

UNITED KINGDOM: PHASE 2BIS

FOLLOW-UP REPORT ON THE IMPLEMENTATION OF THE PHASE 2BIS RECOMMENDATIONS

This report was adopted by the Working Group on Bribery in International Business Transactions on 23 May 2011.

TABLE OF CONTENTS

SUMMARY AND CONCLUSIONS OF THE WORKING GROUP ON BRIBERY	3
WRITTEN FOLLOW-UP TO PHASE 2BIS REPORT – UNITED KINGDOM.....	7

SUMMARY AND CONCLUSIONS OF THE WORKING GROUP ON BRIBERY

a) Summary of Findings

1. The United Kingdom has taken additional steps to implement the OECD Anti-Bribery Convention since its Phase 2bis evaluation in October 2008. The Working Group notes that the U.K. has implemented a number of recommendations in the Phase 2bis report, particularly when the Bribery Act 2010 enters into force.

2. Concerning the foreign bribery offence and corporate liability, the U.K. Bribery Act 2010 was adopted by Parliament and received Royal Assent in April 2010. As noted in the Working Group's Phase 1ter Report on the U.K., the foreign bribery offence in Section 6 of the Act adopts almost all of the features in Article 1 of the OECD Anti-Bribery Convention. In particular, the offence does not permit principal consent as a defence, and also expressly covers foreign bribery committed through an intermediary. Section 7 of the Act establishes a new corporate offence of failure to prevent bribery that follows the approach recommended by the Good Practice Guidance on Implementing Specific Articles of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.¹ These provisions in the Bribery Act thus address the concerns raised in the Phase 2bis Report, but unfortunately they are not yet in force. Recommendations 1(a), 1(b), and 2 are thus fully implemented when the Act as it stands enters into force. Furthermore, the Working Group will examine the application of these provisions in practice in the U.K.'s Phase 3 evaluation.

3. The U.K. also argued that recent corporate convictions for foreign bribery show that the current corporate liability regime implements Recommendation 2 effectively. Since the Phase 2bis evaluation, two companies have been convicted in the U.K. for foreign bribery using the identification theory.² In the Working Group's view, these two convictions demonstrate an increased level of enforcement since the Phase 2bis evaluation, and a corporate criminal liability law that is capable of producing convictions in certain cases. However, these two cases do not dispel the Working Group's concerns about the legal issues arising from the identification theory. First, the cases did not involve bribery where board-level complicity

¹ 2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions, Annex I.

² *R. v. Mabey & Johnson* (25 September 2009) and *R. v. Innospec* (26 March 2010).

By the time the Working Group considered the U.K.'s follow-up report in its meeting on 14-17 December 2010, the U.K. had concluded settlements in two additional corporate foreign bribery investigations. These two additional cases did not result in criminal convictions for foreign bribery and did not involve the identification theory. In October 2008, Balfour Beatty plc reached a settlement with the Serious Fraud Office (SFO) consenting to a civil court order and agreeing to pay GBP 2.25 million under the Proceeds of Crime Act 2002 (POCA). In December 2009, the Financial Services Authority imposed a civil fine of GBP 5.25 million on Aon (a regulated reinsurance company) under the Financial Services and Markets Act 2000 for failing to take reasonable care to establish and maintain effective systems and controls to counter the risks of bribery and corruption associated with making payments to overseas firms and individuals.

is absent, or where the culpable act and intent are found in more than one representative of the company.³ Second, both convictions were the result of guilty pleas at trial. The legal issues of concern to the Working Group were not argued by the litigants. Third, one of the convictions involved a global settlement encompassing non-U.K. charges.⁴

4. Regarding territorial jurisdiction to prosecute foreign bribery, Section 12(1) of the Bribery Act clarifies that an offence is considered to have been committed 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”. Sections 12(2) and (3) of the Act also provide extraterritorial jurisdiction to prosecute foreign bribery committed by persons who have a close connection with the U.K., such as British citizens and residents. Recommendation 3(a) is therefore fully implemented when these provisions as they stand enter into force.

5. The U.K. continues to lack nationality jurisdiction to prosecute legal persons incorporated in Crown Dependencies (CDs) and Overseas Territories (OTs) for foreign bribery. The Bribery Act would not change this situation when it enters into force. As noted in the Phase 2bis report (paras. 261-262), there does not appear to be any legal impediments to providing nationality jurisdiction in these cases. Recommendation 3(b) is thus not implemented.

6. Concerning the application of Article 5 of the Convention, the U.K. has not amended the Code for Crown Prosecutors to refer to the Article. The Working Group has repeatedly stated that referencing Article 5 in the Crown Prosecution Service (CPS) Manual (now CPS Guidance) is not sufficient. The reference to Article 5 in the new Common Approach to Corporate Prosecutions is a step forward. However, this document is not binding, it does not apply to investigators or the Attorney General (AG), and it applies only to prosecutions of companies and not individuals. Recommendation 4(a) is therefore only partially implemented.

