with defendants that prevent the disclosure of such information. Confidentiality agreements undoubtedly encourage companies to resolve investigations. However, they minimise the settlements' deterrent impact.

38 Transparency International UK (2012), *Deterring and Punishing Corporate Bribery: An Evaluation of UK Corporate Plea Agreements and Civil Recovery in Overseas Bribery Cases*, Recommendations 4 and 9.

39 The Scottish authorities may also enter into confidential settlements in certain exceptional cases (Guidance on the Approach of the Crown Office and Procurator Fiscal Service to Reporting by Businesses of Bribery Offences, para. 20).

Furthermore, confidentiality agreements preclude the UK from demonstrating that the settlements are consistent with the Convention. In the lead examiners' view, not only must justice be done; it must also be seen to be done.

c) Administrative Sanctions

74. The Financial Services Authority (FSA) regulates the UK financial industry. The FSA does not enforce the Bribery Act. However, FSA-regulated financial institutions are required to conduct their business with integrity, due skill and diligence. They must “take reasonable care to organise and control its affairs responsibly and effectively, with adequate risk management systems.” They must also “take reasonable care to establish and maintain effective systems and controls for compliance with applicable requirements and standards under the regulatory system and for countering the risk that the firm might be used to further financial crime.”⁴⁰ Financial crime includes corruption. The FSA can impose fines and other sanctions for breach of these principles. These powers are expected to be transferred from the FSA to a new Financial Conduct Authority in the near future.

75. The FSA imposed sanctions for breach of its rules and principles in two cases where firms failed to adequately address foreign bribery issues. In *Aon*, the company (among other things) failed to establish and maintain effective internal controls to counter the risks of bribery and corruption. The FSA imposed a GBP 7.5 million fine, which was reduced by 30% to GBP 5.25 million because of an early settlement. In *Willis*, the company failed to effectively implement internal controls to adequately record and monitor its payments to overseas third parties. This led to a heightened risk that payments were made for corrupt purposes to obtain business. In total, GBP 27 million were paid to overseas third parties in return for obtaining GBP 32.7 million in business (net of commissions paid to agents). The FSA fined the company GBP 9.85 million, which was again reduced by 30% to GBP 6.895 million because the case was settled at an early stage. FSA enforcement actions do not preclude additional criminal or civil proceedings, but none was taken against Aon or Willis. The relationship between FSA and SFO enforcement actions are further considered at p. 29.

Commentary

The lead examiners recommend that the UK raise awareness of the FSA's foreign bribery-related enforcement actions.

d) Additional Remedies

(i) Corporate Monitors

76. When a case is resolved, a corporate defendant may be required to improve its compliance systems, including by appointing a corporate monitor to assess and monitor the defendant's compliance with these conditions. Monitors were imposed in two criminal (*Mabey & Johnson* and *Innospec*) and two civil (*Balfour Beatty* and *Macmillan*) foreign bribery-related cases.

77. The SFO has provided limited information on when and on what terms a monitor would be sought. Its published guidance states that, once an investigation has been completed to its satisfaction, it would then consider monitoring “in some cases”. The monitor would be “an independent, well-qualified

40 Principles 1, 2, and 3 of the FSA's Principles for Businesses and Rule SYSC 3.2.6 R (for insurers, managing agents) and Lloyd's R or SYNC 6.1.1R (for all other firms) of the FSA's Senior Management Arrangement, Systems and Controls Handbook.

individual” nominated by the defendant and accepted by the SFO. The SFO must also agree to the scope of the monitoring, but it undertakes that the scope would be “proportionate to the issues involved.”⁴¹

78. The sanctions for breaching the terms of corporate monitoring may sometimes be insufficient. The monitoring agreement in *Mabey & Johnson* stated that, if the defendant breaches the terms of the agreement, then the SFO may reopen the investigation into the defendant and prosecute the company for any further offences.⁴² The effectiveness of this remedy is questionable since double jeopardy may bar a prosecution of the original offence where monitoring is imposed as part of a criminal resolution. As well, an investigation and prosecution of a separate offence may be impossible due to a lack of evidence. No information was provided on the terms of the monitoring agreements in the other cases.

Commentary

Corporate monitors can be helpful in fighting foreign bribery when used in a transparent and accountable manner. The lead examiners therefore recommend that the UK provide more guidance on when and on what terms a monitor would be sought. Where a monitor is imposed, the UK should make public, where appropriate, the monitoring agreement, the reasons for imposing a monitor, and the basis for the scope and duration of the monitoring.⁴³ ***They also recommend that the UK ensure that breaches of monitoring agreements result in effective sanctions, e.g. fines. After the on-site visit, the SFO undertook to work with other UK Government departments to develop guidance on these issues. The lead examiners welcome this initiative.***

(ii) *Reparations and Compensation to Foreign Countries*

79. Defendants in three foreign bribery cases were required to make payments to the country of the bribed official in addition to other financial penalties. In *Mabey & Johnson* and *BAE Tanzania*, the defendants undertook to the court to pay reparations to the foreign countries in question. In *Messent*, the court issued a compensation order against the defendant to the benefit of the relevant foreign country. The purposes of the payments are to restore, at least in part, the damage caused by the crimes.

80. This is an interesting development but the manner in which the payment is made has raised questions. In *BAE Tanzania* and *Mabey & Johnson*, the obligation to pay stemmed from the plea agreement, not a court order. The SFO considers that failure to make the payments amounts to breach of an undertaking and contempt of court, though there is no case law in support of this position. In *BAE Tanzania*, the agreement did not impose a deadline for payment. Consequently, the payment still had not been made at the time of this report, some 15 months after sentencing.⁴⁴ Part of the delay was attributable to difficulties in ensuring that the funds would be spent appropriately. During this evaluation, the SFO acknowledged that the agreement should have specified the date and method of payment, and with appropriate safeguards to protect the interests of the intended beneficiaries. It is unclear whether there were similar delays and safeguards on how the funds would be spent in *Mabey & Johnson* and *Messent*.

41 SFO Approach to Dealing with Overseas Corruption, at pp. 2-3, and 5.

42 Transcript of sentencing hearing, pp. 103-104.

43 A recent report made similar recommendations (Transparency International UK (2012), *Deterring and Punishing Corporate Bribery: An Evaluation of UK Corporate Plea Agreements and Civil Recovery in Overseas Bribery Cases*, Recommendations 20 and 21).

44 At the meeting adopting this report, the SFO informed the Working Group that the SFO, the Government of Tanzania, BAE Systems, and the DfID signed a Memorandum of Understanding enabling the payment of GBP 29.5 million plus accrued interest to be paid to the people of Tanzania for educational purposes.

Commentary

The lead examiners recommend that the UK take steps to ensure that payments by defendants to foreign countries benefit the people in these countries and are not lost to corruption. Plea agreements should require defendants to make such payments by a specified deadline on pain of further specified sanctions.

4. Confiscation of the Bribe and the Proceeds of Bribery

81. In addition to civil recovery orders, POCA allows for criminal confiscation of the benefit obtained by a convicted person from his/her criminal conduct. Where a foreign public official is bribed to obtain a contract, the SFO considers the value of a contract to be the benefit obtained by the briber. There may be some judicial support for this view but the SFO expects future litigation on this issue.⁴⁵

82. In the only foreign bribery case in which criminal confiscation has been ordered, the SFO did not seek the contract value. In *Mabey & Johnson*, the SFO and the company agreed to cap fines and confiscation at GBP 4.6 million because of the company's ability to pay, even though the company used bribery to win contracts in Jamaica and Ghana worth GBP 42 million. After assessing fines at GBP 3.5 million, the court ordered confiscation of just GBP 1.1 million for the bribery in Jamaica and Ghana. The UK did not provide information on the profits generated by the contracts.

83. After the on-site visit, the SFO announced a new policy of recovering proceeds of crime that have been paid to investors in a company as dividends. In 2009, Mabey & Johnson was sanctioned in criminal proceedings for bribing foreign public officials in Jamaica and Ghana, and for breaching UN Sanctions in the Iraq Oil-for-Food programme. In January 2012, the SFO obtained a consent civil recovery order against Mabey Engineering (Holdings) Ltd., the parent company of Mabey & Johnson. The order covered dividends paid by Mabey & Johnson to its parent company that derived from contracts won by breaching UN sanctions. The order did not relate to proceeds of foreign bribery. Nevertheless, the SFO has stated that it would seek similar orders against other shareholders in the future to recover proceeds of any type of crime falling within its jurisdiction. Particular focus would be given to recovering dividends received by institutional investors which, in the SFO's view, are better able to conduct due diligence on companies in which they invest.

Commentary

The lead examiners note the UK's new policy of seeking recovery of proceeds of foreign bribery that have been paid to a shareholder as dividends. Such a measure could usefully complement sanctions for foreign bribery that have been imposed on the company paying the dividends.

5. Investigation and Prosecution of the Foreign Bribery Offence

a) Case Attribution and Assignment

(i) Attribution and Assignment of Cases to Criminal Law Enforcement Agencies

84. The UK states that the attribution and assignment of foreign bribery cases continue to be governed by the January 2008 Revised Memorandum of Understanding on Implementing Part 12 of the

⁴⁵ POCA Sections 6 and 7(1); Questionnaire Responses pp. 105-106; *R. v. Innospec*, para. 34; SFO Operational Handbook: "Confiscation" (March 2010), citing *R. v. Sivaraman*, [2008] EWCA Crim 1736.

Anti-Terrorism, Crime and Security Act 2001 (MOU). Signatories to the MOU include various government departments and law enforcement and prosecutorial bodies, but not the FSA or Crown Office in Scotland.⁴⁶ The MOU makes the SFO the focal point for receiving all foreign bribery allegations, which are entered into a Register. After an initial assessment to verify the allegations, which may involve making preliminary enquiries, the SFO conducts a vetting exercise to determine which agency should lead the investigation. The SFO will take conduct of the investigation if the case is serious and complex.⁴⁷

85. Rules for attributing cases to Scotland are inconsistent. Under the MOU, if foreign bribery allegations concern a person whose last address or a company whose office is in Scotland, then the case is assigned to the Scottish Crown Office and Procurator Fiscal Service. However, under a June 2011 Crown Office Guidance on self-reporting, the Scottish authorities would be responsible for foreign bribery cases relating to “conduct in, or predominantly in, Scotland”. The Guidance also states that cases raising cross-border issues would be decided after discussions between the SFO and the Crown Office.⁴⁸

86. The MOU also specifies which police body would provide investigative support. The SFO does not have its own police officers. The City of London Police or a local police force may provide support in cases in England and Wales. The Ministry of Defence Police (MDP), a civilian police force regulated by the Ministry of Defence Police Act 1987, provides support if the case involves employees of the Ministry of Defence (MOD) or defence contracts to which the MOD is party.

87. However, the UK’s Phase 3 questionnaire responses describe much broader MDP involvement: the MDP is able to investigate foreign bribery cases where the case “impact significantly on the MOD. Occasionally the MOD Police Fraud Squad will work in collaboration with the SFO on cases of a politically sensitive nature (i.e. BAE Systems).”

88. In Phase 2, the UK stated that the MDP was given a role in foreign bribery cases because of its expertise in investigating corruption cases involving the MOD. However, as the Phase 2 Report pointed out, in cases involving defence purchases by *foreign governments*, the MOD’s role is arguably acting as a seller rather than a buyer. Accordingly, concerns about bribery may be different than in domestic procurement cases and the appropriateness of MDP jurisdiction is less evident.⁴⁹ The UK’s questionnaire responses suggest that the MDP may also be involved in politically sensitive cases despite an absence of any expertise in this regard. A further concern that was raised earlier was the MDP’s independence, particularly when MOD employees are being investigated. However, the UK stated in Phase 3 that the unit of the MOD involved in arms export contracts had been transferred from MOD to UK Trade and Investment (UKTI). As in Phase 2bis, the MDP declined to attend the Phase 3 on-site visit.

89. The UK has stated that it would update the MOU to reflect changes embodied in the Bribery Act. The MOU only covers foreign bribery allegations against “British citizens and incorporated bodies operating outside the UK”. The Bribery Act covers additional entities, such as non-British nationals, and companies and partnerships formed outside the UK but which carries on a business inside. The MOU also refers to the bribery offences that have been repealed by the Bribery Act.

46 See MOU para. 25 for the full list of signatories.

47 Some of the factors in determining whether a case is “serious and complex” are whether the SFO should be responsible for *both* the investigation and prosecution of the case, and whether the size of a contract obtained through bribery is at least GBP 1 million. For a full list of the factors, see Phase 2bis Report para. 233 and SFO Annual Report and Accounts 2010-2011, p. 7.

48 Guidance on the Approach of the Crown Office and Procurator Fiscal Service to Reporting by Businesses of Bribery Offences, paras. 4-5.

49 Phase 2 Report, paras. 109-114 and Follow-up Issue 8(b).

Commentary

The lead examiners commend the UK's commitment to update the 2008 MOU. The revised MOU should clarify attribution rules for Scotland, and account for the Bribery Act's broader jurisdictional rules. After the on-site visit, the SFO undertook to liaise with other agencies to revise the MOU.

(ii) *Cases Investigated by the Financial Services Authority*

90. As noted earlier (p. 25), the FSA enforces its rules and principles against regulated financial institutions. In some cases, the SFO may have an interest in investigating or prosecuting a matter that the FSA considers for investigation, e.g. when a breach of the FSA's rules and principles stems for conduct related to foreign bribery. In such cases, Guidelines in Annex 2 of the FSA Enforcement Guide set out which agency should investigate and how agencies should co-operate. (The FSA did not sign the MOU since it is not directly responsible for investigating foreign bribery.) The Guidelines list factors tending towards FSA action, including where possible criminal offences are technical or in a grey area but regulatory breaches are clear; the alleged misconduct could affect market confidence; the likely defendants are subject to the FSA's jurisdiction or listed companies; and assistance may be sought from the FSA's counterparts in a foreign country. Some factors pointing towards intervention by the SFO include where serious or complex fraud is the predominant issue; where the misconduct would best be dealt with by criminal proceedings; and where powers of arrest are likely necessary.

91. The SFO explained that it declined to take *Willis* because it believed that a company could be fined more heavily by the FSA for insufficient internal controls than by a criminal court for foreign bribery. This factor is not mentioned in the Guidelines. Furthermore, the basis for this belief is unclear. The SFO also believed that a criminal investigation and prosecution would take many years, much longer than proceedings by the FSA. The FSA ultimately fined Willis GBP 9.85 million for failure to maintain adequate internal controls, which was reduced to GBP 6 895 million because of an early settlement. By contrast, the SFO's foreign bribery enforcement actions have resulted in financial penalties of up to GBP 12 million. This casts some doubt over the SFO's belief that the company would be fined less heavily if it took conduct of the investigation instead of the FSA.

92. The SFO should ensure that it investigates allegations of foreign bribery regardless of whether the FSA takes action. The FSA stated at the on-site visit that its penalty in *Willis* addressed the company's lack of sufficient internal controls. The FSA did not seek to determine whether the company's business during the relevant period was corrupt. Nevertheless, it concluded that there was a risk that bribes may have been paid to foreign officials (*Willis* Final Notice, para. 4.3). Despite this finding, the SFO did not consider investigating whether the company or any individuals should be criminally investigated and/or prosecuted for foreign bribery. Part of the misconduct in *Aon* was also unpunished because it fell outside the FSA's jurisdiction.⁵⁰

Commentary

The lead examiners support the UK's use of criminal, civil and administrative measures in foreign bribery cases. However, these measures are not necessarily mutually exclusive. Furthermore, irrespective of the type of measures, all foreign bribery allegations must be seriously investigated, and effective, proportionate and dissuasive sanctions must be imposed when allegations are proven.

50 *Willis* FSA Final Notice paras. 4.3, 4.31 and 6.9; *Aon* Final Notice, para. 2.4(3).

The lead examiners therefore recommend that the UK ensure that these two requirements are met when foreign bribery-related cases are accepted by FSA for investigation. The SFO and FSA should conduct co-ordinated enforcement actions where appropriate. The FSA's fines also may not fully reflect the gravity of the criminality in a case, given that it does not have a mandate to impose sanctions for foreign bribery. In such cases, additional criminal and civil sanctions should be imposed.

b) Commencement of Prosecutions

93. The decision of whether to prosecute a suspect is governed by a two-stage test in the Code for Crown Prosecutors (the Full Code Test). A prosecution may begin only if there is sufficient evidence to provide a realistic prospect of conviction against each suspect on each charge. If this evidential test is met, then a prosecution may begin only if it is in the public interest. Three documents provide non-exhaustive lists of public interest factors that tend in favour of or against prosecution in foreign bribery cases.⁵¹ None of the factors is conclusive; a prosecutor must weigh all factors relevant to a particular case.

94. One factor that tends against prosecution is when a conviction is likely to have adverse consequences for the company under European Law, in particular mandatory exclusion from EU public procurement contracts.⁵² The UK authorities explained that this reference was meant to address cases involving offences “of a relatively minor nature” where exclusion would have a disproportionate effect. Participants at the on-site visit stated that mandatory exclusion has deterred prosecutors and companies from reaching criminal plea agreements. Some practising lawyers described the rule as well-meaning but counterproductive. As noted below (p. 57), the Bribery Act offence of failure to prevent bribery does not result in mandatory exclusion, nor do the SFO’s civil settlements of foreign bribery cases.

95. The prosecution of offences under the Bribery Act in England and Wales requires the consent of a Director of prosecution (e.g. SFO Director or Director of Public Prosecutions). Prosecution under the pre-existing legislation required the consent of the Attorney General (AG). In Scotland, decisions to prosecute under the Bribery Act are taken by Crown Counsel on behalf of the Lord Advocate. At the time of this report, all of the concluded and on-going criminal foreign bribery enforcement actions by the SFO were and are under pre-Bribery Act legislation.

