

RESPONSES TO THE CONSULTATION PAPER ON THE REVIEW OF THE OECD ANTI-BRIBERY INSTRUMENTS

Comments from The Corner House (United Kingdom)

Article 5

The Corner House is deeply concerned at the recent action of the United Kingdom to halt an investigation into foreign bribery on grounds of national security. The Corner House believes that it has grave implications for the OECD Convention, if a member state is able to declare unilaterally a national security exception to the Convention. It is particularly a matter of grave concern where such a declaration is done not in accordance with international law criteria and without a full accounting for the evidential basis for such a decision (recognising that there will be limits as to how much information precisely may be able to given).

The Corner House believes that this action has left a large loophole in the Convention which must be addressed urgently. The Corner House also believes that such an action has seriously undermined the principle of prosecutorial independence which is central to whether Article 5 can be properly adhered to by member states.

The Corner House believes that the OECD Working Group on Bribery must come up with clear guidelines at the earliest opportunity stating that there is no national security exemption to the OECD Convention, and confining any decision not to comply with the Convention to cases where a state is in a situation of true necessity under international law. The Corner House also believes that the OECD should have clearer guidelines for prosecutorial independence.

Lessons from the UK dropping of the BAE/Saudi investigation

The Corner House has very serious concerns about the manner in which national security concerns were raised and the potential for abuse of national security arguments in the UK case.

Documents released during the recent judicial review brought by The Corner House and Campaign Against the Arms Trade show that :

- a. national security concerns were not based on rigorous intelligence assessments from the Security Services themselves on the basis of any objective criteria. The assessment made was from the Cabinet Office's Permanent Secretary for Intelligence, Security and Resilience. The assessment did not include any detailed analysis of the credibility of the threats, the reliability of the source of the threats, the impact if such threats were to be carried out and measures the government and security services might be able to take to mitigate any such impact;
- b. national security concerns were intermingled with concerns prohibited by article 5 of the OECD Convention, such as commercial considerations and damage to international relations, in a manner which made it exceptionally difficult to disentangle the real reasons for the government's case to drop the investigation.

The case raises the real possibility that the UK government may have used national security arguments as a shield for other reasons to which it actually gave as much if not more weight, such as damage to international relations and to commercial contracts, and that it did so to avoid international obligations which prohibited it from taking these latter considerations into account (Article 5 of the OECD Convention). There is a real danger where states use national security arguments, if they are not required to follow international law principles and a clear process, that this may occur again.

Steps to be taken at OECD level

The Corner House notes that while there is no national security exemption in the Convention and that it would be highly undesirable if there were one, under international law there are very limited and strictly confined circumstances in which a state may breach its international obligations in order to protect the lives of its citizens. The Corner House notes that under general international law, where a state wishes to do so, the state is not entitled to be the sole judge of whether the objective standards have been met which would allow the state lawfully to invoke the exemption. The existence of a national security justification is a matter for determination on objective grounds, and ultimately to be determined by the courts. There is clear authority for this, including from the International Court of Justice.

Given this situation under international law, The Corner House believes that the OECD must, with the assistance of international lawyers, draw up clear criteria based on the International Law Commission's Articles of State Responsibility and having regard to its Commentary, as to the circumstances in which states may derogate from their international obligations under the OECD Convention. These criteria should be based on where a situation of genuine 'necessity' exists as defined in Article 25 of the International Law Commission's Articles on State Responsibility.

The Corner House also believes that the OECD must also come up with a clear process which member states must follow where they wish to breach their international obligations under the Convention. This process should include that:

1. At the domestic level, the decision as to whether a prosecution or investigation should proceed where a national security concern based on a situation of genuine 'necessity' is raised must be taken by an independent prosecutor, who must make a full, public and written account of the grounds on which the decision was taken, documenting clearly the balancing exercise that was taken weighting the national security considerations against domestic rule of law and the member state's duties under the Convention;
2. the member state invoking the right to breach their obligations under the OECD must show that any such decision is based on full, rigorous and objectively verifiable intelligence assessments from security services, without political mediation and the state must provide to the OECD a full account of the evidential basis on which their decision was taken; and
3. the member state invoking the right to breach their obligations must show the OECD what steps it took to find a way of bringing a prosecution or conducting an investigation in a manner which would not bring about or exacerbate a state of genuine 'necessity'.

The Corner House also believes that the OECD should consider in circumstances where such a breach is made by a member state, setting up a special committee consisting of international legal experts and possibly national security experts drawn from member states, to consider any such breach and make an assessment as to whether the breach was in made in accordance with international law criteria. This assessment should be made public.

The Corner House finally believes that the OECD should undertake a review of the independence of prosecution authorities who are signatories to the Convention, examining in detail best practice in this regard, and what potential obstacles there are to this. The OECD should consider drawing up guidelines for ensuring statutory independence of prosecutors, to ensure that Article 5 considerations may not affect the decisions taken by prosecutors.

The Corner House believes that member states' full compliance with Article 5 is essential to the integrity and effectiveness of the Convention, and that there must be rigorous and ongoing monitoring by the OECD of whether member states are complying with it.