7. The U.K. has also issued a Protocol between the Attorney General and the Prosecuting Departments. The Protocol explicitly allows Shawcross exercises “in a few very exceptional cases”, and states that the AG and Director of the Serious Fraud Office (SFO) would “probe rigorously” any Ministerial representations that “are said to point away from prosecution” (Protocol paras. 4(e)1-4(e)4). Nevertheless, the Protocol does not refer to Article 5 of the Convention. It also does not explicitly address the concerns raised in the Phase 2bis Report, namely that Shawcross exercises in foreign bribery cases should generally be avoided or at least carefully and narrowly defined. Recommendation 4(b) is thus partially implemented.

8. Concerning the AG’s superintendence role, the Protocol between the Attorney General and the Prosecuting Departments states that the AG will not seek to give a direction to a prosecutor in an individual case. The only exception is where a direction is necessary to safeguard national security. However, during the U.K.’s Phase 2bis evaluation, the Working Group decided not to consider whether Article 5 of the Convention prohibits the consideration of national security in foreign bribery investigations and prosecutions. As for the AG’s consent function, the Bribery Act transfers the power of consent to the Directors of the SFO, Crown Prosecution Service, and Revenue and Customs Prosecutions Office. Recommendation 5(a) is thus fully implemented when the Bribery Act as it stands enters into force.

³ The Working Group expressed concerns that the identification theory would not result in liability in these cases (Phase 2 Report on the U.K. paras. 197-206 and following Commentary).

⁴ In the *Innospec* case, the defendant pleaded guilty to foreign bribery charges in the United States as part of a global settlement.

9. Regarding the SFO's ability to obtain information held by various government bodies, the Working Group is encouraged by the SFO's designation as a prosecuting authority for requesting mutual legal assistance (MLA), including from CDs and OTs. The U.K. has concluded a Double Taxation Agreement with Montserrat and Tax Information Exchange Arrangements (TIEAs) with Bermuda, the British Virgin Islands (BVI), the Cayman Islands, Gibraltar, Anguilla, and the Turks and Caicos Islands. However, it is unclear whether these TIEAs allow the exchange of tax information for use in criminal (as opposed to tax) proceedings. The U.K. also did not provide information on any steps taken to ensure that the SFO can obtain access to information held by the National Audit Office. The U.K. has not amended Section 19(1) of the Anti-Terrorism, Crime and Security Act 2001, which permits but does not require the U.K. tax authorities to disclose information subject to secrecy obligations for use in criminal investigations or proceedings. The U.K. also has not amended Section 2 of the Criminal Justice Act 1987 to allow the SFO Director to issue notices to demand information or documents from government departments. On the whole, Recommendation 5(b) is partially implemented.

10. The AG and SFO have issued new guidelines establishing a plea bargaining framework that covers foreign bribery cases. However, judicial comments in two recent foreign bribery cases have cast doubts on the viability of this regime.⁵ At the time of the assessment of the U.K.'s Follow-Up Report, a third foreign bribery plea bargain was pending a sentencing hearing. On the whole, Recommendation 5(c) is fully implemented, but the Working Group will examine closely the plea bargaining regime in foreign bribery cases in the U.K.'s Phase 3 evaluation.

11. Regarding the provision of MLA by CDs and OTs, the U.K. has extended the OECD Anti-Bribery Convention to Guernsey, Jersey and the Cayman Islands. Progress has been made with extension to BVI. These developments could enhance the U.K.'s ability to obtain MLA from these CDs and OTs. Nevertheless, the U.K. continues to seek MLA from CDs and OTs through rather formal processes, such as letters rogatory. The U.K. did not provide information on resources in CDs and OTs for providing MLA, or on any analyses of delays in the MLA process. Recommendation 5(d) is therefore partially implemented.

12. Concerning the Al Yamamah investigation, the U.K. stated that the global settlement agreement between BAE Systems and the U.K. authorities in February 2010 did not cover the Al Yamamah investigation. However, the U.K. did not indicate whether it has considered whether the circumstances that led to the Al Yamamah investigation's discontinuance have sufficiently changed. Recommendation 5(e) is therefore not implemented.