Commentary

The lead examiners recommend that the UK consider removing the reference in the Code for Crown Prosecutors to mandatory exclusion from EU public procurement contracts.

c) Choice of Charges

96. A prosecutor’s discretion extends to deciding which criminal and/or civil charges should be laid against a defendant. In Phase 2 (Follow-up Issue 8(e)), the Working Group decided to follow up “the possible effect of the tendency to simplify cases and to use alternative charges on the implementation of the Convention in the UK”.

51 Documents include the Code for Crown Prosecutors, Corporate Prosecution Guidance, Joint Prosecution Guidance under the Bribery Act, and the SFO Approach to Overseas Corruption.

52 Corporate Prosecution Guidance paras. 32(g) and 34.

(i) *General Considerations*

97. According to the Code for Crown Prosecutors (Section 6.1), prosecutors should select charges which (a) reflect the seriousness and extent of the offending supported by the evidence; (b) give the court adequate powers to sentence and impose appropriate post-conviction orders; and (c) enable the case to be presented in a clear and simple way.

98. Additional guidance from the AG concerns when civil asset recovery proceedings should be commenced.⁵³ The Guidance states that “[t]he reduction of crime is in general best secured by means of criminal investigations and criminal proceedings”, since “criminal disposal will generally make the best contribution to the reduction of crime.” Proceedings for non-conviction based recovery (*e.g.* civil recovery orders) may also be taken where (a) it is not feasible to secure a conviction, (b) a conviction is obtained but a confiscation order is not made, or (c) a relevant authority is of the view that the public interest will be better served by using those powers rather than by seeking a criminal disposal. The authorities may agree to accept a reduced sum in satisfaction of a civil recovery claim if it is satisfied that (a) the sum is reasonable in light of all relevant circumstance, and (b) accepting the reduced sum would not damage public confidence.

99. *M.W. Kellogg* is an example in which a civil recovery order was sought because criminal prosecution was not feasible due to insufficient evidence, according to the SFO. The defendant company was not party to the actual bribery, but was merely used to channel the illicit gains to its parent company. It should be noted, however, that the facts in *M.W. Kellogg* predated the Bribery Act. The Act’s new corporate offence of failure to prevent bribery does not require the identification theory to establish corporate guilt. This should lessen the need to resort to civil recovery orders in the future.

(ii) *Double Jeopardy*

100. The doctrine of double jeopardy in the UK prevents a criminal prosecution in at least two situations. First, a person may not be convicted twice of the same offence based on substantially the same facts. Second, barring special circumstances, a person should not be tried for an offence based on facts that are the same, or substantially the same, as those in a previous trial. These principles apply equally if the earlier conviction or trial occurred in a foreign jurisdiction. However, a prior criminal conviction or trial would not bar subsequently civil proceedings.⁵⁴ In some jurisdictions, a defendant may enter into a deferred prosecution or non-prosecution agreement which results in sanctions without a formal conviction. According to the SFO, such agreements are tantamount to convictions for the purpose of double jeopardy.

101. After receiving legal advice, the SFO took the view that the principal objection to obtaining a criminal conviction for foreign bribery in two cases was the doctrine of double jeopardy. In *DePuy*, the defendant’s parent company entered into a deferred prosecution agreement with the US authorities based on charges of foreign bribery and conspiracy to commit foreign bribery. In co-ordination with the US authorities, the SFO sought a civil recovery order against the company in respect of the same conduct. In relation to investigations into BAE Systems, the company paid commissions to third party agents in connection with arms sales. There was a high probability that part of the payments would be used to ensure that BAE was favoured in the award of the contracts, according to US court documents. BAE pleaded

53 Attorney General Guidance to Prosecuting Bodies on Their Asset Recovery Powers under the Proceeds of Crime Act 2002, issued 5 November 2009. See also Background and Summary of Guidance on Asset Recovery 2009 issued by the Home Secretary and the AG under POCA Section 2A.

54 *Connelly v. DPP*, [1964] 2 All E.R. 401 (H.L.); *R. v. Beedie*, [1998] Q.B. 356 (C.A.); *R. v. Aughet* (1918), 13 Cr. App. Rep. 101; *R. v. Green*, [1993] Crim LR 46 (C.A.); Sprack (2011), *A Practical Approach to Criminal Procedure*, 17.42-17.61; and SFO Operation Manual: “Double Jeopardy”.

guilty in the US to, among other things, failure to disclose these commissions as required under US export licensing laws. Taking into account the size of the commissions, the court imposed a fine of USD 400 million. The SFO, in co-ordination with the US Department of Justice, decided not to charge BAE with committing foreign bribery in the Czech Republic and Hungary, or to re-open the Al Yamamah investigation (see p. 39). The SFO instead laid a charge of failure to keep adequate books and records relating to a contract in Tanzania. The SFO explained that it did not pursue a civil recovery order for foreign bribery against BAE because of the size of the fine imposed in the US.

(iii) *Self-Reporting by Companies*

102. The SFO's written policy encourages companies to self-report foreign bribery by enticing them with the prospect of civil recovery. Upon receiving a self-report, the SFO will assess the company against a set of criteria, such as whether the Board is genuinely committed to resolving the issue; whether the company is prepared to work with the SFO on the scope and handling of any additional investigation; and whether the company is prepared to discuss how to resolve the case. If these criteria are met, then the SFO would settle the case "civilly wherever possible", unless the company's Board members had engaged personally in the wrongdoing. The Scottish authorities have established a similar self-reporting programme for 12 months ending in June 2012.⁵⁵ At the time of this report, the SFO had received 28 self-reported cases, 22 of which occurred after July 2009 when the SFO issued its written policy on self-reporting.

103. The SFO may also require a self-reporting company to investigate the allegations itself. After receiving a report, the SFO would discuss with the company whether further investigation is necessary. If undertaken, this investigation would be carried out by the company's professional advisers at the company's expense "wherever possible". The scope of the investigation would take into account the investigation's cost and impact on the company's business.⁵⁶ In one case, a company's lawyers provided the SFO with a verbal report of an investigation and supporting documents on a confidential basis. The SFO decided that it did not have jurisdiction and referred the matter to authorities elsewhere.

104. The SFO's definition of "self-reporting" may be overly generous, however. The corporate defendant in *Macmillan* was considered to have self-reported, even though the SFO first learned of the case after a referral from the World Bank. The City of London Police also executed search warrants before the company contacted the SFO. Considering a defendant in such circumstances to have self-reported would not further the goal of enhancing the detection of foreign bribery cases. After the on-site visit, the SFO acknowledged this point and agreed to revisit the policy set out in its Approach to Dealing with Overseas Corruption.

Commentary

The lead examiners recognise the SFO's policy of encouraging companies to self-report foreign bribery by settling these cases civilly. However, the policy should distinguish between cases where the SFO first learns of the allegations of wrongdoing directly from a company, and where a company admits guilt after an investigation has begun. The latter category should usually be accorded less mitigating effect if the self-report policy is to enhance the detection of foreign bribery. The SFO's Approach to Dealing with Overseas Corruption should be amended to reflect this distinction.

55 SFO's Approach to Dealing with Overseas Corruption, paras. 4 and 5; Corporate Prosecution Guidance para. 32(a); Guidance on the Approach of the Crown Office and Procurator Fiscal Service to Reporting by Businesses of Bribery Offences.

56 SFO's Approach to Dealing with Overseas Corruption, paras. 11-13.

(iv) *Seeking Civil Recovery Orders when Criminal Sanctions Are Available*

105. Civil recovery orders alone are *prima facie* insufficient when additional criminal penalties are available. If confiscation is the only sanction imposed, then the defendant is merely returned to the position he/she would have been in had the crime not been committed. Additional criminal penalties, if available, should thus be imposed as deterrence.

106. There is support for the proposition that confiscation alone is not an effective, proportionate and dissuasive sanction when additional criminal penalties are available. The court in *Innospec* stated that the public interest and the principle of deterrence require foreign bribery to be punished “irrespective of whether it has produced a benefit”. In *Mabey & Johnson*, the court held that fines should be preferred to confiscation because of general deterrence. Guidance issued by the AG (see above) acknowledges that criminal sanctions have greater deterrent effect than civil recovery proceedings. The Convention (Article 3) also requires both punitive and confiscatory sanctions to be available for foreign bribery.

107. Furthermore, as a matter of principle, foreign bribery is criminal conduct and thus should attract the stigma of a criminal conviction where possible. As the court in *Innospec* (para. 38) observed:

[...] Those who commit such serious crimes as corruption of senior foreign government officials must not be viewed or treated in any different way to other criminals. It will therefore rarely be appropriate for criminal conduct by a company to be dealt with by means of a civil recovery order; the criminal courts can take account of co-operation and the provision of evidence against others by reducing the fine otherwise payable. It is of the greatest public interest that the serious criminality of any, including companies, who engage in the corruption of foreign governments, is made patent for all to see by the imposition of criminal and not civil sanctions. It would be inconsistent with basic principles of justice for the criminality of corporations to be glossed over by a civil as opposed to a criminal sanction.

108. The SFO’s approach to settling self-reported foreign bribery cases “civilly wherever possible” without also seeking criminal prosecution and sanctions may thus be unsound. The SFO proceeded civilly against M.W. Kellogg because it considered that it had insufficient evidence to proceed criminally. As for DePuy, the SFO proceeded civilly because it took the view that it was barred by double jeopardy concerns. In cases such as these where the SFO believes that it cannot proceed criminally, the reason why a civil recovery order was sought should be explained, which was not done in *Balfour Beatty*. However, if criminal penalties are available in addition to a civil recovery order, then they should be sought to ensure that the overall sanctions are effective, proportionate or dissuasive.⁵⁷ Companies that self-report should be rewarded with reduced – rather than a total absence of – criminal penalties.

Commentary

The lead examiners consider civil recovery orders to be a useful remedy in foreign bribery enforcement actions, but they caution against its possible overuse. They therefore recommend that the policy of systematically settling self-reported foreign bribery cases “civilly wherever possible” should be reconsidered. They further recommend that the UK ensure that self-reported cases are resolved in a manner consistent with the Convention. When a civil recovery order is used because criminal sanctions are unavailable, the UK should make public the

57 An NGO recently recommended a “full review of whether the current procedures governing civil settlements are sufficiently robust and transparent”, clear criteria for when civil recovery should be pursued, and a protocol on how civil settlement negotiations are conducted (Transparency International UK (2012), *Deterring and Punishing Corporate Bribery: An Evaluation of UK Corporate Plea Agreements and Civil Recovery in Overseas Bribery Cases*, Recommendation 13-15).

reasons for doing so, where appropriate. After the on-site visit, the SFO undertook to review its policy on self-reporting.

(v) *Proceedings against Related Natural and Legal Persons*

109. The Corporate Prosecution Guidance (para. 8) recognises the importance of prosecuting both natural and legal persons who are culpable in a case. The SFO's Approach to Foreign Bribery (paras. 6-7) adds that whether individuals would be prosecuted depends on factors such as the involvement of the individuals; the action taken by the company; whether individuals benefitted financially; whether the individuals could be subject to other sanctions such as professional disciplinary action, disqualification from acting as company directors, or be subject to a Serious Crime Prevention Order. Guidance applicable in Scotland provides that it may "not be in the public interest to allow a business to self-report and reach a civil settlement but prosecute individuals connected to the business, though there maybe exceptions."⁵⁸

110. In practice, a few individuals have been prosecuted after an enforcement action with a company has been settled and *vice versa*. Sanctions against both an individual and a company were imposed in only one case (*DePuy / Dougall*). Individuals were not investigated in *Macmillan* and *Balfour Beatty*, or the two cases conducted by the FSA (*Aon* and *Willis*). Under the *BAE Tanzania* plea agreement, the SFO agreed not to prosecute any person except for conduct connected with the Czech Republic or Hungary. Charges were dropped against an alleged BAE intermediary in Central Europe. In *Mabey & Johnson*, the company's directors were prosecuted and convicted of breach of UN sanctions in Iraq but not foreign bribery. The UK decided that it was not in the public interest to further prosecute them for foreign bribery committed in Jamaica and Ghana. Individuals in *M.W. Kellogg* were extradited to the US. Shortly after the on-site visit, three officers of Innospec were charged in the UK.

Commentary

To achieve the necessary deterrent effect, the lead examiners recommend that the UK continue prosecuting both natural and legal persons in a foreign bribery case whenever appropriate. The lead examiners note that this is a horizontal issue that affects many other Parties to the Convention.

d) *SFO Advice to Specific Companies*

111. Recently the SFO has begun to discuss specific foreign bribery-related issues with individual companies, which appears to have been very well-received by the private sector. According to the SFO Director, "[c]ompanies come and talk to us about their anti-corruption policies and what they are doing. [...] What we do is to give any advice that we might have to the company and we leave it to the company to get on and do what it thinks is right."⁵⁹ The advice relates to either a specific transaction or a company's measures to prevent bribery. The adoption of this advisory role reflects a change in the SFO's priority away from law enforcement.

(i) *SFO Advice Concerning Specific Transactions*

112. The SFO has issued written guidance stating that it would indicate whether it would prosecute foreign bribery that is discovered during a corporate merger or acquisition. The guidance states that a corporate group X that is considering taking over another group Y may discover, during due diligence, that

58 Guidance on the Approach of the Crown Office and Procurator Fiscal Service to Reporting by Businesses of Bribery Offences, para. 12.

59 SFO Director's Speech to Kingsley Napley & Carmichael Fisher (21 June 2011).

there are foreign bribery issues in Y. Upon X's request, the SFO would give an assurance of whether it would prosecute the case if the merger or acquisition went ahead. In particular, the SFO would undertake not to prosecute if X takes the necessary remedial action to improve Y's corporate culture, and undertakes to keep the SFO informed about progress. Prosecution might be considered, however, if the corruption was long lasting and systemic.⁶⁰

113. The SFO's advisory role appears to also apply to situations unrelated to mergers and acquisitions. In one example, a company had a profitable wholly-owned subsidiary that operated in a corruption-rife country. The government of the country told the company that, if the company wished to continue to do business, then the company should transfer a 51% interest in the subsidiary to the family of the President. Upon being approached by the company's board, the SFO Director stated that he "would have no intention of [investigating and prosecuting] the case whatsoever [...] even if technically the transfer of the interest in the subsidiary constituted a bribe".⁶¹

114. After the on-site visit, the SFO explained that it provides "guidance" on facts which have taken place and been revealed. It offers companies its views in broad terms on the approach that it would likely take, while stating that it would not guarantee that it would not prosecute. The SFO would be held to the guidance it provides if the company has made full disclosure of all relevant material. The SFO would also reserve the right to take action against individuals.

115. Prosecutors in some Parties to the Convention also provide opinions to specific companies upon request, but the SFO's approach differs in several respects. First, the SFO's process concerns how it would exercise prosecutorial discretion. It is not limited to a legal opinion on whether a particular transaction violates the law. Second, the SFO process covers not only prospective but also past conduct. In essence, the SFO enters into a *de facto* non-prosecution agreement by undertaking not to prosecute past conduct if certain conditions are met. Third, the process is not transparent. There is no public information on the factual situations that have been discussed or the SFO's opinion of those situations. Finally, the procedure is not well-defined. For example, there is no stated requirement that a request for guidance or the guidance itself to be in writing.

(ii) *SFO Opinions on Corporate Procedures to Prevent Bribery*

116. The SFO has also invited companies to discuss its approach to the application of the offence in Section 7 of the Bribery Act, namely failure to prevent bribery and whether a company has adequate procedures to prevent bribery. The SFO will examine the culture within a company and take into account a non-exhaustive list of factors, such as whether the company has put in place measures such as a clear and visible statement of an anti-corruption culture; a code of ethics; policies on gifts, hospitality, facilitation payments, political contributions, lobbying; a due diligence policy for retaining third party agents; and mechanisms to implement, enforce and update these measures. The SFO would also look at whether the company has previous cases of corruption and, if so, the effect of any remedial action.⁶²

117. Two other Parties to the Convention provide opinions on whether a specific company has adequate procedures to prevent foreign bribery, but with some important differences from the SFO. First,

60 SFO Approach to Overseas Corruption, paras. 16-20; SFO Director's Speech, "Private Equity and the UK Bribery Act", hosted by Debevoise & Plimpton LLP (21 June 2011).

61 Speech by SFO Director to the Corporate Investigations Group (12 February 2010) (see www.sfo.gov.uk). The SFO Director has subsequently explained that the case would not be investigated and prosecuted because of unusual circumstances, namely duress, extortion and enforced nationalisation.

62 SFO Approach to Dealing with Overseas Corruption, para. 22.

opinions are only available before misconduct in the company has been uncovered. Opinions are therefore again available for prospective but not past misconduct. Second, the opinions are provided by a certified private entity or a government department. This avoids putting the prosecutor in the position of being the company's legal advisor and thus in a potential conflict of interest. Third, the procedures in these countries state that prior approval of a company's bribery prevention measures does not in and of itself preclude subsequent prosecution and liability. It is not clear whether the SFO opinions are similarly qualified.⁶³ After the on-site visit, the SFO stated that it does not give a company an assurance that its procedures are adequate.

Commentary

The lead examiners are concerned about the SFO's practice of giving advice to companies concerning specific transactions and procedures to prevent bribery. First, the current practice blurs the line between the SFO's advisory and enforcement roles. The SFO may undertake not to prosecute a company for past conduct if certain conditions are met. In essence, the SFO enters into de facto non-prosecution agreements in these cases. It thus plays a different role from giving advice to companies about future conduct. Second, non-prosecution agreements are not in and of themselves objectionable, but in principle they should have the same degree of transparency and accountability as with criminal plea agreements and civil settlements. The Working Group also needs information about these de facto non-prosecution agreements to determine their conformity with the Convention. The SFO should also be more transparent when giving advice to companies about future conduct.

For these reasons, the lead examiners recommend that the SFO establish clear procedures and criteria for communicating with companies concerning prospective and past conduct. Such procedures should clearly distinguish between companies seeking advice and those who self-report wrongdoing. Requests for advice and the advice itself should be in writing and made public. Where the communication concerns self-reporting, agreements not to prosecute and their factual basis should also be set out in writing. This information, and an explanation of why the SFO decided not to prosecute, should also be made public where appropriate.

e) Article 5 of the Anti-Bribery Convention

118. Article 5 of the Convention states that “[i]nvestigation and prosecution of the bribery of a foreign public official shall [...] not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved.” Commentary 27 of the Convention adds that prosecutorial discretion should be exercised on the basis of professional motives and is not to be subject to improper influence by concerns of a political nature.

119. In the past, the Working Group raised several concerns about the implementation of Article 5 in the UK. In particular, the Working Group was of the view that the Article should: (a) be legally binding in UK law; (b) apply to all stages of a foreign bribery investigation and prosecution and all individuals who may be involved; and (c) also apply to Shawcross Exercises.⁶⁴

63 See Chile Phase 1ter Report, paras. 23-33 and Annex 1; and Italy Phase 2 Report, paras. 176-180.

64 Phase 2 Report paras. 164 and Recommendation 5(a); Phase 2bis Report paras. 94-108 and 169, and Recommendations 4(a) and 4(b).

(i) *Legal Status of Article 5 in UK Domestic Law*

120. An overriding issue is that Article 5 does not have binding force in the UK. International conventions to which the UK is party do not automatically form part of the UK's domestic legal order; they must be implemented at the national level. The Phase 2bis Report (para. 99) accordingly noted that Article 5 needs "to be clearly binding in the UK domestic sphere (although not necessarily through legislation)".

121. The UK has issued prosecutorial guidance on this issue. In 2008, the UK revised the Crown Prosecution Service Guidance (previously the CPS Manual) to prohibit CPS prosecutors from considering Article 5 factors in foreign bribery cases. However, this Guidance does not apply to the SFO. Subsequently, the UK issued the Corporate Prosecutions Guidance and Joint Prosecution Guidance. Both refer to Article 5 and, unlike the CPS Guidance, apply to the SFO.

122. Unfortunately, the prosecutorial guidance does not legally bind all prosecutors from considering Article 5 factors in foreign bribery cases. Prosecutors are required to consider the guidance. However, the guidance does not have the force of law. Furthermore, the Corporate Prosecutions Guidance and Joint Prosecution Guidance do not expressly *prohibit* consideration of Article 5 factors in foreign bribery cases; they state that: "Prosecutors dealing with bribery cases are *reminded* of the UK's commitment to abide by Article 5" (emphasis added). It is thus debatable whether a prosecutor who considers Article 5 factors would be in breach of the Guidance. The CPS Guidance contains prohibitive language by requiring prosecutors to "ensure that they are not influenced in the negative by [Article 5 factors]", but it does not apply to the SFO.

123. A further concern relates to the Code for Crown Prosecutors. According to the Code, one public interest factor that tends against prosecution is where "a prosecution may require details to be made public that could harm [...] *international relations* [...]". The Working Group has expressed concerns that this provision may be read to be inconsistent with Article 5 and thus recommended that the Code be amended (Phase 2 Recommendation 5(a)). The UK has not done so. As in Phases 2 and 2bis, the UK strongly indicated during the Phase 3 on-site visit that the Code applies to all criminal offences and hence there is no need for it to refer to Article 5.

(ii) *Application of Article 5 to Relevant Actors and Stages of Foreign Bribery Investigations*

124. Phase 2bis Recommendation 4(a) asked that the UK ensure that Article 5 applies effectively to all stages of a foreign bribery investigation or prosecution. The Report (para. 169) noted that some UK officials had suggested that Article 5 might not apply for the purposes of taking an "early view" on the viability of an investigation. The Recommendation also asked to the UK to ensure that Article 5 applies to all individuals who could play a role in foreign bribery investigations and prosecutions, including the SFO, police and AG.

125. The SFO is responsible for making an early assessment of the viability of an investigation (see p. 27). At this stage, SFO prosecutors are bound to consider the Corporate Prosecutions Guidance and Joint Prosecution Guidance. However, as discussed earlier, these two documents contain language that does not strictly in law prohibit a prosecutor from being influenced by Article 5 factors.

126. A further shortcoming is that the prosecutorial guidance documents apply only to prosecutors. They do not apply directly to the police, such as the City of London Police or the Ministry of Defence Police. The UK states that the police have been informed through training that prosecutors would apply the JPG. Nonetheless, in some circumstances the police may investigate foreign bribery cases independently without the supervision of a prosecutor.

127. The guidance also does not apply to the AG. While the AG is no longer required to consent to foreign bribery prosecutions under the Bribery Act, he retains the power to direct specific cases (including foreign bribery) where necessary to safeguard national security.⁶⁵ At the time of this report, the SFO also has several ongoing investigations governed by the legislation that existed before the Bribery Act. Therefore, the consent of the AG would be required to prosecute these cases since the Bribery Act is not retrospective. At the on-site visit, the AG's representatives stated that the AG considers himself bound by Article 5, as was the case during the BAE Al Yamamah investigation. After the on-site visit, the UK added that "any decision of the AG to ignore the JPG in the exceptional circumstance outlined, or to act contrary to Article 5 where AG consent is required, could be judicially reviewed."

128. Finally, the prosecutorial guidance referring to Article 5 noted above does not apply in Scotland. The UK states that the independence of the Scottish Lord Advocate is enshrined in Section 48(5) of the Scotland Act 1998. Prosecutors dealing with the Bribery Act would be made aware of Article 5. There was no information on when and how this would be done, or whether Article 5 would be made legally binding in Scotland.

(iii) *Article 5 and Shawcross Exercises*

129. Under UK practice, the AG may conduct a Shawcross exercise to seek information from Ministers that is relevant to the decision of whether the public interest requires a prosecution. The responsibility for the eventual decision rests with the AG (in any case which requires his consent to prosecute) or with the relevant Director of prosecution. The same applies to the Lord Advocate in Scotland. The Phase 2bis Report (paras. 147-155) noted that Ministers who were consulted during the BAE Al Yamamah investigation made submissions based on factors prohibited under Article 5. Recommendation 4(b) accordingly asked that the UK ensure that all relevant parts of the government are fully aware of their duty to respect the principles in Article 5. After Phase 2bis, the AG and the prosecuting departments (including the SFO) signed a Protocol that applies to Shawcross Exercises. But the Protocol does not refer to Article 5 since it is of general application, according to the AG's representatives at the on-site visit. The AG's representatives added that the AG considers himself bound by the Protocol, and that decisions by the AG under the Protocol are judicially reviewable. However, as noted earlier, Article 5 does not have the force of law in the UK.

Commentary

As the Working Group noted, Article 5 needs "to be clearly binding in the UK domestic sphere (although not necessarily through legislation)". Since Phase 2bis, the UK has issued guidance to prosecutors concerning Article 5. Article 5 is still not legally binding in the UK. The Guidance also does not apply to all relevant actors, and does not strictly prohibit consideration of Article 5 factors. The lead examiners therefore reiterate the Working Group's views in Phases 2 and 2bis. They recommend that the UK (a) take steps to ensure that Article 5 is clearly binding on investigators, prosecutors (including in Scotland), the AG and the Lord Advocate at all stages of a foreign bribery investigation or prosecution, and in respect of all investigative and prosecutorial decisions, and (b) ensure that all relevant parts of the government are fully aware of their duty to respect the principles in Article 5, so that they can assist investigators and prosecutors to act in accordance with that Article.

65 Protocol between the Attorney General and the Prosecuting Departments, Section 4(b).

f) ***BAE Al Yamamah and BAE Tanzania***

130. In December 2006, Saudi officials threatened to cease co-operation with the UK on intelligence and security issues if the UK continued to investigate allegations that BAE Systems had bribed Saudi officials to win the Al Yamamah jet fighter contract. The then-SFO Director terminated the investigation on grounds of national security. The Phase 2bis Report noted that the Saudi threat to withdraw co-operation may evolve over time. The Working Group accordingly recommended that UK “consider re-opening the Al Yamamah investigation if the UK were satisfied that the circumstances that led to the decision to discontinue the investigation sufficiently changed” (Phase 2bis paras. 136-168 and Recommendation 5(e)).

131. In February 2010, the SFO entered into an agreement under which BAE agreed to plead guilty to accounting misconduct in relation to a contract in Tanzania. Several terms of the agreement barred re-opening of the Al Yamamah investigation:

6. *The SFO shall not prosecute any person in relation to conduct other than conduct connected with the Czech Republic or Hungary.*

8. *There shall be no further investigation or prosecutions of any member of the BAE Systems Group for any conduct preceding 5 February 2010.*

9. *There shall be no civil proceedings against any member of the BAE Systems Group in relation to any matters investigated by the SFO.*

132. During this evaluation, the UK explained that the Al Yamamah investigation could not be re-opened, in the view of the SFO, primarily because a plea agreement between BAE Systems and the US authorities prevented a prosecution on the grounds of double jeopardy. The UK also stated that, if the Al Yamamah investigation were now reopened, BAE would challenge the investigation on grounds of abuse of process, given the wording of the agreement. The SFO Director therefore stated that he could not legally re-open the case. The SFO worked on the assumption that the national security concerns surrounding the Al Yamamah discontinuance continued to apply at the time of the settlement. The SFO did not, however, conduct a reassessment of these concerns. The SFO did not believe that it was appropriate to seek a civil recovery order because of the size of the fines imposed on BAE in the US.

133. Paragraph 8 of the plea agreement also appears to release the company from liability for all prior conduct, including that unknown to the SFO. The sentencing court expressed “surprise” at this “blanket indemnity” and noted that the company’s simultaneous plea agreement with the US authorities did not contain a similar provision.⁶⁶ The SFO disagrees with this interpretation. It referred to correspondence from BAE’s counsel confirming that BAE “would not dispute that paragraph 8 should properly be interpreted as meaning that the SFO will not prosecute our client’s group in relation to matters which were the subject of its investigation or of which the SFO was otherwise aware before the date of the settlement.”

Commentary

The lead examiners are disappointed that the UK did not consider re-opening the Al Yamamah investigation. In Phase 2bis, the Working Group recommended that the UK do so if circumstances that led to the case’s discontinuance change. At a minimum, the UK should have reassessed the national security issues surrounding the discontinuance before BAE’s settlement with the US authorities. This could have allowed the UK to re-open the Al Yamamah investigation before any double jeopardy concerns of the SFO arose. The lead examiners further recommend that the UK ensure that its settlement agreements are not

66 *BAE Tanzania*, Court’s Sentencing Remarks, para. 5.

overbroad, including by explicitly reserving the right to prosecute the defendant for conduct unknown to the UK authorities at the time of settlement.

g) Resources and Priority

134. The SFO's budget has decreased from GBP 53.3 million in 2008/9 (which, according to the UK, included ring-fenced funding for two large cases) to GBP 35.9 million in 2010/11. GBP 4.6 million was committed to foreign bribery cases in 2011/12. The budget is forecast to be GBP 31.3 million in 2014-15, which represents an over 40% decrease from 2008/9 without accounting for inflation.⁶⁷ In addition, many SFO staff have left since May 2010 and have taken longer than usual to be replaced because of speculation that the SFO would be replaced by a National Crime Agency (see p. 41).

135. Nevertheless, the SFO Director has not requested more budgetary resources. Pressure on resources may have been reduced, at least in part, by the greater use of plea negotiations, self-reporting and self-investigations by companies, and corporate monitoring. The SFO also declined to investigate two cases after the FSA agreed to take conduct of the cases. The SFO states that it is now more efficient in resolving cases. Since the 2008 Phase 2bis evaluation, its caseload (for all cases, not only foreign bribery) has increased from 65 to over 100. The average time to investigate a case has been reduced from 45 to 24 months. After a charge is laid, it takes approximately 15 months for the trial to begin. The conviction rate has increased from 62% to 84%. The SFO Director has said that: "The challenge for me is not to fight the [budget] cuts in any way but to use them as an opportunity to get more for less in what we do."⁶⁸ At the on-site visit, the SFO stated that it did not have the resources to investigate every allegation and that it must take a balanced approach.

136. A change in priority away from law enforcement may also have reduced budgetary pressures. The SFO has stated that, in foreign bribery cases, "[o]ur emphasis is on helping corporates to develop [a modern corporate] culture and to use enforcement action only where this is necessary and proportionate."⁶⁹ The UK's questionnaire responses add that the priority for small- and medium-sized enterprises is not enforcement but raising awareness of what is needed to build an anti-corruption corporate culture. The SFO's policy of giving advice to rather than prosecuting companies (see p. 34) is consistent with prioritising corruption prevention over enforcement. After the on-site visit, the SFO added that "if [it] were to stop engaging in education, prevention and disruption [*sic.*], no other public body would be likely to do so in its place."

137. Police resources available to the SFO have also decreased. The SFO does not have its own police officers. In Phase 2bis, the 12 officers in the City of London Police Overseas Anti-Corruption Unit (COLP OACU) worked exclusively on foreign bribery cases except in emergencies. After a change in its funding structure, the OACU is now available in foreign bribery cases only when the bribed official is from a developing country. Cases involving developed countries' officials are now drawn from the COLP Economic Crime Department, and must compete for resources with investigations of other types of economic crime. According to the MOU on case attribution and assignment (see p. 27), the SFO may also turn to local police forces for support.

67 SFO Annual Report and Accounts 2010-11, p. 9.

68 SFO Annual Report and Accounts 2010-11, pp. 4 and 8; Questionnaire responses SQ3.8.4 at p. 65; SFO Director's Speeches to the Higher School of Economics, Moscow (15 March 2011) and the Cambridge Symposium (4-11 September 2011).

69 SFO Approach to Overseas Corruption, para. 21. See similar statements emphasising prevention in the SFO's Annual Report 2010/11 (p. 7) and the press release in on the *M.W. Kellogg* settlement.

Commentary

The lead examiners consider that preventing corruption and promoting an anti-corruption corporate culture are equally important as criminal investigations and prosecutions. They also note that the SFO's expertise and statutory mandate is in criminal investigations and prosecutions. The lead examiners therefore recommend that the SFO maintain its role in criminal foreign bribery investigations and prosecutions as a priority. Other relevant UK government departments should take over from the SFO a greater responsibility for assisting companies to prevent corruption.

Commentary 27 of the Convention and 2009 Anti-Bribery Recommendations require adequate resources be provided for effective prosecution of foreign bribery. The lead examiners are also concerned about the SFO's resources and staff turnover. The UK's enforcement of its foreign bribery laws has increased significantly in recent years. Much of this improvement may be attributed to the decision in 2004 to designate the SFO as the lead criminal law enforcement agency for foreign bribery. The SFO's recent improvements in efficiency are partly due to the use of pre-trial resolutions, requiring companies to self-investigate, and allowing cases to be investigated by the FSA instead of the SFO. However, litigation may well increase in the future because of the new Bribery Act, and if the SFO re-focuses on investigations and prosecutions. The lead examiners therefore recommend that the UK take steps to ensure that SFO and police resources for foreign bribery cases are adequate.

h) National Crime Agency

138. In 2011, Home Office published the National Crime Agency (NCA) Plan, setting out the vision for the new agency. The plan aimed to connect the efforts of local policing and neighbourhood action to national agencies and action overseas. The ultimate goal was to improve the UK's response to serious and organised crime, and to strengthen arrangements at the border. The NCA will comprise four distinct Commands, including the Economic Crime Command (ECC). The NCA will have its own operational capability to conduct investigations, including cases with an international dimension. Participants at the on-site visit stated that the NCA will count bribery and corruption within its remit. The NCA and its Director General will be accountable to the Home Secretary and to Parliament. It is expected that the NCA will be operational in 2013, subject to the passage of legislation.

139. After much speculation, the UK government announced that the NCA would not subsume the SFO, but the precise relationship between the two bodies has yet to be defined. The UK government stated that the SFO would work with the ECC but retain its operational independence. The NCA would maintain an overview of the capacity and capability of the specialist agencies that deal with economic crime, including the SFO and COLP. But the precise division of responsibilities in foreign bribery cases remain unclear. An Economic Crime Coordination Board has been established to improve co-ordination between agencies and drive operational progress ahead of the formal establishment of the NCA. Despite these assurances, several participants at the on-site visit speculated that the SFO would eventually be merged with the NCA. At the time of this report, the SFO stated that the status of this issue remained unchanged.

Commentary

The lead examiners recommend that the Working Group follow up the impact of the NCA on the UK's priority, co-ordination, resources and framework for investigating and prosecuting foreign bribery cases.

i) Obtaining Information from the National Audit Office

140. Under Sections 2 and 2A of the Criminal Justice Act 1987, the SFO Director may issue a written notice requiring a person under investigation or any other person to provide relevant information or documents. These powers are extended to the vetting stage for offences under Sections 1 and 6 (but not 7) of the Bribery Act. In Phase 2bis, the SFO stated that it could not use these powers to obtain information from other government departments, including the National Audit Office (NAO). As a result, it was unable to obtain a 1992 NAO report on the accounting arrangements at the Ministry of Defence involving the Al Yamamah transactions. The NAO refused to publish the report or provide it to the SFO, citing Parliamentary privilege. To date, this is the only NAO report that has not been published. The Working Group accordingly recommended that the UK take steps to ensure that the SFO can obtain information held by the NAO (Phase 2bis paras. 228-229 and Recommendation 5(b)).