13. On the issue of resources, funding for the City of London Overseas Anti-Corruption Unit has been extended at the same level to March 2013. The SFO has spent less on outside counsel fees and has increased its number of investigators and support staff. Recommendation 6 is thus fully implemented. However, at present the SFO faces significant budget cuts. Furthermore, the planned creation of a new economic crime agency replacing the SFO could affect the resources and priority given to foreign bribery cases. The U.K. states that the SFO's funding reduction is consistent with those applied to many other government departments. Despite these cuts, the SFO would continue to carry out all of its normal functions. A new economic crime agency would also enhance the U.K.'s ability and reputation to tackle economic crime, including bribery. Nevertheless, the Working Group will examine closely the issue of resources in the U.K.'s Phase 3 evaluation.

14. Concerning officially supported export credits, the Working Group recommended that the Export Credits Guarantee Department (ECGD) investigate whether a transaction involves foreign bribery when a criminal investigation into the same case has been blocked for reasons other than on the merits. ECGD has

⁵ *R. v. Innospec Limited* (26 March 2010 Crown Court) and *R. v. Dougall*, [2010] EWCA Crim 1048.

not implemented this recommendation. ECGD has only noted the recommendation and stated that it would take the recommendation into account if and when a relevant case arises. ECGD has not changed its internal policies or standard contracts to ensure that it can investigate such cases when they arise. In addition, ECGD has not reviewed its policies to address future cases like Al Yamamah. A review of its anti-bribery and corruption procedures completed in December 2009 did not refer to the Working Group's Recommendations. Recommendations 7(a) and 7(b) have not been implemented.

15. Regarding the follow-up issues, the Constitutional Renewal Bill that was submitted to Parliament ultimately did not contain the provision on the appointment and removal of the SFO Director discussed in the Phase 2bis Report. The Working Group therefore does not have to continue monitoring Follow-up Issue 8(a). The Group will continue to monitor Follow-up Issues 8(b) and 8(c) since there have not been foreign bribery cases or other relevant developments since the Phase 2bis evaluation.

b) Conclusion

16. Based on these findings, the Working Group concludes that the U.K. has fully implemented Recommendations 5(c) and 6; partially implemented Recommendations 4(a), 4(b), 5(b), and 5(d); and not implemented Recommendations 3(b), 5(e), 7(a) and 7(b). Recommendations 1(a), 1(b), 2, 3(a) and 5(a) are fully implemented when the Bribery Act as it stands enters into force. Follow-up Issue 8(a) has been resolved, while Issues 8(b) and 8(c) remain outstanding. These follow-up issues and the outstanding recommendations will be among the issues examined in the U.K.'s Phase 3 evaluation in March 2012.

WRITTEN FOLLOW-UP TO PHASE 2BIS REPORT – UNITED KINGDOM

Date of approval of Phase 2bis Report: 16 October 2008

Date of information: 23 November 2010

Part I: Recommendations for Action

Text of recommendation 1(a):

1. Regarding the offence of foreign bribery, 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);

Actions taken as of the date of the follow-up report to implement this recommendation:

The Bribery Act received Royal Assent on 8 April 2010. The Act introduces a new framework of bribery offences, including in section 6 a specific offence of bribery of a foreign public official and in section 7 an offence of failure by a commercial organisation to prevent bribery.

A General Election on 6 May produced the first coalition government in the United Kingdom for 75 years. The new government has announced that the Bribery Act will come into force on 6 April 2011.

Section 9 of the Act requires the Secretary of State to publish guidance about adequate procedures to help commercial organisations prevent bribery by people associated with them. A public consultation about the guidance began on 14 September and ended on 8 November 2010. The guidance will be published in January 2011.

The Bribery Act applies to each part of the United Kingdom (the Scottish Parliament were asked to consent to the inclusion of provisions to extend the Bill to Scotland on 3 December 2009 and this was done on 11 February 2010).

If no action has been taken to implement recommendation 1(a), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken: N/A

Text of recommendation 1(b):

1. Regarding the offence of foreign bribery, the Working Group recommends that the UK:

(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).

Actions taken as of the date of the follow-up report to implement this recommendation:

The Bribery Act dispenses with the ‘breach of principal’s trust’ model used in the Prevention of Corruption Act 1906 and principal’s consent does not constitute a defence.

The Act makes it clear that for the purposes of the general (section 1) and foreign public official offences (section 6) the offences are committed whether the advantage is given directly or through a third party. The nationality of the third party is immaterial.

The new section 7 offence of failure by a commercial organisation to prevent bribery by a person associated with the organisation is also relevant. Section 7(3)(b) makes clear that there is no requirement for the bribe payer to be a UK national or other relevant person as defined by section 12(4).

If no action has been taken to implement recommendation 1(b), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken: N/A

Text of recommendation 2:

2. Regarding the liability of legal persons, 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).

Actions taken as of the date of the follow-up report to implement this recommendation:

It is possible to prosecute companies using the existing bribery laws. This has been done on two occasions.⁶ Part 12 of the Anti-terrorism, Crime and Security Act 2001 also put beyond doubt that the pre-existing offences of corruption apply to the bribery of foreign public officials.