141. In Phase 3, the UK reversed its position. NAO representatives stated that the SFO can use Section 2 and 2A powers to obtain information from the NAO, and the NAO would comply if served with such notices. The SFO concurred, explaining that Section 2 powers cannot be used against bodies acting on behalf of the UK Central Government. However, the NAO is not such a body, according to the NAO's constituting statute.⁷⁰ In March 2011, the NAO published its report on the BAE Eurofighter Typhoon project. The report deals with the capability, cost and governance of the project. More importantly, the NAO has made this report public, unlike its earlier report on the Al Yamamah transactions.

j) Disclosure

142. The Phase 2bis Report (paras. 243-5 and Follow-up Issue 8(b)) noted that disclosure of evidence by the prosecution to the defence in complex economic crime cases was very labour-intensive and time-consuming. Reviews concluded that the disclosure regime was not suited for these cases. This observation remains true in Phase 3. The UK's questionnaire responses cite management of vast quantities of digital material and the laborious disclosure process as continuing challenges in foreign bribery cases. However, the SFO's recent policy of asking companies to self-investigate could help reduce disclosure. In July 2011, the AG issued Supplementary Guidelines on Disclosure of Digitally Stored Material. These guidelines deal with a number of topics, including a disclosure officer's obligation to inspect retained material such as in large and complex cases. Whether these guidelines would reduce the prosecution's disclosure burden remains to be seen.

Commentary

The lead examiners recommend that the Working Group follow up the impact of the UK's disclosure framework on the enforcement of foreign bribery offences.

6. Money Laundering

143. New money laundering offences in the Proceeds of Crime Act 2002 (POCA) entered into force shortly before the UK's Phase 2 evaluation. The Working Group accordingly decided to follow up the application of these offences, and UK efforts to raise awareness and elaborate guidelines/typologies on foreign bribery (Phase 2 Follow-up Issue 8(c)).

144. There have not been any major amendments to the POCA money laundering offences since Phase 2. Money laundering is covered by the three offences of concealing (Section 327), arrangements (section

⁷⁰ National Audit Act 1983, Section 3(5), which was later repeated in the Budget Responsibility and National Audit Act 2011, Schedule 2, paragraph 2.

328), and acquisition, use and possession (Section 329) of “criminal property”. “Criminal property” is defined as “a person’s benefit from criminal conduct or representing such a benefit” (Section 340(3)). “Criminal conduct” includes conduct which constitutes an offence in any part of the UK, and conduct which would constitute an offence in the UK had the conduct occurred there (Section 340(2)). Additional offences (Sections 330-332) cover a failure to disclose suspected money laundering by individuals in regulated sectors to “nominated officers”, *i.e.*, individuals designated by an employer to receive suspicions of money laundering, or members of staff of the Serious Organised Crime Agency.

145. The POCA money laundering offences “appear to be used frequently”, according to the 2007 Financial Action Task Force (FATF) Mutual Evaluation Report (paras. 135-137). The number of investigations, prosecutions and convictions were also increasing. The Report adds that the conviction rates for money laundering offences are lower than the average of those for other offences. This was expected by the UK authorities, given that money laundering cases involve complex financial investigations, circumstantial evidence, and jury trials.

146. The POCA reporting requirements have continued to generate a large number of suspicious activity reports (SARs). The Financial Intelligence Unit (FIU) of the Serious Organised Crime Agency is responsible for receiving and analysing SARs. The FIU received over 240 000 SARs from September 2009 to October 2010. From April 2010 to March 2011, the FIU disseminated to law enforcement 67 SARs on bribery and corruption, of which 50-60 related to overseas bribery. The SFO also stated that SARs from financial institutions and regulated businesses have been the source of information regarding foreign bribery, though statistics were not available.

147. The UK has made efforts to raise awareness of money laundering issues. SOCA has conducted conferences and workshops, and distributed publications to the UK private sector on emerging dangers and threats to their businesses.⁷¹ The UK has not developed guidelines or typologies covering detection of foreign bribery offences within the money laundering offences. UK officials stated that reporting entities are expected to refer to publicly available material prepared by international organisations such as the FATF’s recent corruption typology, to which the UK contributed. The FSA has also recently published a regulatory guide, which sets out the FSA’s expectations in relation to regulated firms’ anti-bribery and corruption systems and controls, and gives examples of good and poor practice drawn from its supervisory work. They added that the volume of SARs reflects a high level of awareness of money laundering issues among reporting entities.

7. Accounting Requirements, External Audit, and Corporate Compliance and Ethics Programmes

148. This section of the report considers the UK’s implementation of outstanding Phase 2 recommendations concerning accounting standards and reporting by auditors. It also looks at post-Phase 2 developments in corporate compliance, internal controls and ethics programmes among UK companies. False accounting offences and their enforcement are discussed at p. 18 and will not be repeated here.

a) Accounting Standards

149. Phase 2 Recommendation 3(a) requested the UK to clarify and unify its accounting legislation by adopting International Accounting Standards. The Companies Act 1985 required accounting under UK Generally Accepted Accounting Principles and did not allow for reporting under international standards. In 2008, the 1985 Act was replaced by the Companies Act 2006. The 2006 Act allows companies to prepare accounts that provide a “true and fair view of the state of affairs of the company” or accounts “in

71 Serious Organised Crime Agency, Suspicious Activity Reports Regime: Annual Report 2010, at p. 33.

accordance with international accounting standards” (Sections 395(1), 396(2), 403(2)). Publicly-traded companies⁷² must prepare consolidated statements in accordance with these standards.⁷³ Non-publicly traded companies are permitted to record accounts using international accounting standards, but are not required to do so. Recommendation 3(a) has therefore been fully implemented.

150. The UK regime also has a number of additional elements which are relevant to financial crime risks including bribery. In particular, the UK Listing Authority (part of the FSA) sets out additional requirements on companies that have listed equity share capital in the UK. The Authority’s Listing Principles require all such companies to comply with a number of listing principles aimed to ensure the fair treatment of holders and potential holders of its listed equity shares. These principles require the companies to, among other things, act with integrity towards potential or actual shareholders. They also require listed companies to, among other things, produce regular financial reports to provide a fair review of the firm’s business and disclose inside information to the market in a timely fashion. Companies are also required, under threat of criminal sanction, to ensure that statements to the market are not misleading, false or deceptive. The FSA has the remit to bring cases against companies that breach the listing rules.

151. The FSA’s remit to supervise and take enforcement action against firms for system and control failures related to bribery is likely to be expanded next year. The current proposed revisions to the Financial Services and Markets Act envisages that the new Financial Conduct Authority’s statutory objective relating to integrity (including the reduction of financial crime) will be extended to include firms with a listing in the UK, whereas the current Act extends only to those firms authorised by the FSA.

b) *External Auditors’ Duty to Detect Foreign Bribery*

152. UK external auditors are subject to the International Standards on Auditing (ISA), of which two aspects are relevant to detecting foreign bribery. ISA 250A (para. 18) requires auditors to identify material misstatement of financial statements due to non-compliance with laws and regulations. ISA 240 (para. 5) requires an auditor to obtain “reasonable assurance that the financial statements taken as a whole are free from material misstatement, whether caused by fraud or error”.

153. At the on-site visit, representatives of the auditing profession explained that audit programmes are designed to target foreign bribery issues if the company’s risk profile indicates a risk of foreign bribery. To determine the foreign bribery risk of an audited company, auditors are guided by factors such as the amount of sales to governmental bodies, the countries in which companies operate, and the reliance on third party agents and consultants. The programme and organisation of an audit is tailored to address the appropriate foreign bribery risk areas. The UK authorities also reported that seven foreign bribery investigations were triggered by reports received from auditors.

c) *External Auditors’ Duty to Report Foreign Bribery*

154. ISA applies to external auditors’ duty to report foreign bribery to management and corporate monitoring bodies. An auditor must report internally if the auditor “has identified” a fraud or “has obtained information that indicates that a fraud may exist”. An auditor must also report matters involving non-compliance with laws or regulations. In general terms, the auditor shall report the information to the appropriate level of management. If management is believed to be involved in the wrongdoing, then he/she shall report to those charged with the company’s governance. In the case of non-compliance with laws and

72 More specifically, IAS reporting is required for companies that fall within Article 4 of Regulation (EC) No. 1606/2002 of the European Parliament and of the Council of 19 July 2002.

73 Companies Act 2006, Section 399. But publicly traded companies may choose to record specific accounts under the “true and fair” view or UK GAAP standards (Companies Act 2006, Sections 395(1), 399).

regulations, further reports may be made to the next higher level authority (e.g. audit committee or supervisory board) as appropriate.⁷⁴

155. UK external auditors are required to report suspected foreign bribery to law enforcement only if money laundering is also involved. Under the ISAs, an auditor is required to report fraud or non-compliance with laws to regulatory and law enforcement if applicable laws override his/her duty of confidentiality.⁷⁵ One example is the Proceeds of Crime Act 2002, which requires an auditor who knows or suspects money laundering to report to a Nominated Officer, who in turn reports to the Serious Organised Crime Agency. Money laundering is defined as the concealment, disguise, conversion, transfer, or removal of any “benefit from criminal conduct,” including proceeds from bribery. It should be noted, however, foreign bribery does not necessarily involve money laundering, e.g. when foreign bribery does not generate a benefit, or generates a benefit that cannot be laundered.

156. Phase 2 Recommendation 3(b) asked the UK to adopt guidance to clarify the obligation of auditors to report instances of foreign bribery. Guidance has since been issued on reporting money laundering but not specifically foreign bribery. Nevertheless, at the on-site visit and in a written submission to the lead examiners, the UK auditors were well aware of the reporting obligations described above. They were also aware of the SFO’s foreign bribery enforcement actions that concerned false accounting. As noted above, auditors’ reports have led to foreign bribery investigations. Nevertheless, the guidance on money laundering that has been issued sufficiently implements Recommendation 3(b).

d) Corporate Compliance and Ethics Programmes

157. Based on discussions at the on-site visit with the private sector, many large or multinational corporations have implemented compliance and ethics programmes dealing with bribery. Representatives of major companies stated that the enactment of the Bribery Act did not require dramatic alterations to the compliance programmes for these companies. Nevertheless, the Bribery Act and the GCO have led to a heightened awareness among UK companies of the risks surrounding foreign bribery and the importance of compliance programmes. Enforcement actions by the SFO and FSA draw further attention. Panellists recounted that they had received inquiries from shareholders and corporate managers regarding how to handle exposure to corruption risks. Lawyers and auditors estimated that inquiries about bribery risks from major clients had doubled since the enactment of the Bribery Act.

158. By contrast, there appears to be a lack of awareness among small- and medium-sized enterprises (SMEs). As noted at p. 7, roughly 25-30% of UK SMEs are exporters. The Federation of Small Businesses, a business organisation representing approximately 200 000 SMEs, did not receive an increase in the number of inquiries from its members about the Bribery Act. At the on-site visit, lawyers, accountants, auditors and private sector participants commented that many SMEs require a significant amount of assistance to implement an effective compliance programme. Some expressed concern about whether SMEs had adequate resources to implement a corporate compliance programme commensurate with the risks they faced. The UK stated that the GCO was issued partly to address the SMEs’ lack of awareness.

159. The UK Financial Reporting Council publishes the UK Corporate Governance Code, which sets out standards of good practice, requires companies in the UK to have appropriate internal controls and risk management systems. Premium listed companies are required to publish how they comply with the Corporate Governance Code, which may trigger an investigation if there are concerns. The Reporting Council also published guidance in 2005 which made clear that, “Effective financial controls, including the maintenance of proper accounting records, are an important element of internal controls. They help ensure

74 ISA 240 paras. 40-42; ISA 250A paras. 18-24.

75 ISA 240 para. 43; ISA 250A para. 28.

that the company is not necessarily exposed to avoidable financial risks and that financial information used within the business and for publication is reliable. They also contribute to the safeguarding of assets, including prevention and detection of fraud”.⁷⁶

Commentary

The lead examiners recommend that the UK devote significant attention to raising awareness of foreign bribery among SMEs and providing them with additional assistance in developing and implementing effective anti-bribery compliance programmes. They also note that this is a horizontal issue that affects many other Parties to the Convention. They further recommend that the FSA raise awareness of the Listing Principles and the UK Corporate Governance Code.

8. Tax Measures for Combating Bribery

a) Tax Deductibility of Bribes and Enforcement

160. During Phase 2, the tax deduction of any payment, the making of which constitutes the commission of a criminal offence in the UK, was denied under Section 577A of the Income and Corporations Tax Act 1988 (1998 Act). This provision has since been replaced by Section 55 of the Income (Trading and Other Income) Act 2005 and Section 1304 of the Corporation Tax Act 2009. Both Sections expressly deny the tax deduction of payments which constitute a criminal offence, including foreign bribery. The non-tax deductibility of bribe payments is also confirmed in the Business Income Manual (BIM) for Her Majesty’s Revenue and Customs (HMRC), which tax assessors use to evaluate tax returns.⁷⁷ BIM, however, still refers to the 1988 Act and the pre-Bribery Act laws. The UK tax authorities have confirmed that BIM will be updated to refer to the current legislation.

161. Phase 2 Recommendation 3(c) asked the UK to extend the time limits for re-opening a tax return for investigation. In Phase 2, the tax authorities normally had one year from the date a tax return is filed to open enquiries (extended by up to three months for late returns). This period may be extended by up to 20 years in cases of fraudulent or negligent conduct by the taxpayer.⁷⁸ The Working Group was concerned that the one-year base period was insufficient to allow for the detection of criminal activities, such as bribe payments to foreign public officials. Since April 2010, the base period has been increased to four years from the date of the tax return. The time limit is increased to six years in a case of careless misconduct by the taxpayer, and 20 years for deliberate misconduct.⁷⁹ HMRC added that tax deduction of bribes is *prima facie* “deliberate behaviour.”

162. The SFO Director has stressed the importance for auditors to check whether companies are claiming tax deductions for bribe payments.⁸⁰ HMRC stated that it is informed when the SFO initiates or concludes a foreign bribery enforcement action. When enforcement actions are concluded, HMRC would re-examine the tax returns that have been filed by the defendant for the relevant period. If it is revealed that bribes had been deducted from income tax, HMRC would commence proceedings to recover the unpaid tax, interest, and any applicable penalty for submitting an incorrect or inaccurate return.

76 Financial Reporting Council (2005), *Internal Control: Revised Guidance for Directors on the Combined Code*, p. 3, para. 3.

77 Business Income Manual (HMRC) 43125, 43130, 43135, 43140, 43145, and 434150.

78 UK Phase 2 Evaluation, para. 58; see Taxes Management Act 1970, Sections 34 and 36(1).

79 Finance Act 2008, Schedule 39, Sections 7 and 9.

80 SFO Director’s Speech at the 29th International Symposium on Economic Crime (September 2011).

163. In practice, this has never occurred. In *Innospec, Mabey & Johnson* and *DePuy*, the SFO stated that bribe payments were recorded in the companies' accounting records as legitimate business expenditure and hence would have been tax deductible. In *BAE Tanzania*, payments to a third-party marketing consultant were recorded as business expenses for the provision of technical services and were hence *prima facie* tax deductible. The court strongly suggested that some of the payments may have been used to bribe foreign public officials. The UK has further stated that the plea and settlement agreements in these cases do not prevent HMRC from pursuing the defendants for tax deduction of bribes. Nevertheless, HMRC has yet to retroactively deny the deduction of illicit payments in these cases.

Commentary

The lead examiners recommend that HMRC be more proactive in enforcing the non-tax deductibility of bribe payments against the defendants in past and future foreign bribery enforcement actions. HMRC should systematically re-examine the defendants' tax returns for the relevant years to verify whether bribes had been deducted. This is especially important after the conclusion of an enforcement action when there may be proven allegations of bribery. The lead examiners also encourage the SFO to continue sharing information on foreign bribery and related enforcement actions with HMRC.

b) Detection of Bribery

164. The OECD Bribery Awareness Handbook for Tax Examiners has been distributed to HMRC tax examiners. HMRC stated that tax examiners are not specifically trained to detect bribe payments but fraud more generally. Nevertheless, HMRC has uncovered bribe payments during tax examinations but has yet to detect any foreign bribery cases. There was no information on what happened in these instances. A useful method to improve detection, if it is confirmed that bribes have been deducted in these cases, would be for HMRC to examine why it had failed to detect the bribes when the tax returns were initially filed.

Commentary

HMRC should strengthen its training and awareness-raising programmes for tax examiners to detect, prevent and report foreign bribery.

c) Sharing of Tax Information

165. In Phase 2bis, the SFO stated that it could not use its powers under Section 2 of the CJA 1987 to demand information from other government agencies, including HMRC. Section 3(3) of the CJA 1987 only permits (but does not require) disclosure of information subject to statutory secrecy obligations (other than those in an enactment contained in the Taxes Management Act 1970). Phase 2bis Recommendation 5(b) thus asked the UK to take steps to ensure that the SFO can obtain information that may be relevant to a foreign bribery investigation and which is held by other UK government agencies.