While accepting that UK law has been in need of modernisation, the Working Group analysis of corporate liability for foreign bribery in the UK has been mistaken. The UK has already demonstrated effective corporate liability for foreign bribery.

Enforcement data published in the OECD Working Group Bribery Annual Report 2009 confirms that only eight of 38 Convention countries have prosecuted a company for foreign bribery in the 10 year history of WG monitoring. The UK has been active in enforcement and investigation of foreign bribery against natural and legal persons, a fact acknowledged by Transparency International in their 2010 OECD Progress Report.

A legal person can commit any of the offences under section 1, 2 or 6 of the new Bribery Act by application of the ‘identification principle’.⁷

The Act also creates a specific offence of failure by a commercial organisation to prevent bribery. The offence is committed if a person associated with the commercial organisation bribes another to obtain or retain business or an advantage in the conduct of business for the organisation. It is a defence if the commercial organisation had in place adequate procedures designed to prevent persons associated with it from committing bribery.

If no action has been taken to implement recommendation 2, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken: N/A

⁶ Mabey & Johnson and Innospec

⁷ Where “the acts and state of mind” of those who represent the directing mind and will be imputed to the company.

Text of recommendation 3(a):

3. Regarding jurisdiction 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));

Actions taken as of the date of the follow-up report to implement this recommendation:

With regard to the current law the UK's territorial jurisdiction complies with the requirements of Article 4(1) and does not require an extensive physical connection to the bribery act. As noted in paragraph 207 of the UK's Phase 2 report:

As indicated in Phase 1, UK law establishes jurisdiction over any part of an offence taking place within the territory of the United Kingdom. Prosecuting authorities confirmed that there is no requirement for a substantial part of the offence to have taken place in the United Kingdom to establish jurisdiction. Instances where the benefits of the bribe payment returned to the United Kingdom or where a telephone conversation relative to the offence took place within the territory would be covered by bribery legislation. In support of this, the UK authorities indicated that, in the Van der Horst case, which was discussed during the Phase 1bis, a conviction had been handed down for corrupt activity mainly carried out overseas.

Under section 12(1) of the Bribery Act, an offence is committed under section 1, 2 or 6 if any act or omission which forms part of the offence takes place in a part of the United Kingdom. Section 12(5) provides that the section 7 offence may be committed irrespective of whether the acts or omissions which form part of the offence take place in the UK or elsewhere.

If no action has been taken to implement recommendation 3(a), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken: N/A

Text of recommendation 3(b):

3. Regarding jurisdiction over foreign bribery cases, the Working Group recommends that the UK:

(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)).

Actions taken as of the date of the follow-up report to implement this recommendation:

The Bribery Act does not extend jurisdiction to legal persons incorporated in the Crown Dependencies (CDs) and British Overseas Territories (OTs). Although the United Kingdom Government is responsible for the overseas relations of the CDs and OTs they are separate legal jurisdictions. It is for the authorities there in the first instance to ensure that their law is effective to enable them to prosecute offences in their territory.

However, the new section 7 failure to prevent bribery offence in the Bribery Act relating to commercial organisations would apply to a commercial organisation incorporated in the CDs or OTs which carries on a business or part of a business in the UK.

In addition, the UK is progressing with extension of the OECD Convention and UNCAC to those CDs and OTs with adequate measures in place. The UK has funded an independent review of CD and OT anti-corruption legislation and procedures to assess whether they have the necessary measures in place to allow them to seek extension of UNCAC and the OECD Bribery Convention, or to identify what steps are needed before they are in a position to request such extensions.

The extension of UNCAC and the OECD Convention is part of a wider G20 process that not only embraces work relating to tax transparency, the equivalence of AML and CFT systems but goes beyond that to demonstrate that the whole financial and regulatory system is fit for purpose. The UK therefore believes that those CDs and OTs with a significant financial services industry should be prioritised above the others.

This process has already resulted in the extension of the OECD Convention to the CDs of Guernsey and Jersey (the Convention having been extended to the third CD, the Isle of Man, in 2001) and the extension of UNCAC to all three CDs. UNCAC was extended to the British Virgin Islands (BVI) in 2006. The OECD Convention was extended to the Cayman Islands in 2010 and the BVI has been assessed as compliant with the OECD Convention. The UK is waiting for a formal request for its extension. Work is ongoing towards further extensions.

If no action has been taken to implement recommendation 3(b), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken: N/A

Text of recommendation 4(a):

4. Regarding the application of Article 5, 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);

Actions taken as of the date of the follow-up report to implement this recommendation:

In accordance with Article 5, prosecutions must not be influenced by considerations of economic interest, relations with other states or the identity of those involved. This principle is clearly stated in Crown Prosecution Service (CPS) Guidance to Prosecutors. It is also clearly stated in new guidance on the common approach of the Director of Public Prosecutions, the Director of the SFO and the Director of the Revenue and Customs Prosecutions Office (RCPO) to corporate prosecutions, published 13 November 2009. Both guidance notes are publicly available on the internet and have been publicised to prosecutors through their internal intranet. In Scotland the independence of the Lord Advocate as head of the prosecution service is enshrined in legislation (section 48(5) of Scotland Act 1998). It is a key objective of Crown Office to prosecute cases independently, fairly and efficiently and one of the core values is making our decisions based on a fair, impartial and objective assessment of what is in the public interest.

If no action has been taken to implement recommendation 4(a), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken: N/A

Text of recommendation 4(b):

4. Regarding the application of Article 5, the Working Group recommends that the UK:

(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).

Actions taken as of the date of the follow-up report to implement this recommendation:

Answer as for 4(a)

If no action has been taken to implement recommendation 4(b), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken: N/A

Text of recommendation 5(a):

5. Regarding the investigation and prosecution 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);

Actions taken as of the date of the follow-up report to implement this recommendation:

When the Bribery Act 2010 comes into force the Attorney General's consent will no longer be required to bring prosecutions for bribery offences in England and Wales. Under the Act (including under section 53 of the Serious Crime Act 2007 where there is an international element to encouraging or assisting) such prosecution can only be brought with the consent of the Director of Public Prosecutions, the Director of the Serious Fraud Office and the Director of Revenue and Customs Prosecutions.

In July 2009 a Protocol was published setting out how the Attorney General and the Directors of the relevant prosecuting authorities exercise their functions in relation to each other.

This Protocol sets out in a clear and transparent way how the relationship between the Attorney General and the prosecutors is to work. As well as outlining roles and responsibilities, for example in setting the strategic direction and objectives of the prosecuting authorities, the protocol makes clear the nature and extent of the Attorney General's role in individual prosecution cases. At the same time the protocol underlines and supports the independence of the prosecutors in taking prosecution decisions, and ensures that there is proper public and Parliamentary accountability for the conduct of prosecutions.

It indicates that the Attorney will not seek to give a direction to a prosecutor in an individual case save very exceptionally where necessary to safeguard national security. If any such direction were made, the Attorney would make a report to Parliament, so far as was compatible with national security. The Protocol states that the prosecuting authorities may consult with the Attorney General about cases which are particularly sensitive or have wider implications for prosecution policy or the operation of the criminal justice system. Prosecution decisions in these cases remain those of the prosecuting authorities, and not the Attorney General.

In Scotland the Lord Advocate is the Ministerial Head of the Crown Office and Procurator Fiscal Service, and the head of the system of all criminal prosecution. Under section 48(5) of the Scotland Act 1998 "Any decision of the Lord Advocate in his capacity as head of the systems of criminal prosecution and investigation of deaths in Scotland shall continue to be taken by him independently of any other person." All prosecutions are undertaken in the public interest under the guidance and supervision of the Lord Advocate.

If no action has been taken to implement recommendation 5(a), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken: N/A

Text of recommendation 5(b):

5. Regarding the investigation and prosecution of foreign bribery cases, the Working Group recommends that the UK:

(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);

Actions taken as of the date of the follow-up report to implement this recommendation:

The SFO have been designated, in accordance with section 7(5) of the Crime (International Cooperation) Act 2003, as a prosecuting authority which may request assistance in obtaining evidence abroad through mutual legal assistance (MLA). This includes to the Crown Dependencies and Overseas Territories, which are separate legal jurisdictions.

Although the UK is not party to any bilateral mutual legal assistance treaties with the CDs or OTs, MLA requests can be made through international reciprocity. However, as noted above, the UK is progressing with extension of the OECD Convention and UNCAC to those CDs and OTs with adequate measures in place, while encouraging others to develop a sufficient basis to request extension. The OECD Convention has been extended to all three CDs and the Cayman Islands and UNCAC has been extended to BVI, with work ongoing towards further extension during 2010. An extension of UNCAC would provide a formal basis under which requests can be sent.

Furthermore, the UK has tax information exchange agreements (TIEAs) with Bermuda, the British Virgin Islands, the Cayman Islands, Gibraltar, Anguilla and the Turks and Caicos Islands and has concluded negotiations over a double taxation agreement (DTA) with Montserrat. On 24 June 2009 the Isle of Man announced plans for the automatic exchange of information on savings interest with the UK and other EU member states. These agreements are made in accordance with section 10 of the Anti-Terrorism, Crime and Security Act 2001 (ATCSA). Section 19(2) of ATCSA permits the disclosure of information for the purposes of criminal investigations and proceedings in the United Kingdom and elsewhere.