166. HMRC's regime for sharing such information has not changed since Phase 2bis. HMRC may (but is not obliged to) disclose information for the purposes of assisting criminal investigations or proceedings whether in the UK or abroad. Secrecy laws do not bar disclosure.⁸¹ HMRC may also make "public interest

81 Anti-Terrorism, Crime, and Security Act 2001, Sections 19 and 20. See also "Anti-Terrorism, Crime and Security Act 2001: Code of Practice on the Disclosure of Information".

disclosures”, e.g. disclosures “to a person exercising public functions, whether in the UK or abroad, for the purpose of preventing or detecting a crime.”⁸²

167. The UK has entered into international agreements to exchange tax information. The UK is a party to the Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters (signed by 32 countries) and the amending Protocol. The amended Convention allows shared tax information to be used in criminal investigations (e.g. for foreign bribery). The UK also has Double Taxation Agreements (DTAs) and Tax Information Exchange Agreements (TIEAs) with 137 jurisdictions. However, apart from a few DTAs (e.g. with the Cayman Islands), none of these agreements allows shared information to be used in criminal investigations without consent. The UK’s policy is to rectify this situation when negotiating future DTAs and renegotiating existing DTAs, such as by including in the agreements language from Paragraph 12.3 of the Commentary to Article 26 of the OECD Model Tax Convention. Similar language is found in the European Council Directive on Administrative Cooperation in the Field of Taxation (2011/16/EU) to which the UK is subject.

Commentary

The lead examiners note that Phase 2bis Recommendation 5(b) remains only partially implemented. They therefore recommend that the UK ensure that HMRC is obliged to provide information for use in foreign bribery investigations upon request. HMRC should also be obliged to report suspicions of foreign bribery to the SFO.

9. International Co-operation

168. This section considers post-Phase 2bis developments in extradition and mutual legal assistance (MLA) in foreign bribery cases, including the evidentiary threshold for granting MLA and extradition (Phase 2 Follow-up Issue 8(f)). The section will also consider outstanding Working Group recommendations that concern the Crown Dependencies (CDs) and Overseas Territories (OTs).

a) Extradition

169. The framework for extradition in foreign bribery cases under the Extradition Act 2003 has not substantially changed since Phase 2. The UK may consider an extradition request absent a formal treaty basis. Dual criminality is required for certain categories of offences and for certain countries. An extradition request cannot be refused on the basis that the person is a UK national or resident. This framework has been applied in foreign bribery cases. The UK has extradited two individuals to the US to face foreign bribery charges, and has extradited a third individual from Australia.

170. The Phase 2bis Report (para. 206-208) expressed concerns over a proposed “forum” bar to extradition. An amendment to the Police and Justice Act 2006 would allow courts to refuse extradition if (1) a significant part of the conduct in respect of which extradition is sought occurred in the UK and (2) it would not be in the interests of justice for the offence in question to be tried in the state requesting extradition. The amendment has been enacted but has not yet entered into force. In October 2011, the UK government published results of an extradition review which found that “the implementation of the forum bar would have a detrimental impact on the scheme of extradition with no corresponding benefit to outweigh the disadvantage”. The review suggested that the Director of Public Prosecutions issue guidance for prosecutors to consider the appropriate forum in extradition matters. At the time of this report, the Government was considering the review panel’s findings.

82 HMRC Internal Disclosure Guide 46050 and 46250; Commissioners for Revenue and Customs Act 2005, Section 20; see also HMRC Internal Disclosure Guide 46300, Annex 2.

Commentary

The lead examiners recommend that the Working Group follow up the implementation of the “forum” bar to extradition.

b) Mutual Legal Assistance Generally

171. MLA requests are governed by the Crime (International Co-Operation) Act 2003. Amendments to the Act in 2006 made available search and seizure for all “indictable offences” under UK law, which includes all Bribery Act offences. The statute does not generally require dual criminality, except where the request concerns fiscal offences or the use of search and seizure powers. The UK does not separately require a treaty to effect mutual legal assistance. Banking secrecy is not a ground for refusing an MLA request.

172. The UK provided some MLA statistics. According to the Home Office, in 2010-2011, the UK received approximately 3 500 incoming MLA requests, of which it is estimated no more than 10% related to bribery and corruption. Precise statistics of outgoing MLA requests were unavailable (since prosecuting authorities send requests directly), but an estimated 75% go to European Union countries. The SFO stated that, in 2010/11, it received 22 requests concerning foreign bribery, of which 14 came from OECD countries. Corresponding data on out-going requests were not available. As of September 2011, the SFO had 41 outstanding outgoing requests involving foreign bribery and other crimes. Since 2006, Scotland has received six and sent at least three MLA requests in corruption and bribery cases.

173. The SFO states that difficulties in receiving MLA have led to the termination or delay of some cases. *Anglo Leasing* was closed because Kenya did not provide MLA despite repeated requests. *Mott McDonald* was terminated in part because the SFO could not gather evidence from Lesotho. The response to MLA requests ranged from an acknowledgement and subsequent allocation within one month to no formal response or acknowledgement for 9 months. Where responses have been delayed, the UK has sought assistance from the UK Central Authority and the Foreign and Commonwealth Office via the appropriate UK mission.

Commentary

The lead examiners recommend that the UK produce more detailed statistics on formal MLA requests received, sent and rejected, so as to identify more precisely the proportion of those requests that concern bribery of foreign public officials. The lead examiners recognise that obtaining effective MLA is a horizontal issue affecting many Parties to the Anti-Bribery Convention. Furthermore, they do not have information from relevant Parties to the Convention on how effectively the UK has responded to their requests for MLA on foreign bribery cases; therefore it is difficult to adequately assess this issue.

c) Ability to Provide MLA after Termination or Settlement

174. The UK’s ability to provide MLA after settling a foreign bribery enforcement action has come into question. The SFO stated that the settlement agreements in *M.W. Kellogg* and *Macmillan* specifically provided that the SFO could conduct further investigations if it receives requests under MLA treaties. There was no corresponding provision in the plea agreement in *BAE Tanzania*. The agreement allowed the SFO to further prosecute “any person” in connection with conduct in the Czech Republic or Hungary. However, it also stated that the SFO “shall forthwith terminate all its investigations into the BAE Systems Group”. Since the settlement, the Czech Republic has complained of difficulties with receiving MLA from

the UK to investigate BAE.⁸³ The SFO has since stated that the plea agreement in *BAE Tanzania* does not preclude MLA. After the on-site visit, the SFO stated that it has provided the requested assistance to the Czech Republic, and that it was also willing and able to assist Tanzanian authorities.

175. A further issue is whether MLA may be provided after an investigation is terminated. The UK questionnaire responses stated that providing MLA in a case where the allegation was found to be unwarranted may constitute an abuse of process. Each case needs to be looked at on its own facts in the context of what the law permits or requires. The UK is aware that concerns have been expressed by more than one country regarding the provision of MLA after the termination of an investigation.

Commentary

Whether and to what extent the UK may provide MLA after an investigation or enforcement action has been terminated or settled is unclear. The lead examiners therefore recommend that the UK explicitly reserve the right to provide MLA in its settlement agreements in foreign bribery-related cases and ensure, where possible, that pending MLA requests are not adversely affected by the UK's conclusion of its own investigations.

d) Crown Dependencies and Overseas Territories

176. The UK has a number of Crown Dependencies (CDs) and Overseas Territories (OTs). Some of these territories are considered offshore financial centres- which can be used to facilitate foreign bribery. The implementation of the Convention in these CDs and OTs is therefore of significant interest with respect to enforcement of foreign bribery and MLA.

(i) Application of the Convention to Crown Dependencies and Overseas Territories

177. The Working Group has recommended that the UK extend the Convention to its CDs and OTs since 1999.⁸⁴ The UK's position on the procedure for doing so has remained largely unchanged. The UK Government is responsible for the OTs internationally, and thus it alone has the authority to ratify Conventions on their behalf. Nevertheless, the general practice has been for the OTs to decide to which treaties they wish to become party. More recently, the UK has funded an independent review to assess whether the OTs' anti-corruption legislation and procedures allow them to seek extension of the Convention.

178. Unfortunately, progress under this procedure has been slow. The Convention has been extended to all three CDs – Isle of Man (2001), Guernsey (2009) and Jersey (2009) – but only one OT: Cayman Islands (2010). The other OTs have made little progress, if any. The UK reported in April 2011 that Anguilla was working on the necessary legislation; no new developments have been reported since. Legislation entered into force in the Turks and Caicos Islands (TCI) in June 2009. That same month, the UK reported to the Working Group that the legislation was “broadly compatible” with the Convention. But in late 2011, the UK stated that it would review the TCI legislation before extension could occur. Gibraltar submitted a draft foreign bribery Bill to the UK for review in 2005 (Phase 2, para. 223). It was not until 2011 that it passed the Crimes Act, which has now been submitted to the UK for review again. In 2006, the British Virgin Islands (BVI) enacted a foreign bribery offence and requested extension of the UN Convention against Corruption. Some five years later, the UK was still waiting for BVI to request extension of the OECD Convention. Just before this evaluation report was adopted, the UK stated that BVI and Montserrat were considering extension of the Convention but no timetable was given. No information

83 Czech Position (23 June 2011), “British PM Pledges Czech Help on Gripen Probe”.

84 See Phase 1 p. 28; Phase 2 Recommendation 6(b); and Phase 2bis Recommendation 5(d).

was provided about Bermuda. The UK considers the remaining OTs not sufficiently significant to justify extension of the Convention.⁸⁵

179. At the on-site visit, the Foreign Commonwealth Office (FCO) stated it continues to “encourage” the OTs to request extension of the Convention. The UK government is also planning to issue a white paper on the government’s policies with respect to OTs. There is no deadline for the paper’s publication, or any commitment that the paper would accelerate the extension of the Convention. Some on-site visit participants suggested that OTs have limited capacity and resources to seek extension. But there were also no plans to improve the OTs’ capacity and resources in this regard.

180. As noted in Phase 2bis (para. 262), the UK can and has extended international treaties to OTs and enacted legislation in these territories over their objection. As recently as 2000, the UK exercised these powers to enact legislation in the OTs to ensure their compliance with international human rights conventions. The UK government intervened after the OTs were given an opportunity to adopt the necessary legislation themselves. After the Phase 3 on-site visit, the UK acknowledged that “from a constitutional perspective” the UK has “unlimited power to legislate for the OTs”. In Phase 2bis (para. 270), the UK stated that it may be “a matter of good policy and administration” to consult the OTs rather than legislate directly. But the Working Group noted that lengthy inaction by the OTs despite consultations should be taken into account in deciding the appropriate policy.

Commentary

The lead examiners believe that the UK must take a much more proactive approach to extending the Convention to the OTs. They therefore recommend that the UK promptly adopt as a matter of priority a roadmap setting forth specific goals, concrete steps and deadlines for implementing the Convention in the OTs. Where necessary, these steps should include the provision of technical assistance and capacity building for OTs on an urgent basis.

(ii) Jurisdiction to Prosecute Legal Persons Incorporated in the CDs and OTs

181. Under both the Bribery Act and its predecessor legislation, the UK does not have nationality jurisdiction to prosecute legal persons incorporated in the CDs or OTs. It does, however, have nationality jurisdiction over natural citizens of the CDs and OTs. This led the Working Group to recommend that the UK establish, for foreign bribery cases, nationality jurisdiction over legal persons incorporated in the CDs and OTs (Phase 2bis Recommendation 3(b) and Phase 1ter para. 89).

182. The differential treatment between natural and legal persons is not due to any legal impediment. In the prior litigation involving BVI mentioned above, the UK government wrote Diplomatic Notes and court briefs stating “in unmistakable terms” that “corporations incorporated under the laws of any of its Overseas Territories are subjects of the United Kingdom.” The UK government stated specifically that the UK has adopted legislation regulating the extraterritorial actions of companies incorporated in OTs. Many of these laws concern areas involving the UK’s international obligations (*e.g.*, anti-terrorism) (Phase 2bis paras. 261-262).

183. At the on-site visit, the UK stated that it may exercise nationality jurisdiction over natural persons of the CDs and OTs because that power has not been devolved to the territories. By contrast, the UK stated that regulation of commerce and business organisations has devolved to the CDs and OTs. This position

85 The Sovereign Base Areas have a Prevention of Corruption Ordinance which was passed in 1920. Their treaty of establishment contains additional provisions concerning the applicable law. The remaining OTs either do not have indigenous populations, or have small populations and no financial sector.

appears inconsistent with those taken by the UK in prior litigation described above. The UK also pointed out that the offence in Section 7 of the Bribery Act applies to a company incorporated in a CD or OT, but only if the company carries on a business or a part of a business in the UK.

Commentary

The lead examiners reiterate the Working Group's Phase 2bis Recommendation 3(b), and recommend that the UK extend the jurisdiction of the Bribery Act to legal persons incorporated in the CDs and OTs.

(iii) Seeking MLA from Crown Dependencies and Overseas Territories

184. Phase 2bis Recommendation 5(b) asked the UK to improve the ability of the CDs and OTs to provide MLA to the UK. In Phase 2bis (paras. 267-268), the SFO reported difficulties in obtaining MLA from the CDs and OTs. Sources of delay included the requirement of formal mechanisms for making requests and the lack of resources in the CDs and OTs. In Phase 3, formal letters rogatory continued to be required for MLA requests to the CDs and OTs. The UK did not provide information on the resources available in the CDs and OTs for processing MLA requests.

185. The Phase 2bis Report (para. 269) also pointed out that dual criminality may be an obstacle. At least some OTs and CDs require dual criminality before they provide co-operation, but many still had not adopted foreign bribery legislation. The Bribery Act does not apply to the CDs and OTs. At the time of this report, most of the OTs do not have specific foreign bribery offences (see above). All three CDs have offences that cover foreign bribery,⁸⁶ but only the Isle of Man has an offence that applies specifically to foreign bribery. Jersey and Guernsey have offences that are based on the problematic agent-principal concept similar to the pre-Bribery Act legislation in the UK (Phase 2bis paras. 36-41). Even more problematically, none of the CDs and OTs has criminalised a legal person's failure to prevent bribery. UK requests to the CDs and OTs to obtain MLA to investigate offences under Section 7 of the Bribery Act may therefore not meet the dual criminality test. The UK stated that it would consider bringing the legislation in the CDs and OTs to conform to the Bribery Act, but there are no current plans to do so.

186. Despite the lack of efforts, the UK now states that there are no problems with seeking MLA from the CDs and OTs. The Home Office reported that it had sent 32 MLA requests to CDs and OTs in two cases. All of the requests were made to CDs or OTs to which the Convention has been extended. None of the requests was refused. Both the UK and Scotland reported that there were no significant delays in obtaining MLA from CDs and OTs.

10. Public Awareness and the Reporting of Foreign Bribery

187. This section addresses the UK's efforts to raise public awareness of foreign bribery and to implement Phase 2 recommendations in this area. This section will also consider recent developments on the reporting of foreign bribery, including whistleblowing and whistleblower protection. Efforts to improve corporate compliance, internal controls and ethics are discussed in an earlier section (p. 45).

a) Efforts to Raise Awareness of Foreign Bribery

188. The Working Group considered Phase 2 Recommendation 1(a) partially implemented at the time of the UK's 2007 Follow-up Report. In particular, the Working Group considered that further awareness-

86 Corruption Act 2008 (Isle of Man); Corruption (Jersey) Law 2006 as amended; and the Prevention of Corruption (Bailiwick of Guernsey) Law, 2003.

raising efforts among judicial personnel were needed. By the time of Phase 3, the UK courts have considered several cases related to foreign bribery. Judges from the Crown Court (where most foreign bribery cases will likely be heard) participated at the on-site visit and were fully aware of the foreign bribery offence. Recommendation 1(a) is thus fully implemented.

189. The UK has made significant efforts to raise awareness of the Bribery Act and the foreign bribery offence in both the public and private sectors. Ministers and officials from the MOJ and the Department for Business, Industry, and Skills (BIS) have made numerous presentations in the UK and overseas to lawyers, civil society, academic institutions, companies and trade associations. The public consultation on the GCO also involved a number of events. In 2010, the Justice Secretary was appointed the UK's "International Anti-Corruption Champion", who is tasked to ensure the effective implementation of the Bribery Act and develop a coherent, cross-departmental approach to fight international corruption.

190. Information on the Bribery Act is available on government websites, including BusinessLink, the UK Government's on-line resource for businesses. The BIS Anti-Corruption Portal (www.business-anti-corruption.com) contains country-specific pages describing the risk of bribery to businesses. UK Trade and Investment (UKTI) also maintains a website called "Overseas Business Risk" which mentions the Bribery Act and includes country-specific pages on bribery risks in over 90 countries.

191. While awareness of the Bribery Act is high, private sector representatives indicated that SMEs continue to face awareness and compliance challenges. The UK government has taken steps to raise awareness among SMEs; BIS's Anti-Corruption Portal, for example, provides compliance- and bribery-related information targeted at SMEs. UKTI has also produced a small business guide on the Bribery Act. UK business organisations have also played an important role providing specialised training and awareness-raising programmes for SMEs. These efforts are commendable but more needs to be done (see p. 41).

192. The FCO has allocated new resources to awareness-raising events abroad. Training on the Bribery Act and Guidance has been provided to officials in overseas missions. To facilitate awareness-raising, the FCO has created a "Bribery Toolkit" that contains a copy of the Bribery Act, "Guidance to Posts" on how to respond to questions concerning the Bribery Act, and information on officers' obligations to report allegations of bribery. The guidance in the Toolkit emphasises the importance of international anti-bribery efforts by mentioning the UK-specific recommendations made by the Working Group. UKTI also regularly conducts courses for officers working in overseas missions on the OECD Guidelines for Multinational Enterprises, the Anti-Bribery Convention and the Bribery Act.