If no action has been taken to implement recommendation 5(b), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken: N/A

Text of recommendation 5(c):

5. Regarding the investigation and prosecution of foreign bribery cases, the Working Group recommends that the UK:

(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);

Actions taken as of the date of the follow-up report to implement this recommendation:

In England and Wales the Attorney-General published Guidelines on Plea Discussions in cases of Serious or Complex Fraud (which includes corruption) setting out a transparent framework within which prosecutors can discuss pleas in such cases with the legal representatives of a person facing prosecution. For the purposes of the Guidelines, fraud means any financial, fiscal or commercial misconduct or corruption which is contrary to the criminal law.

The SFO published a guide to self-reporting and plea negotiation on 21 July 2009, setting out their approach to dealing with overseas corruption. Corporate self-reporting and plea negotiation are also discussed in new guidance setting out the common approach of the DPP, SFO and RCPO to corporate prosecution, published 13 November 2009. These guidelines do not apply in Scotland where cases are dealt with on an individual basis.

The first UK corporate conviction for overseas corruption was a success of this self-reporting and plea negotiation regime. The prosecution for corruption arose from the company's voluntary disclosure to the SFO of evidence to indicate that the company had sought to influence decision-makers in public contracts in Jamaica and Ghana between 1993 and 2001. Following early plea negotiations, the company agreed that it would be subject to financial penalties to be assessed by the Court, will pay reparations and will submit its internal compliance programme to an SFO approved independent monitor.

If no action has been taken to implement recommendation 5(c), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken: N/A

Text of recommendation 5(d):

5. Regarding the investigation and prosecution of foreign bribery cases, the Working Group recommends that the UK:

(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);

Actions taken as of the date of the follow-up report to implement this recommendation:

All 6 Caribbean Overseas Territories⁸ (COTs) have legislation in place that allows for the exchange of information for mutual legal assistance purposes. In addition, five of the 6 COTs are members of the Egmont Group⁹ of FIUs (Financial Intelligence Units¹⁰) and participate in the informal information-sharing network. We are actively working with the remaining COT to help it meet membership standards.

Furthermore, as noted above, the UK is progressing with extension of the Convention and UNCAC to those CDs and OTs with adequate measures in place, while encouraging others to develop a sufficient basis to request extension. The Convention has been extended to all three CDs and the Cayman Islands and UNCAC has been extended to BVI, with work ongoing towards further extension during 2010.

If no action has been taken to implement recommendation 5(d), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken: N/A

⁸ Anguilla, Bermuda, British Virgin Islands, Cayman Islands, Montserrat and Turks and Caicos Islands

⁹ The Egmont Group is a grouping of national FIUs with over 100 member countries and a permanent secretariat based in Toronto. The Egmont Group provides a forum for improve support to national anti-money laundering and counter-terrorist financing programmes and enhances bilateral and multilateral international collaboration in strategic analysis among FIUs. Its members are provided access to a secure network for information sharing.

¹⁰ Financial Intelligence Units are the central national authorities responsible for receiving, analysing and disseminating to competent authorities suspicious activity/transaction disclosures received from the financial sector.

Text of recommendation 5(e):

5. Regarding the investigation and prosecution of foreign bribery cases, the Working Group recommends that the UK:

(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).

Actions taken as of the date of the follow-up report to implement this recommendation:

The House of Lords ruled 30 July 2009 that the former Director of the SFO, Robert Wardle, acted lawfully in discontinuing the investigation into alleged bribery and corruption surrounding the Al Yamamah contract. As a result of this legal ruling the current Director, Richard Alderman, concluded that the investigation remains discontinued.

In February 2010, BAE Systems plc (BAES) was charged with conspiracy to defraud, making false statements about its FCPA compliance program, and violating the Arms Export Control Act (AECA) and International Traffic in Arms Regulations (ITAR) by the US Dept of Justice. These charges were in relation to the Al Yamamah contract as well as contracts in the Czech Republic and Hungary. BAES pleaded guilty to the charges and was fined \$400 million. The SFO is in the process in prosecuting BAES for failing to maintain accurate books and records in relation to its contract of supply with the government of Tanzania, contrary to section 221 of The Companies Act 1985. The plea agreement has yet to come before the courts. BAES has agreed to pay £30 million comprising a financial order to be determined by a Crown Court judge with the balance paid as an ex gratia payment for the benefit of the people of Tanzania.¹¹

If no action has been taken to implement recommendation 5(e), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken: N/A

¹¹ BAE pleaded guilty on 23 November 2010 at Westminster Magistrates Court. The matter was been committed to Southwark Crown Court for sentence on 20 December 2010.

Text of recommendation 6:

6. Regarding resources 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).

Actions taken as of the date of the follow-up report to implement this recommendation:

On 16 June 2010 the Chancellor of the Exchequer announced that the Financial Services Authority will cease to exist. A new prudential regulator will be created, which will operate as a subsidiary of the Bank of England. It will carry out the prudential regulation of financial firms, including banks, investment banks, building societies and insurance companies. Following publication of the De Grazia Review in June 2008 into the way the SFO approaches its cases, the SFO was restructured and established a dedicated Anti-Corruption Domain. The SFO has reallocated more resources to combat overseas corruption, and increased the number of investigators and support staff focusing on anti-corruption work from 65 to around 100 - an increase of over 50 percent.

Funding for the 12 man City of London Police -Overseas Anti-Corruption Unit- has been confirmed to continue until at least March 2013.

After the election in May the new Government produced a public coalition agreement which announced; "We take white collar crime as seriously as other crime, so we will create a single agency to take on the work of tackling serious economic crime that is currently done by, among others, the Serious Fraud Office, Financial Services Authority and Office of Fair Trading."

If no action has been taken to implement recommendation 6, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken: N/A

Text of recommendation 7(a):

7. 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), Revised Recommendation Paragraph I);

Actions taken as of the date of the follow-up report to implement this recommendation:

ECGD notes the recommendation and will take it into account if and when such an occasion occurs.

If no action has been taken to implement recommendation 7(a), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken: N/A

Text of recommendation 7(b):

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

(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).

Actions taken as of the date of the follow-up report to implement this recommendation:

The Working Group's concern is predicated in the first instance on the view that ECGD may be bearing a risk of financial loss where it should not be doing so. The risk of financial loss referred to might mean either financial loss caused by corruption, or financial loss caused in any other way.

In the former case, such a financial loss would only occur when the exporter, or (in the majority of cases) the bank, whom ECGD agrees to indemnify, is not paid that which is owed to it because the obligations to repay have been vitiated by corruption. Where the indebted party does not seek to have its debt obligations vitiated in such a manner¹² it would be impossible that ECGD should suffer financial loss, or the risk of it, as a result of corruption.

If the latter meaning is intended - that the financial risk of loss caused otherwise than by corruption should be transferred to the exporter or bank - a number of issues arise, since the effect would be to penalise an exporter because of the combination of an unproven allegation and an act of another party beyond his control. Moreover, the penalisation would take the form of a removal of protection against a potential loss not caused by the substance of the allegation even if it were proven.

ECGD is not aware that any other OECD ECA puts such terms in its contracts and considers that it would be unworkable to do so because:

- (a) of the formidable difficulty of defining "foreign government interference" and how such interference could be evidenced or proven;
- (b) where representations have been made by a foreign government which has caused Her Majesty's Government to believe that national security is at stake, as a result of a criminal investigation, it follows that the British national interest will, equally, not lie in favour of ECGD asserting and, if necessary, litigating in a British Court, the proposition that there has been "foreign government interference";
- (c) the removal of cover from an exporter, which it has contracted and paid for, in circumstances where an investigation of alleged corruption has been halted because of representations made by an overseas Government or there has been "foreign government interference", would take place where there will not have been an admission by, or proof of guilt against, the alleged wrongdoer. It is inappropriate to penalise such a party or prejudge what defence that party might have put forward if the case had proceeded;
- (d) the purpose of any ECA support is to further the interests of the exporters of the country

¹² In the case the Working Group was considering, it was the reaction of the indebted party which allegedly caused the investigation to be halted.

concerned, and to insert a restriction on the provision of that support, if a foreign government has chosen “to interfere”, would render any ECA’s contract of negligible or non-existent interest to an exporter because of the absence of certainty as to what would constitute foreign government interference, the conditionality of the support and the fact that the occurrence of the event which would trigger the removal of support was beyond the control of the exporter; and

- (e) removal of support would to an even greater extent be unjust (and defeat the purpose of ECA support) in most ECGD transactions since its support is usually provided to a bank that makes loans available to finance the purchase of goods and services from UK exporters. There have been no instances in ECGD transactions where it has been alleged or asserted against a bank that it has been guilty of corruption and for ECGD to deny coverage to a bank in circumstances where there has been “foreign government interference” in relation to a prosecution of an exporter would be unfair and inappropriate.