193. The FCO has also tasked its overseas missions to provide information to businesses on the Bribery Act and to support companies dealing with bribe solicitations and corruption risks. The FCO asserts that it clearly instructs companies that it is illegal to pay such bribes. UKTI's website explains that "officials may be able to take up justified complaints of discriminatory treatment, bribe solicitation or extortion with procurement agencies, ministries and local authorities."⁸⁷ The SFO has also prepared a letter which companies can provide to foreign officials to discourage them from soliciting facilitation payments, which the FCO stated had been well received. Private sector representatives at the on-site visit all positively acknowledged the government's awareness-raising and communications efforts. However, they also stated that, when faced with bribe solicitations, their experiences with UK overseas missions have been mixed.

87 UK Trade & Investment, "Overseas Business Risk - Managing the risks of overseas corruption - advice and assistance from Posts" (www.ukti.gov.uk/uktihome/localisation/114765.html) (last updated 27 July 2010).

Commentary

The lead examiners commend the UK's efforts to raise awareness of the Bribery Act and the foreign bribery offence within the public and private sectors. They encourage the UK to continue its efforts, in co-operation with business associations, to encourage companies, in particular SMEs, to develop internal control and compliance mechanisms.

b) Reporting of Foreign Bribery

194. The Working Group has recommended that the UK establish a clear obligation for UK civil servants to report instances of bribery to the relevant authorities (Phase 2 Recommendation 2(a)). The Civil Service Code (2010) states that civil servants must act with integrity, honesty, objectivity, and impartiality. It requires civil servants to report actions by others believed to be in conflict with the Code to management. Criminal or unlawful activity should be reported to the police or appropriate regulatory authorities. The UK confirms that the Code requires civil servants to report misconduct committed by not only other civil servants but also private persons or organisations. While the Code's reporting obligations are framed in non-mandatory language, the UK states that they are binding on all civil servants. The FCO and MOD also stated that a breach of the Code, including for non-reporting, would result in sanctions.

195. The FCO has continued to emphasise to its overseas missions the obligation to report allegations of bribery involving UK companies to the appropriate UK authorities. FCO officials receive an annual "eGram" further reminding them of these obligations. Overseas missions have reported 49 foreign bribery allegations to date, including in *Messent*.

196. After the on-site visit, the UK provided more detailed data on the sources of foreign bribery allegations (as of 31 January 2012). The sources of the SFO's 11 active cases were: the United States Department of Justice (2), individuals (2), overseas governments (1), Serious Organised Crime Agency (SOCA) (2), solicitors (1), OECD (1) and self-referrals (2). The sources of the SFO's 18 cases under consideration were: UK police (1), public referrals (1), companies (1), OECD (1), anonymous report (1), overseas authorities (2), SOCA (1), Foreign and Commonwealth Office (1), self-referrals (6), other (3). As noted at p. 32, the SFO has received 28 self-reports from companies. It would thus appear that a significant number of self-reports have not resulted in cases that have been concluded, are on-going, or are under consideration. The SFO explained that this may be because there was insufficient factual basis to take action or because some cases were transferred to other jurisdictions.

Commentary

The lead examiners are satisfied that the Civil Service Code fully implement Phase 2 Recommendation 2(a). They commend the UK's efforts to raise awareness and facilitate the reporting of foreign bribery allegations in overseas missions. The effectiveness of these efforts is illustrated by a foreign bribery conviction that originated from this means of detection. They encourage the UK to continue its efforts in these areas.

c) Whistleblowing and Whistleblower Protection

197. The UK's Public Interest Disclosure Act 1998 (PIDA) protects employees from detrimental treatment for disclosing misconduct, including foreign bribery. PIDA classifies disclosures into three tiers depending to whom the disclosure is made, with increasing thresholds for protection to be afforded:

- (a) Tier 1 Internal Disclosures to employers or Ministers of the Crown: A good faith disclosure made to the employer will be protected if the whistleblower has a reasonable belief the information tends to show that the misconduct has occurred, is occurring or is likely to occur.

- (b) Tier 2 Regulatory Disclosures to prescribed bodies: These disclosures will be protected where the whistleblower meets the requirements of Tier 1 (but without having actually made an internal disclosure) and reasonably believes that the information and any allegations in it are substantially true and is relevant to the regulator.
- (c) Tier 3 Wider Disclosures to, for example, the police, media, consumer groups, or non-prescribed regulators: These disclosures are protected if in addition to meeting the tests for regulatory disclosures, they are reasonable in all of the circumstances and are not made for personal gain. A wider disclosure must also fall within one of four circumstances to trigger protection: (i) the whistleblower reasonably believes that he/she would be victimized if he/she had raised the matter internally or with a prescribed regulator; (ii) there was no prescribed regulator and he/she reasonably believed the evidence was likely to be concealed or destroyed; (iii) the concern had already been raised with the employer or a prescribed regulator; or (iv) the concern was of an exceptionally serious nature.

198. In Phase 2, a whistleblower who reported foreign bribery to law enforcement was governed by Tier 3. The Working Group was concerned that this higher threshold may discourage such reporting, and therefore recommended that the UK improve the protection of persons who make such reports (Recommendation 2(b)). Since Phase 2, the SFO has been designated the agency responsible for receiving public interest disclosures related to serious and complex fraud, including foreign bribery. Whistleblower reports to the SFO are thus now governed by the lower threshold of Tier 2 disclosures.

199. PIDA's scope of coverage may be insufficient in foreign bribery cases. The Act does not apply to expatriate workers of UK companies who are based abroad unless there are "strong connections with Great Britain and British employment law."⁸⁸ This effectively excludes many foreign-based employees who are most proximate to – and thus most likely to report – acts of foreign bribery. The recent case of *Foxley* starkly illustrates this limitation.⁸⁹ The whistleblower was a UK national (Tribunal Decision, para. 67) whose employer was a UK-incorporated company (para. 12). His employment contract stated "the point of hire [...] was expressed to be in the UK" (para. 31). The tribunal also found that "the process of termination and [...] notice was ultimately given in the UK" (para. 82) and that "the dismissal occurred in the UK" (para. 88). *Foxley*'s employment was based in Saudi Arabia but required him to work with individuals in the UK, including officials of the UK Ministry of Defence (paras. 34 and 70-73). While his employment contract was governed by Saudi law (para. 30), a separate confidentiality agreement was subject to English law (para. 38). He argued to the Tribunal that he had been unfairly dismissed because he reported suspicions of foreign bribery to his employer. Nevertheless, the Tribunal held that it lacked jurisdiction to hear the claim.

200. The UK explains that *Foxley* chose his contract to be governed by Saudi law which thus deprived him of PIDA protection. However, the policy reason underpinning PIDA is to detect crime and protect those who report wrongdoing. This policy objective is undermined when the application of PIDA is dictated solely by the law governing an employment contract. The UK also argues that *Foxley* is but one decision and is not binding judicial precedent.

201. Phase 2 Recommendation 2(b) also suggested that the UK pursue efforts to make whistleblower protection measures more widely known among companies and the general public. The UK encourages all UK-registered companies to respect international standards and voluntary instruments on responsible business conduct, including the OECD Guidelines for Multinational Enterprises and Ruggie's Guiding Principles on Business and Human Rights, which contain provisions on whistleblower protection. Such

88 *Serco Limited v. Lawson*, [2006] UKHL 3 at paras. 35-40.

89 *Foxley v. GPT Project Management Ltd.*, Employment Tribunal, No. 22008793/2011 (12 August 2011).

mechanisms are also encouraged under the Companies Act 2006 and the Financial Reporting Council's Combined Code on Corporate Governance. The GCO cites "speak-up" and whistleblowing mechanisms as examples of corporate measures to prevent bribery.⁹⁰ The SFO Guidelines on Making a Public Interest Disclosure detail the criteria and procedure for reporting economic crime and the protection afforded to those who report.

202. Despite these efforts, public awareness of PIDA remains low, according to civil society representatives at the on-site visit. A 2011 survey found that 85% of respondents would raise concerns about possible corruption at work with their employer, but 77% did not know of a law that protects whistleblowers.⁹¹ The low level of awareness could explain why the number of whistleblower reports has been, according to the SFO, "very low in recent years". This led the SFO to recently launch "SFO Confidential" – a confidential telephone, e-mail and web-based service to which reports can be directed.

203. However, SFO comments raise some issues. A 2011 speech by the SFO Director sets out an apparent policy to ignore whistleblower reports of misconduct after a company has received advice from the SFO:

What we do is to give any advice that we might have to the company and we leave it to the company to get on and do what it thinks is right. The feedback we get is very positive and the perception is that we are sensible and commercial in our engagement with the companies. It works to the company's advantage because they have the assurance of working with the SFO on this. What this means, in particular, is that if we get a phone call from a whistleblower about the particular problem, we know that the company is trying to resolve it and therefore there is no need for us to take any action. [Emphasis added]⁹²

During this evaluation, the SFO asserted that the Director's comment referred only to a company that reports possible wrongdoing to the SFO and initiates an internal investigation. In such cases, the SFO would "hold back" from addressing a whistleblower's report of the same possible wrongdoing until the internal investigation has been completed. However, if the whistleblower came forward with information about additional wrongdoing, then the SFO would act on that information.

Commentary

The lead examiners welcome the UK's efforts to lower the threshold for whistleblower disclosures that qualify for protection. Nevertheless, they are concerned that PIDA may deny protection to many whistleblowers in foreign bribery cases. They therefore recommend that the Working Group follow up whistleblower protection in the UK to determine if whistleblowers who report in good faith and on reasonable grounds are protected under PIDA.

11. Public Advantages

a) Official Development Assistance

204. The UK is a significant contributor of official development assistance (ODA), which is administered by the Department for International Development (DfID). The UK government has committed to dedicate 0.7% of its Gross National Income to ODA by 2013⁹³ and DfID's spending on aid is

90 Confidential whistleblowing mechanisms are expressly referred to under Principle 1 (Proportionate Procedures) and Principle 2 (Top Level Commitment).

91 Public Concern At Work, *Submission to Civil Society Review of UNCAC Article 33*, at p. 3.

92 SFO Director's Speech at Kingsley Napley & Carmichael Fisher (21 June 2011).

93 Source: www.parliament.uk.

due to increase by a third in real terms over the next four years. The top five recipients of UK bilateral aid in 2009 – 2010 were India, Ethiopia, Bangladesh, Sudan and Tanzania.⁹⁴

205. A 2011 Public Accounts Committee Report criticised DfID's financial management and loss of aid money to fraud and corruption. The Report found that fraud and corruption investigation was reactive, and recommended that DfID give more attention to tackling fraud.⁹⁵ DfID stated that it has zero tolerance to fraud and corruption and has taken recent steps to prevent and detect foreign bribery in ODA-funded contracts. It has engaged an external firm to conduct pre-grant due diligence which includes reviewing the anti-bribery policies and procedures of organisations selected for DfID grants. A Counter-Fraud Unit has been established to investigate corruption involving DfID funds. A detailed guidance note on the Bribery Act and its implications for DfID's work has also been circulated to staff.

206. DfID's procurement contracts incorporate anti-foreign bribery clauses that disqualify contractors who commit an offence under the pre-Bribery Act legislation; DfID stated that the clause will be updated to refer to the Bribery Act. DfID checks whether a contractor or supplier has been debarred by multilateral development banks. A pre-qualification questionnaire asks a contractor or supplier whether it has been convicted of bribery offences. DfID stated that the effectiveness of its due diligence measures was limited by the absence of a national registry listing companies that have been convicted or debarred by other government procuring agencies.

b) Public Procurement

207. Phase 2 Recommendation 7(a) suggested that the UK consider adopting a regime of additional administrative or civil sanctions for legal persons that engage in foreign bribery. Since that time, the UK has implemented Article 45 of the EU Procurement Contracts Directive. A UK public contracting authority must permanently exclude an "economic operator" from public procurement contracts if the authority knows that the economic operator (or its directors or representatives) has been convicted of offences relating to corruption, bribery, fraud or money laundering.⁹⁶ The UK considers exclusion (known as debarment in some jurisdictions) not as a sanction but as protection of the procurement process. Innospec and Mabey & Johnson, which were convicted of foreign bribery under the Prevention of Corruption Act, have been excluded. Mandatory exclusion applies to companies convicted of bribery under Sections 1 and 6 of the Bribery Act, but not to those that reach civil settlements with the SFO.

208. Procuring authorities may – but are not obliged to – exclude a company convicted of failure to prevent bribery under the Section 7 of the Bribery Act.⁹⁷ At the on-site visit, the Cabinet Office stated that mandatory indefinite exclusion for a Section 7 offence would not allow for different degrees of severity of the offence to be considered. Whether and how long a company convicted of a Section 7 offence is excluded would instead be discretionary, having regard to the seriousness of the offence and the company's remedial efforts. The now defunct Office of Government Commerce (OGC) developed guidance for procuring authorities on the mandatory exclusion of economic operators in 2010. This Guidance is currently available only on the website of the National Archives. The Cabinet Office website does not refer or link to this document. Also, the Guidance does not set out the factors to be considered in deciding whether to exclude a company convicted under Section 7 of the Bribery Act.

94 DfID, *DFID in 2009-2010* at p. 7 (www.dfid.gov.uk).

95 Public Accounts Committee (12 October 2011), *Fifty-Second Report - DfID Financial Management*. See also *The Times* (20 October 2011) "Millions in Aid Lost to Fraud and Corruption".

96 Regulation 23 of the Public Contracts Regulations (2006) and Regulation 26 of the Utilities Contracts Regulations (2006).

97 Under Regulation 23(4)(d) and Regulation 26(5)(d).

209. Partial measures are taken to verify the preconditions for exclusion. A pre-qualification questionnaire asks economic operators about their previous convictions. However, public contracting authorities are not obliged to investigate whether economic operators participating in a tender have been convicted of exclusion-triggering offences. Contracting authorities do not usually check the exclusion lists of multilateral development banks, nor do they normally have access to the Police National Computer (PNC), which lists UK corporate convictions. However, the OGC Guidance (para. 8) states that an official central record of corporate convictions is not available. The Cabinet Office is of the view that both public contracting authorities and suppliers need training to ensure more effective due diligence.

210. As noted above, the UK does not maintain a national corporate procurement exclusion registry. Such an exclusion registry would provide a comprehensive database of all companies that have been subject to mandatory or discretionary exclusion in the UK, and could allow procuring authorities to more effectively and efficiently conduct due diligence on suppliers and contractors. The Cabinet Office stated that, without such a registry, they could not monitor whether excluded companies have improved their internal governance.

Commentary

The lead examiners are encouraged by the steps taken by DfID to prevent and deter bribery in publicly-funded contracts, and recommend that the Working Group follow up these efforts as they develop. To assist public contracting authorities' due diligence of contracts, the lead examiners recommend that the UK consider a systematic approach to be undertaken to allow these agencies to easily access information on companies sanctioned for corruption, such as through the establishment of a national debarment register. They further recommend that public contracting authorities are trained to carry out this due diligence more effectively, including by checking for any convictions of the tenderer awarded the contract. They also recommend that the Cabinet Office make available on its website guidance on the exclusion for economic operators, including factors to be considered in deciding whether to exclude a company convicted under Section 7 of the Bribery Act.

c) Officially Supported Export Credits

211. The Export Credits Guarantee Department (ECGD) is the UK's official export credit agency. In Phase 2, the Working Group decided to follow up the effectiveness of ECGD's measures to detect and prevent foreign bribery (Follow-up Issue 8(g)).

212. In 2009, ECGD revised its anti-bribery and corruption procedures to comply with the 2006 OECD Council Recommendation on Bribery and Officially Supported Export Credits.⁹⁸ Accordingly, ECGD informs its clients of the legal consequences of bribery and encourages applicants to develop appropriate management control systems to combat bribery. Clients are required to provide an anti-corruption declaration, and disclose information on charges or convictions for bribery offences, as well as on the use of agents and commission fees. ECGD states that it always informs law enforcement authorities if there is credible evidence that bribery was involved in the award or execution of an ECGD-supported contract, and internal procedures have been established to facilitate this reporting. ECGD trains staff on its anti-bribery and corruption procedures, with refresher training conducted around every 18 months.

213. ECGD has discretion to deny support to companies on grounds of involvement in bribery. ECGD stated that it cannot automatically debar companies that have engaged in bribery since this would "fetter

98 ECGD (2009), *A Review of ECGD's Anti-Bribery and Corruption Procedures*.

Ministerial discretion”.⁹⁹ However, ECGD stated at the on-site visit that a previous admission or conviction of bribery by an applicant is *prima facie* grounds to refuse an application for support. Civil settlements of foreign bribery charges would also be taken into account. In other cases where a company may have been involved in bribery, ECGD would conduct “enhanced due diligence” as required by the OECD Council Recommendation on Bribery and Officially Supported Exports Credits. Enhanced due diligence involves reviewing an exporter’s track record of reform and what internal corrective and preventive measures have been undertaken. Support may be denied or withdrawn depending on the outcome of the enhanced due diligence review.

214. Two Phase 2bis recommendations relate to ECGD’s support of the Al Yamamah contract between BAE and the Saudi Government. In April 2008, after the Al Yamamah criminal investigation had been discontinued, the SFO stated that it had supplied to ECGD evidence of bribery-related fraud concerning the Al Yamamah contract. Citing “private law obligations of commercial confidence”, ECGD refused to indicate what it had done with this evidence or whether it had taken any action. ECGD added that it had no investigative powers and that it relied on the criminal investigative authorities. When the Working Group adopted the UK Phase 2bis Report in October 2008, it had been informed by the UK that ECGD support for the Al Yamamah contract was still in force. Unbeknownst to the Working Group, this support had been terminated some six weeks prior at BAE’s request.

215. Phase 2bis Recommendation 7(a) concerned ECGD’s response to future cases like Al Yamamah. The Working Group recommended that ECGD “make vigorous use of all its powers to investigate whether an ECGD-supported transaction involves bribery, if a criminal investigation into the transaction has been blocked for reasons other than on the merits”. ECGD has stated that it would consider this Recommendation if and when such a situation arises. It has not, however, committed to investigating such cases in the future. At the on-site visit, ECGD added that all of its contracts contain clauses that give ECGD a right of audit. However, it has not developed internal rules or policies to ensure that these audit powers would be invoked whenever a case like Al Yamamah arises.

216. Phase 2bis Recommendation 7(b) concerned ECGD’s broader policy response. The Working Group recommended that ECGD “review its general contracting policies for future transactions to address policy issues raised by cases that cannot be investigated by criminal law enforcement authorities”. The Phase 2bis Report suggested options such as declining support for contracts exporting to countries that have interfered with UK investigations. It also suggested contractual clauses excluding coverage or giving ECGD expanded investigative powers when a criminal investigation is blocked. ECGD disagrees with these suggestions and believes that it would be unfair to withdraw support based on unproven allegations. It also believes that it would be difficult to define and to litigate where there is “foreign government interference” in a UK investigation. At the on-site visit, ECGD confirmed that it continues to provide support to transactions involving exports to Saudi Arabia. Since Phase 2, the Government has not conferred on ECGD additional powers to investigate bribery.

Commentary

The lead examiners recommend that ECGD take substantive, proactive steps to implement Phase 2bis Recommendations 7(a) and 7(b).

⁹⁹ ECGD stated at the on-site visit that Parliament, if it so wished, could overcome this obstacle by enacting legislation requiring convicted companies to be automatically debarred from receiving ECGD support.

C. RECOMMENDATIONS AND ISSUES FOR FOLLOW-UP

217. Since Phases 2 and 2bis, the number of foreign bribery-related enforcement actions in the UK against legal and natural persons has commendably increased. In this respect, the designation of the SFO as the UK's lead agency for foreign bribery has had a positive effect. There is also heightened awareness of the Bribery Act and the foreign bribery offence in both the public and private sectors owing in part to the efforts of the UK government, including its overseas missions. The Working Group welcomes these developments and encourages the UK to continue its efforts, especially in vigorously investigating and prosecuting foreign bribery.

218. Regarding outstanding recommendations from previous evaluations, since its Phase 2 and 2bis Written Follow-Up Reports, the UK has fully implemented Phase 2 Recommendations 1(a), 2(a), 3(a), 3(b), 3(c), 5(b), 5(c), and 7(a); and Phase 2bis Recommendations 1(a), 1(b), 2, 3(a), and 5(a). UK has partially implemented Phase 2 Recommendations 2(b), 4(a), 5(a), 5(b), and 6(b); and Phase 2bis Recommendations 4(a), 4(b), 5(b), and 5(d). UK has not implemented Phase 2bis Recommendations 3(b), 5(e), 7(a), and 7(b). The Working Group expresses its disappointment, however, that the UK did not reassess the national security issues surrounding the Al Yamamah discontinuance before BAE's settlement with US authorities.

219. In conclusion, based on the findings in this report on the UK's implementation of the Anti-Bribery Convention, the 2009 Anti-Bribery Recommendation and related OECD anti-bribery instruments, the Working Group: (1) makes the following recommendations to enhance implementation of these instruments in Part 1; and (2) will follow up the issues identified in Part 2. The Working Group invites the UK to report orally on the implementation of recommendations 1(b), 5(c), 5(d), 5(f), 7(a), 7(b), 7(c), 9(a) and 9(b) within one year (i.e., by March 2013). The Working Group invites the UK to submit a written follow-up report on all recommendations and follow-up issues within two years (i.e., by March 2014).

1. Recommendations of the Working Group

Recommendations for ensuring effective investigation, prosecution and sanctioning of foreign bribery

1. With respect to facilitation payments, the Working Group recommends that the UK:
 - (a) co-ordinate its approach to facilitation payment cases to ensure a coherent approach across the SFO, CPS and other UK prosecuting agencies, such as the Scottish Crown Office and Procurator Fiscal Office, as well as use a consistent definition of facilitation payments in its published guidance including the JPG, GCO and Quick Start Guide (Convention Article 5; 2009 Recommendation VI, X.C.i);
 - (b) develop firm criteria for assessing whether companies are moving towards a "zero tolerance" policy within a reasonable timeframe (Convention Article 5; 2009 Recommendation VI, X.C.i).
2. With respect to the Guidance to Commercial Organisations (GCO), the Working Group recommends that the UK:
 - (a) concerning hospitality and promotional expenditures, (i) clarify the significance of "reasonable and proportionate" in the GCO, including the reference to industry norms; and (ii) amend the GCO to note that certain examples represent a high risk of bribery (Convention Articles 1, 5; 2009 Recommendation, X.C.i);

- (b) clarify the significance of indirect benefits in determining whether persons may be an “associated person” under section 7 of the Bribery Act (Convention Articles 2, 5).
3. With respect to investigation and prosecution, the Working Group recommends that the UK:
- (a) ensure that the Bribery Act applies equally to joint ventures that were created before and after the entry into force of the Act (Convention Article 5);
 - (b) continue prosecuting both natural and legal persons in a foreign bribery-related case whenever appropriate (Convention Article 5);
 - (c) consider removing the reference in the Code for Crown Prosecutors to mandatory exclusion from EU public procurement contracts (Convention Article 5).
4. Regarding the attribution and assignment of cases, the Working Group recommends that:
- (a) the UK update the 2008 Memorandum of Understanding to clarify attribution rules for Scotland and to account for the Bribery Act’s broader jurisdictional rules (Convention Article 5);
 - (b) where appropriate, the SFO and FSA conduct co-ordinated enforcement actions, and consider seeking criminal and/or civil sanctions in addition to FSA penalties (Convention Articles 3, 5, 8(2)).
5. With respect to the settlement of cases, the Working Group recommends that the UK:
- (a) reconsider the SFO’s policy of systematically settling self-reported foreign bribery cases “civilly wherever possible”, and ensure that self-reported cases result in effective, proportionate, and dissuasive sanctions (Convention Articles 3, 5; 2009 Recommendation, IX.i);
 - (b) amend the SFO’s Approach to Dealing with Overseas Corruption to distinguish between cases reported directly by the company prior to investigation, and cases where a company admits guilt after the commencement of an investigation (Convention Article 5; 2009 Recommendation, IX.i);
 - (c) make public, where appropriate and in conformity with the applicable rules, as much information about settlement agreements as possible, including on the SFO’s website (Convention Articles 1, 3, 8);
 - (d) avoid entering into confidentiality agreements with defendants that prevent the disclosure of information to the public about case resolutions (Convention Articles 3, 8);
 - (e) establish clear procedures and criteria for communicating with companies which clearly distinguish between companies seeking advice and those that self-report wrongdoing, as well as make public (where appropriate and in conformity with the applicable procedural rules) in a more detailed manner sufficient information to increase transparency of written advice and provide guidance to companies and decisions not to prosecute in cases of self-reported misconduct (Convention Article 5);
 - (f) ensure that its settlements agreements (i) explicitly reserve the right to provide MLA, and (ii) are not overbroad, including by explicitly reserving the right to prosecute the defendant

for conduct unknown to the UK authorities at the time of the settlement (Convention Articles 3, 5, 9(1)).

6. With respect to sanctions, the Working Group recommends that the UK:

- (a) regarding corporate monitors, (i) provide guidance on when and on what terms the UK authorities would seek a monitor; (ii) make public where appropriate the monitoring agreement, the reasons for imposing a monitor, and the basis for the scope and duration of the monitoring; and (iii) ensure that breaches of monitoring agreements result in effective sanctions (Convention Article 3);
- (b) ensure that (i) payments of reparations and compensation to foreign countries by defendants are not lost to corruption; and (ii) plea and settlement agreements impose further specified sanctions if defendants fail to make the required payments by a specified deadline (Convention Article 3);
- (c) regarding public procurement, (i) consider undertaking a systematic approach to allow relevant agencies to easily access information on companies sanctioned for corruption such as through the establishment of a national debarment register; (ii) train public contracting authorities to carry out this due diligence more effectively, including by checking for any convictions of the tenderer awarded the contract; and (iii) make available on the Cabinet Office's website guidance on excluding economic operators, including factors to be considered in deciding whether to exclude a company convicted under Section 7 of the Bribery Act (Convention Article 3(4); 2009 Recommendation, XI.i).

7. With respect to resources and priority, the Working Group recommends that the UK:

- (a) maintain the SFO's role in criminal foreign bribery-related investigations and prosecutions as a priority (Convention Article 5);
- (b) ensure that other government departments assume a greater responsibility in assisting companies to prevent corruption (Convention Article 5);
- (c) ensure that SFO and police resources for foreign bribery-related cases are adequate (Convention Article 5).

8. With respect to Article 5 of the Convention, the Working Group recommends that the UK:

- (a) take steps to ensure that Article 5 is clearly binding (though not necessarily through legislation) on investigators, prosecutors (including Scotland), the Attorney General and the Lord Advocate at all stages of a foreign bribery-related investigation or prosecution, and in respect of all investigative and prosecutorial decisions (Convention Article 5);
- (b) ensure that all relevant parts of the government are fully aware of their duty to respect the principles in Article 5, so that they can assist investigators and prosecutors to act in accordance with that Article (Convention Article 5).

9. With respect to Crown Dependencies (CDs) and Overseas Territories (OTs), the Working Group recommends that the UK:

- (a) promptly adopt a roadmap setting out specific goals, concrete steps, deadlines, and the provision of technical assistance for implementing the Convention in the OTs (Convention Article 1);
- (b) extend jurisdiction of the Bribery Act to legal persons incorporated in the CDs and OTs (Convention Article 4(2)).

10. With respect to measures for mutual legal assistance (MLA), the Working Group recommends that the UK:

- (a) produce more detailed statistics on formal MLA requests received, sent and rejected, so as to identify more precisely the proportion of those requests that concern foreign bribery (Convention Article 9(1));
- (b) ensure, where possible, that pending MLA requests are not adversely affected by the UK's conclusion of its own investigations.

Recommendations for ensuring effective prevention and detection of foreign bribery

11. With respect to awareness-raising, the Working Group recommends that the UK continue its efforts, in co-operation with business associations, to encourage companies in particular SMEs to develop internal control and compliance mechanisms; raise awareness of the FSA's foreign bribery-related enforcement actions, the UK Corporate Governance Code, and the FSA's Listing Principles (2009 Recommendation X.C., and Annex II).

12. With respect to tax-related measures, the Working Group recommends that the UK:

- (a) ensure that Her Majesty's Revenues and Customs (HMRC) proactively enforces the non-tax deductibility of bribe payments against defendants in past and future foreign bribery-related enforcement actions, including by systematically re-examining defendants' tax returns for the relevant years to verify whether bribes had been deducted, and examining why HMRC failed to detect proven cases of bribery (2009 Recommendation, VIII.i; 2009 Tax Recommendations);
- (b) strengthen HMRC's training and awareness-raising programmes for tax examiners to detect, prevent and report foreign bribery (2009 Recommendation, VIII.i; 2009 Tax Recommendations);
- (c) ensure that HMRC is obliged to provide information for use in foreign bribery-related investigations upon request and report suspicions of foreign bribery to the SFO (2009 Recommendation, VIII.i; 2009 Tax Recommendations);
- (d) ensure that the SFO continues to share information on foreign bribery-related enforcement actions with HMRC (2009 Recommendation, VIII.i; 2009 Tax Recommendations).

13. Regarding export credits, the Working Group recommends that Export Credits Guarantee Department (ECGD):

- (a) in any case where a criminal investigation into a transaction supported by ECGD has been blocked for reasons other than on the merits, make vigorous use of all of its powers, including notably its audit powers, to investigate whether the transaction involves foreign bribery (Convention Article 3(4); 2009 Recommendation, XI.i);
- (b) review its general contracting policies for future transactions to address policy issues raised by cases that cannot be investigated by criminal law enforcement authorities (Convention Article 3(4); 2009 Recommendation, XI.i).

2. Follow-up by the Working Group

14. The Working Group will follow up the issues below as case law and practice develop:

- (a) the following matters under the Bribery Act and associated guidance: facilitation payments; hospitality payments; the written law exception; corporate liability; and the interpretation of “carries on a business or part of a business, in any part of the United Kingdom” (Convention Articles 1, 2; 2009 Recommendation, VI);
- (b) legislative and other efforts concerning plea negotiations, civil settlements, deferred prosecution agreements and plea agreements (Convention Article 5);
- (c) impact of the National Crime Agency on the UK’s priority, co-ordination, resources and framework for investigating and prosecuting foreign bribery-related cases (Convention Article 5);
- (d) impact of the UK’s disclosure framework on the enforcement of foreign bribery-related offences (Convention Articles 3, 5);
- (e) whistleblower protection to determine if whistleblowers who report in good faith and on reasonable grounds are protected under the Public Interest Disclosure Act (PIDA) (2009 Recommendation, IX, X.C.v);
- (f) implementation of the “forum” bar to extradition (Convention Article 10).

ANNEX 1 PREVIOUS WORKING GROUP RECOMMENDATIONS TO THE UNITED KINGDOM AND WORKING GROUP ASSESSMENT OF THEIR IMPLEMENTATION

1. 2005 Phase 2 Recommendations and Assessment of Their Implementation in 2007

Phase 2 Recommendation	2007 Working Group Evaluation
<i>Preamble</i>	
The Working Group therefore recommends that the United Kingdom enact at the earliest possible date comprehensive legislation whose scope clearly includes the bribery of a foreign public official.	Not Implemented
<i>Recommendations for ensuring effective measures for preventing and detecting bribery of foreign public officials</i>	
1. With respect to <u>awareness</u> raising activities to promote the implementation of the Convention and the foreign bribery offence relating to bribery and corruption and amending the Prevention of the Corruption Acts 1889 to 1916, the Working Group recommends that the United Kingdom:	
a) enhance existing efforts to raise awareness of the Convention and the foreign bribery offence among law enforcement authorities including the Police, judicial authorities and UK public officials involved with UK companies operating abroad. [Revised Recommendation, Paragraph I;	Partially Implemented
b) undertake further public awareness activities for the purpose of increasing the level of awareness of the Convention and the foreign bribery offence among trade unions and small and medium sized enterprises (SMEs) doing business internationally [Revised Recommendation, Paragraph I];	Fully Implemented
c) take appropriate measures to publicise, including in all explanatory material distributed to UK companies, the conditions under which parent and affiliate companies can be liable in connection with foreign bribery, and encourage UK companies to report to UK authorities, as well as to other appropriate authorities, instances of foreign bribery they come across in the course of their operations [Revised Recommendation, Paragraph I].	Fully Implemented
2. With respect to the <u>reporting</u> of the offence of bribing a foreign public official to the competent authorities, the Working Group recommends that the United Kingdom:	
a) establish a clear obligation for civil servants to report possible instances of bribery to the relevant authorities [Revised Recommendation, Paragraph I];	Partially Implemented
b) in applying its legislation in the field of whistleblowing, improve protection of persons who report directly to law enforcement authorities; and pursue its efforts to make such measures more widely known among companies and the general public [Revised Recommendation, Paragraph I].	Partially Implemented
3. With respect to the <u>prevention and detection</u> of foreign bribery, the Working Group recommends that the United Kingdom:	

a) proceed diligently with the adoption of reforms clarifying and unifying the UK accounting legislation with the International Accounting Standards, to ensure the fraudulent accounting offence is in full conformity with Article 8 of the Convention [Convention, Article 8; Revised Recommendation, Paragraph V.A.];	Not Implemented
b) proceed with the adoption of guidance for auditors in order to explain and clarify their reporting obligation concerning possible acts of foreign bribery [Revised Recommendation, Paragraphs I, V.B.(iii) and V.B.(iv)];	Partially Implemented
c) ensure sufficient time and resources are available to tax authorities to review tax information and allow for the detection of possible criminal conduct, including foreign bribery offences [Revised Recommendations, Paragraph I and IV].	Partially Implemented
<i>Recommendations for ensuring adequate mechanisms for the effective investigation and prosecution of offences of bribery of foreign public officials and related offences</i>	
4. With respect to <u>investigation</u> , the Working Group recommends that the United Kingdom:	
a) ensure that the role of the Serious Fraud Office (SFO) in foreign bribery investigations is confirmed and that appropriate human and financial resources are provided, and consider monitoring and evaluating the performance of the SFO and other relevant agencies with regard to foreign bribery allegations on an on-going basis, including in particular with regard to decisions not to open or to discontinue an investigation [Convention, Article 5; Revised Recommendation, Paragraph I];	Partially Implemented
b) amend the Memorandum of Understanding to clarify that the Ministry of Defence Police's investigative jurisdiction is limited to cases where the Ministry of Defence is a party to the contract [Convention, Article 5; Revised Recommendation, Paragraph I];	Fully Implemented
c) reconsider obligations in the Memorandum of Understanding specific to foreign bribery investigations requiring disclosure of information about the investigation to non-investigatory government departments (notably the Foreign and Commonwealth Office and the Ministry of Defence) [Convention, Article 5; Revised Recommendation, Paragraph I];	Fully Implemented
d) increase resources for the prompt and effective handling of mutual legal assistance requests [Convention, Articles 9 and 10; Revised Recommendation, Paragraphs II.vii and VII].	Fully Implemented
5. With respect to <u>prosecution</u> , the Working Group recommends that the United Kingdom:	
a) amend where appropriate the Code for Crown Prosecutors, the Crown Prosecution Service Manual and other relevant documents to ensure that the investigation and prosecution of bribery of foreign public officials shall not be influenced by considerations of national economic interest, the potential effect upon relations with another state or the identity of the natural or legal persons involved [Convention, Article 5];	Not Implemented
b) in light of the longstanding absence of any consent requirement for the common law bribery offence, consider the appropriateness of Law Officers consent for cases of foreign bribery [Convention, Article 5; Revised Recommendation, Paragraph I];	Partially Implemented
c) broaden the level of persons engaging the criminal liability of legal persons for foreign bribery offences [Convention, Article 2].	Not Implemented
6. With respect to <u>Crown Dependencies and Overseas Territories</u> , the Working Group recommends that the United Kingdom, within the rules governing their relationship:	
a) verify compliance of Guernsey's new legislation with the OECD Convention, invite the Jersey authorities to enact a comprehensive anti-corruption statute at the earliest possible date in order to extend the OECD Convention to the islands [Convention, Article 1];	Fully Implemented
b) continue to encourage the Overseas Territories to adopt the necessary legislation in line with the principles of the Convention and Revised Recommendation, and support them in their efforts [Convention, Article 1].	Partially Implemented