ECGD considers that paragraph 285 of the Working Group’s report is misconceived. The suggestion made to the Working Group by ECGD, both in writing and in oral evidence in 2008, was not that “any confidentiality understandings” precluded UK criminal proceedings; what they precluded was ECGD making any comment to the Working Group about what information it had or had not received from the prosecuting authority and what actions it had or had not taken as a result. The suggestion therefore made in paragraph 285 as to what might be placed by ECGD in contracts of support appears to be based on a misunderstanding.

If no action has been taken to implement recommendation 7(b), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken: N/A

Part II. Issues for Follow-up by the Working Group in Phase 2bis

Text of issue for follow-up 8(a):

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);

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

The terms of appointment of the Directors and the grounds for dismissing will continue to be settled by the Attorney General in accordance with existing legislation.

Text of issue for follow-up 8(b):

8. The Working Group will follow up on the issues below, as practice develops, in order to assess:

(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);

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

Here is a link to the latest Crown Prosecution Service guidance on disclosure:
http://www.cps.gov.uk/legal/d_to_g/disclosure_manual

The Scottish Parliament has recently passed the Criminal Justice and Licensing (Scotland) Act 2010. Part 6, which is due to come into force next year, provides a statutory platform for disclosure. This will have the benefit of:

- Clarifying the law and practice in disclosure in criminal proceedings;
- Removing any remaining uncertainty around the nature and extent of the Crown's duty;
- Ensuring that accused are provided with all of the information that they should be provided with and, therefore, receive a fair trial;
- Protecting sensitive information where disclosure to an accused would seriously prejudice an important public interest e.g. put an individual's life or safety at risk;
- Ensuring that anyone that misuses disclosed information is robustly dealt with; and
- Clarifying the reporting responsibilities that investigation agencies have to the Crown.

Text of issue for follow-up 8(c):

8. The Working Group will follow up on the issues below, as practice develops, in order to assess:

(c) the use of co-operative witnesses and deferred prosecution of companies in foreign bribery cases (Revised Recommendation Paragraphs I and II).

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

In relation to co-operating witnesses we should draw the Working Group's attention to the latest Crown Prosecution Service guidance:

http://www.cps.gov.uk/legal/v_to_z/victims_and_witnesses_-_witness_immunities_and_undertakings/index.html

As well as to s.113 of the Coroners and Justice Act 2009 which extends the powers to give immunity and other undertakings to witnesses under the Serious and Organised Crime and Policing Act 2005 to BIS and FSA cases. See below.

Powers in respect of offenders who assist investigations and prosecutions (England and Wales)

- (1) Chapter 2 of Part 2 of the Serious Organised Crime and Police Act 2005 (c. 15) is amended as follows.
- (2) In section 71 (assistance by offender: immunity from prosecution), in subsection (1) (immunity notice)—
 - (a) for “any offence” substitute “ an indictable offence or an offence triable either way”, and
 - (b) after “prosecution”, in second place it occurs, insert “ for any offence”.
- (3) In subsection (4) of that section (specified prosecutors)—
 - (a) after paragraph (d) insert—

“(da)the Financial Services Authority;
(db)the Secretary of State for Business, Innovation and Skills, acting personally;”, and
 - (b) in paragraph (e) for “(d)” substitute “ (db)”.
- (4) After subsection (6) of that section insert—

“(6A) In exercising the power to designate a prosecutor under subsection (4)(e), the Financial Services Authority and the Secretary of State for Business, Innovation and Skills may each designate only—

 - (a) one prosecutor (a “chief prosecutor”) to act at any one time, and
 - (b) an alternative prosecutor (a “deputy prosecutor”) to act as a specified prosecutor—
 - (i) when the chief prosecutor is unavailable, or
 - (ii) during any period when no chief prosecutor is designated.

(6B) Paragraph 5(1) of Schedule 1 to the Financial Services and Markets Act 2000

(arrangements for discharging functions of the Authority) does not apply to the exercise of the powers conferred on the Financial Services Authority under this Chapter.

(6C) An immunity notice may be given by the Financial Services Authority, the Secretary of State for Business, Innovation and Skills or a prosecutor designated by either of them under subsection (4)(e), only with the consent of the Attorney General.”

(5) In section 72 (assistance by offender: undertakings as to use of evidence), in subsection (1) (restricted use undertaking) for “any offence” substitute “an indictable offence or an offence triable either way”.

(6) In subsection (2)(a) of that section, at the beginning insert “ any”.

(7) After section 75A insert—

“75B Guidance about use of powers under sections 71 to 74

(1) The Attorney General may issue guidance to specified prosecutors about the exercise by them of any of their powers under sections 71 to 74.

(2) The Attorney General may from time to time revise any guidance issued under this section.

(3) In this section “specified prosecutor” is to be construed in accordance with section 71.”

Deferring prosecution is not currently a practice in England and Wales, Northern Ireland or Scotland and is not currently the subject of legislative proposals.