7. With respect to <u>sanctions</u> , the Working Group recommends that the United Kingdom:	
a) consider adopting a regime of additional administrative or civil sanctions for legal persons that engage in foreign bribery [Convention, Article 3];	Partially Implemented
b) considers revisiting the policies of agencies such as Department for International Development and Export Credit and Guarantees Department on dealing with applicants convicted of foreign bribery, to determine whether these policies are a sufficient deterrence [Revised Recommendation, Paragraph I and Paragraph VI (iii)];	Fully Implemented
c) encourage prosecutors to actively pursue the necessary procedures for confiscation in all appropriate foreign bribery cases [Convention, Article 3].	Fully Implemented
<i>Follow-up by the Working Group</i>	
8. The Working Group will follow-up on the issues below, as practice develops, in order to assess:	
a) the application of sanctions with a view to determining whether they are sufficiently effective, proportionate and dissuasive to prevent and punish the offence of transnational bribery, in particular, the practice of the courts with regard to the criminal liability of legal persons for the offence of active bribery of foreign public officials [Convention, Articles 2 and 3];	Continue to follow-up
b) the effectiveness of the investigations carried out by the Ministry of Defence Police in relation to foreign bribery offences in defence contracts [Convention, Article 5 ; Revised Recommendation, Paragraph I];	Continue to follow-up
c) with respect to money laundering, the application of the new provisions under the Proceeds of Crime Act 2002, particularly with respect to the application of offences of failure to report, the levels of sanctions in practice, and the efforts made to raise awareness and elaborate guidelines/typologies covering foreign bribery offences [Convention, Article 7; Revised Recommendation, Paragraphs II.(i) and III];	Continue to follow-up
d) the application in practice of the territorial and nationality jurisdiction for foreign bribery offences, given the absence of cases to date regarding the establishment of jurisdiction over offences that have taken place wholly or substantially abroad [Convention, Article 4];	Continue to follow-up
e) the possible effect of the tendency to simplify cases and to use alternative charges on the implementation of the Convention in the UK [Convention, Article 5; Revised Recommendation, Paragraph I];	Continue to follow-up
f) the application of the evidentiary threshold for providing mutual legal assistance and extradition. In this respect the UK should compile quantitative information to assist the Working Group in its follow-up assessment [Convention, Article 9];	Continue to follow-up
g) the recent changes of the ECGD procedures to combat bribery and corruption with regard to any weakening of the rules that could reduce the ability of the ECGD to detect and prevent foreign bribery [Revised Recommendation, Paragraph I and Paragraph VI (iii)].	Continue to follow-up

2. 2008 Phase 2 Recommendations and Assessment of Their Implementation in 2010

Phase 2bis Recommendation	2010 Working Group Evaluation
1. Regarding the <u>offence of foreign bribery</u> , the Working Group recommends that the UK:	
(a) enact effective and modern foreign bribery legislation in accordance with the Convention at the earliest possible date and as a matter of high priority (Convention Article 1);	Implemented when Bribery Act enters into force
(b) ensure, in particular, that such legislation does not permit principal consent as a defence to foreign bribery and criminalises extraterritorial foreign bribery committed through an intermediary who is not a UK national (Convention Article 1).	Implemented when Bribery Act enters into force
2. Regarding the <u>liability of legal persons</u> , the Working Group recommends that the UK adopt on a high priority basis appropriate legislation to achieve effective corporate liability for foreign bribery (Convention Articles 2 and 3).	Implemented when Bribery Act enters into force
3. Regarding <u>jurisdiction</u> over foreign bribery cases, the Working Group recommends that the UK:	
(a) satisfy the Working Group, by enacting legislation or otherwise, that it has established a broad territorial basis for jurisdiction that does not require an extensive physical connection to the bribery act (Convention Article 4(1));	Implemented when Bribery Act enters into force
(b) enact legislation to establish, for foreign bribery cases, nationality jurisdiction over legal persons incorporated in the Crown Dependencies and Overseas Territories (Convention Article 4(2)).	Not Implemented
4. Regarding the <u>application of Article 5</u> , the Working Group recommends that the UK:	
(a) take all necessary measures to ensure that Article 5 applies effectively to investigators and prosecutors at all stages of a foreign bribery investigation or prosecution, and in respect of all investigative and prosecutorial decisions including those made by the SFO, police and Attorney General (Convention Article 5);	Partially Implemented
(b) ensure that all relevant parts of the government are fully aware of their duty to respect the principles in Article 5 so that they can assist investigators and prosecutors to act in accordance with that Article (Convention Article 5).	Partially Implemented
5. Regarding the <u>investigation and prosecution</u> of foreign bribery cases, the Working Group recommends that the UK:	
(a) ensure that the Attorney General's superintendence role does not include the power to give directions to the Director in individual foreign bribery cases, and eliminate the statutory requirements for the Attorney General to consent to prosecutions of foreign bribery (Convention Article 5; Revised Recommendation Paragraphs I and II);	Implemented when Bribery Act enters into force
(b) take steps to ensure that the SFO can obtain access to information that may be relevant to a foreign bribery investigation and which is held by the National Audit Office, tax authorities in the Crown Dependencies and Overseas Territories, and other UK government agencies (Revised Recommendation Paragraphs I and II);	Partially Implemented
(c) include the foreign bribery offence within the scope of the current reform efforts to make its system of plea bargaining more effective (Revised Recommendation Paragraphs I and II);	Fully Implemented

(d) improve the ability of the Crown Dependencies and Overseas Territories to provide MLA to the UK, including by eliminating formal requirements and increasing the available resources; ensuring that the Overseas Territories adopt, and encouraging the Crown Dependencies to adopt, foreign bribery legislation, and analysing the causes of delay (Convention Article 9; Revised Recommendation Paragraphs I, II.vii and VII);	Partially Implemented
(e) consider re-opening the Al Yamamah investigation if the UK were satisfied that the circumstances that led to the decision to discontinue the investigation sufficiently changed (Convention Article 5).	Not Implemented
6. Regarding <u>resources</u> for foreign bribery cases, the Working Group recommends that the UK ensure that the SFO and the relevant investigative agencies have sufficient human and financial resources so as to carry out their role effectively in foreign bribery cases (Revised Recommendation Paragraphs I and II).	Fully Implemented
7. Regarding <u>export credits</u> , the Working Group recommends that Export Credits Guarantee Department (ECGD):	
(a) in any case where a criminal investigation into a transaction supported by ECGD has been blocked for reasons other than on the merits, make vigorous use of all of its powers, including notably its audit powers, to investigate whether the transaction involves foreign bribery (Convention Article 3(4), Revised Recommendation Paragraph I);	Not Implemented
(b) review its general contracting policies for future transactions to address policy issues raised by cases that cannot be investigated by criminal law enforcement authorities (Convention Article 3(4), Revised Recommendation Paragraph I).	Not Implemented
8. The Working Group will follow up on the issues below, as practice develops, in order to assess:	
(a) the rules for appointing and removing the SFO Director, and the powers of the Attorney General and SFO Director in foreign bribery cases (Convention Article 5; Revised Recommendation Paragraphs I and II);	Issue resolved
(b) the results of the UK's continuing active review of the disclosure regime for prosecutors in complex commercial cases as they apply to foreign bribery and the need for resources in such cases (Revised Recommendation Paragraphs I and II);	Continue to follow up
(c) the use of co-operative witnesses and deferred prosecution of companies in foreign bribery cases (Revised Recommendation Paragraphs I and II).	Continue to follow up

ANNEX 2 PARTICIPANTS AT THE ON-SITE VISIT

Government Ministries and Bodies

- Serious Fraud Office
- Ministry of Justice
- Crown Prosecution Service
- City of London Overseas Anti-Corruption Unit
- Attorney General's Office
- Financial Services Authority
- Home Office
- Serious Organised Crime Agency
- Department of Business, Innovation and Skills
- Foreign Commonwealth Office
- Crown Office, Scotland
- UK Trade and Investment
- HM Revenues & Customs
- Export Credit Guarantee Department
- Department for International Development
- Cabinet Office
- National Audit Office
- HM Treasury

Judiciary

- Four justices of the Crown Court at Southwark

Private Sector

Private enterprises

- AstraZeneca
- BAE Systems
- BP
- Halcrow
- Qinetiq
- Vodafone

Business associations

- British Chamber of Commerce
- Confederation of British Industry (CBI)
- Control Risks
- Federation of Small Business
- International Chambers of Commerce

Legal profession and academics

- Patricia Barratt, Clifford Chance
- Nick Benwell, Simmons and Simmons
- Matthew Cowie, Skadden Arps
- Sam Eastwood, Norton Rose
- Charlie Monteith, White & Case
- Elisabeth Robertson, Addleshaw Goddard

Accounting and auditing profession

- Deloitte
- Ernst & Young
- KPMG
- PWC

Civil Society

- CAFOD
- Global Witness
- Public Concern at Work
- Transparency International UK
- Tearfund

ANNEX 3 LIST OF ABBREVIATIONS AND ACRONYMS

AG	Attorney General	HMRC	Her Majesty's Revenues and Customs
AML	anti-money laundering	MER	mutual evaluation report (FATF)
BIM	Business Income Manual	MDP	Ministry of Defence Police
BIS	Department of Business, Innovation and Skills	MLA	mutual legal assistance
BVI	British Virgin Islands	MOD	Ministry of Defence
CDs	Crown Dependencies	MOJ	Ministry of Justice
CJA 1987	Criminal Justice Act 1987	MOU	memorandum of understanding
COLP	City of London Police	NAO	National Audit Office
CPS	Crown Prosecution Service	NGO	non-governmental organisation
DfID	Department for International Development	OACU	Overseas Anti-Corruption Unit (City of London Police)
DPP	Director of Public Prosecutions	ODA	official development assistance
DTA	Double Taxation Agreement	OTs	Overseas Territories
ECGD	Export Credit Guarantee Department	PIDA	Public Interest Disclosure Act 1998
EUR	euro	POCA	Proceeds of Crime Act 2002
FATF	Financial Action Task Force	SAR	suspicious activity report
FCO	Foreign Commonwealth Office	SFO	Serious Fraud Office
FCPA	U.S. Foreign Corrupt Practices Act 1977	SME	small- and medium-sized enterprise
FSA	Financial Services Authority	SOCA	Serious Organised Crime Agency
GBP	pound sterling	TIEA	Tax Information Exchange Agreement
GCO	Guidance to Commercial Organisations (Bribery Act)	UKTI	UK Trade and Investment
JPG	Bribery Act 2010 Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions	USD	United States dollar

ANNEX 4 SUMMARY OF UK FOREIGN BRIBERY ENFORCEMENT ACTIONS

Note: This Annex includes only concluded foreign bribery enforcement actions that have resulted in sanctions.

Criminal Enforcement Actions

1. Tobiasen (August 2008)

The defendant paid GBP 83 000 in bribes to Ugandan officials to secure six contracts totalling GBP 500 000. The court imposed a sentence of five months' imprisonment suspended for one year.

2. Mabey & Johnson (September 2009)

The corporate defendant paid a GBP 100 000 bribe to a Jamaican official to win contracts worth GBP 16 million. The company also paid GBP 470 792 in bribes to officials in Ghana to secure contracts worth GBP 26 million. The court imposed financial penalties of GBP 3.747 million consisting of GBP 1.5 million in fines, GBP 1.1 million in confiscation, GBP 658 000 in reparations to Ghana, and GBP 139 000 in reparations to Jamaica, and GBP 350 000 in costs to the SFO.

3. Innospec (March 2010)

The defendant paid USD 8 million in bribes to Indonesian officials and secured contracts of USD 170 million. The court imposed a financial penalty of USD 12.7 million, having regard to the company's inability to pay and additional penalties imposed in the US.

4. Dougall (April 2010)

The defendant was a director of marketing at a medical devices company. He facilitated GBP 4.5 million in bribes to Greek medical professionals in the healthcare system to secure contracts for the company worth GBP 20 million. The court noted that the defendant was co-operative, did not initiate or profit from the system of bribery, and attempted to terminate the system on several occasions. A suspended sentence of 12 months' imprisonment was imposed.

5. Messent (October 2010)

The defendant was the director of an insurance company who authorised 46 bribe payments to Costa Rican public officials totalling USD 1.982 million (approx. GBP 1.267 million). As a result of the bribes, the defendant earned bonuses totalling GBP 327 024 (net of taxes). He was sentenced to 21 months' imprisonment and ordered to pay GBP 100 000 in compensation to the government of the bribed foreign official.

6. *BAE Tanzania (December 2010)*

The corporate defendant was a multinational defence company incorporated in the UK who, from 1 January 1999 to 31 December 2005, inaccurately recorded commission payments to a former marketing agent in order to secure the sale of radar systems for air traffic control to the Tanzanian government worth USD 39.97 million. The court sentenced BAE to pay a fine of GBP 500 000, costs of GBP 225 000. The plea agreement also required the defendant to make an *ex gratia* payment of GBP 29.5 million for the benefit of the people of Tanzania.

Civil Enforcement Actions

1. *Balfour Beatty (October 2008)*

Balfour Beatty admitted to “inaccurate accounting” and “payment irregularities” in a joint venture between a subsidiary and an Egyptian company to secure contracts worth GBP 22.5 million to construct the Alexandria Bibliotheca in Egypt. Through a civil recovery order, Balfour Beatty paid GBP 2.25 million as well as the costs to recover the proceeds. Balfour Beatty also voluntarily agreed to introduce certain compliance systems, and to submit these systems to a form of external monitoring for an agreed period.

2. *M.W. Kellogg (February 2011)*

M.W. Kellogg is a subsidiary of U.S.-based KBR, which was one of four oil services companies that participated in TKSJ, an international consortium, that bribed Nigerian officials to secure a contract to build and maintain a gas plant. The SFO obtained a civil recovery order requiring M.W. Kellogg to pay GBP 7 028 077 (representing dividends and accrued interest that M.W. Kellogg received from its ownership interest in TKSJ) and to overhaul its internal audit and control measures. The SFO noted that it recognized M.W. Kellogg did not take part in the criminal activity but was used as a conduit to channel proceeds from the project to its parent company.

3. *DePuy International Ltd. (April 2011)*

DePuy International Ltd. made payments to intermediaries as commissions and to make further payments to Greek medical professionals in connection with the sale of orthopaedic products. DePuy was estimated to have received GBP 33.5 million in sales based on the unlawful conduct from 1998 to 2007, and approximately GBP 14.8 million ultimately were passed on to DePuy from its Greek intermediary. The SFO obtained a civil recovery order requiring DePuy to pay GBP 4.829 million plus prosecution costs.

4. *Macmillan Publishers Ltd. (July 2011)*

Macmillan made improper payments in an unsuccessful bidding process for an education project supported by a World Bank-managed fund in order to supply textbooks to south Sudan. Investigators also found that the company could not guarantee that business secured in Rwanda, Uganda, and Zambia were not the result of bribes. The SFO obtained a civil recovery order requiring Macmillan to pay GBP 11 263 852.28, which represents the estimated amount earned as a result of the improper conduct. Macmillan was also required to pay GBP 27 000 in the prosecution’s costs.

Administrative Enforcement Actions

1. *Aon (January 2009)*

The company used and paid overseas third party agents without sufficient controls to prevent foreign public officials being paid in order to secure business. Approximately 66 suspicious payments totalling

EUR 3.4 million and USD 2.5 million were made, earning the company brokerage fees of USD 7.2 million EUR 1 million. The FSA fined Aon GBP 7.5 million, which was reduced by 30% to GBP 5.25 million because the case was settled at an early stage.

2. *Willis (July 2011)*

The company failed to implement internal controls to adequately record and monitor its payments to overseas third party agents. This led to a heightened risk that payments were made for corrupt purposes to obtain business. In total, GBP 27 million were paid to agents. Business obtained through these agents totalled GBP 32.7 (net of commissions paid to agents). The FSA fined the company GBP 9.85 million, which was reduced by 30% to GBP 6.895 million because the case was settled at an early stage. Again, additional criminal and civil sanctions were not imposed.

ANNEX 5 EXCERPTS OF LEGISLATION

Bribery Act 2010

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.
- (5) In cases 1 and 2 it does not matter whether the advantage is offered, promised or given by P directly or through a third party.

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.

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 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.

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,
 - (b) the Director of the Serious Fraud Office, or
 - (c) the Director of Revenue and Customs Prosecutions.
- (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, 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.

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 section 154(1) of the Criminal Justice Act 2003, and
 - (b) in its application to Northern Ireland, as a reference to 6 months.

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.