

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

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BRIEF INTRODUCTION

We are aware from the Executive Summary that the OECD is seeking responses to the Consultation Document from its anti-corruption partners . We however felt that it would be appropriate for us to send a response since our project on corruption in international business is sponsored by a UK publicly funded body, the Arts & Humanities Research Council.

Below we focus on a few of the issues raised in the Consultation Document. We will be pleased to provide you with a fuller review or the interim results of our survey of companies listed on the London Stock Exchange, should you so wish. We would also like to draw your attention to our article ‘The OECD Anti-Bribery Convention: Ten Years On’ which is to be published in *Manchester Journal of International Economic Law*, April 2008 Issue.

A. GENERAL IMPRESSIONS CONCERNING EFFECTIVENESS AND IMPLEMENTATION OF OECD ANTI-BRIBERY INSTRUMENTS

Judging from the Phase I and II Reports and the Recommendations made by the Working Group (WG) it is apparent that the monitoring system put in place is robust and its aim is to ensure that State Parties comply with the OECD Convention fully. There is much that other organisations like the African Union and the United Nations can learn from the OECD monitoring model since their anti-corruption legal instruments have a provision on monitoring.

However, questions remain in respect of the effectiveness of the monitoring process in bringing about the necessary level of compliance, in line with the recommendations of the Working Group. The case of the UK provides a good illustration. At the time of ratification the UK's anti-corruption laws were to be found in common law, in the Public Bodies Corrupt Act 1889, and in the Prevention of Corruption Act 1906 as amended by Prevention of Corruption Act 1916. The WG carried out Phase 1 monitoring in December 1999 that resulted in the communication of various concerns in respect of Art 1, among them the lack of clarity as to whether existing provisions on bribery extended to foreign public officials. This saw the inclusion of Part 12 (ss 108 – 110) in the Anti-Terrorism Crime and Security Act 2001 (ATCSA) which introduced a foreign element into the common law offence of bribery and the existing statutes on corruption through a territorial extension. Section 108(3) ATCSA amends s.7 of the Public Bodies Corrupt Act to include public bodies in territories outside the UK. In introducing the foreign element in this way, the UK felt that it had met the standards set by Art 1 of the OECD Convention.

Regardless, the WG retained its concerns in respect of the way in which the UK had extended the bribery offence to apply to foreign public officials. Its concerns stemmed from the fact that an autonomous definition of “foreign public official” had not been adopted. In its Phase 1 Bis Report, with regard to the definition of bribery of foreign public official, the WG stated:

Article I(4) of the Convention gives an autonomous definition of foreign public officials to which national legislation should conform as closely as possible. In defining a foreign public official, the U.K.’s new legislation preserves the terminology employed in the domestic context. In essence, the definitions of “agent”, “principal”, “public office” and “public authorities” from which the concept of “public official” must be derived, are simply transposed by territorial extension so that they must now respectively be interpreted in a “foreign” context in the light of the expanded scope of the offence. The Working Group

considers that such an approach may make a homogenous application of the Convention among the Parties more difficult.¹

This concern continues since in Phase 2 the WG recommended that bribery of foreign public officials be specifically defined. As yet, the UK has not acted upon this recommendation.

The OECD also recommended that the UK adopt a single anti-corruption instrument. The progress towards such a result is tediously slow. In 2003 the UK Government published its Draft Corruption Bill (Cm 5777) following the model proposed by the Law Commission in its Report *Legislating the Criminal Code: Corruption* of 1998 (Law Com No 248.) The Bill was not enacted due to widespread criticism of lack of clarity and complexity. The Law Commission, at the request of the Home Office, has now published a consultation document which considers the changes that would be desirable in light of the criticisms to their previous recommendations and seeks to ensure that the proposals are consistent with the international obligations of the UK e.g. the COE Convention and the UN Convention. See Law Commission, *Reforming Bribery*. Consultation Paper 185 (2007).

The above exhibits the difficulties in getting a State Party to act upon the Recommendations made. It is important for the OECD to give this issue further thought with a view to seeing how this could be done without compromising the principles of international law.

B. NEED FOR INCREASED AWARENESS (Para. 79)

We agree that there is a need for increased awareness amongst the various stakeholders. Our pilot study seems to suggest that SMEs in particular may not be focusing that much attention to corruption issues. It is also important that agencies such as the local chambers of commerce and trade associations as well as government departments such as the UK Department for Trade and Industry play a central in awareness raising. We have not found much evidence of this happening. In addition, our research, thus far, indicates that the adoption of internal company procedures (see Consultation Document, III.4) is varied with respect to the incidence and type of measures implemented, as well as to the extent of their enforcement. Whilst resource limitations or other factors may make this issue more pressing for SMEs, it also applies to large companies.

C. WHISTLEBLOWER PROTECTION (Para. 90)

More needs to be done on legal protection of whistleblowers within organizations. Only a few of the State Parties seem to have such legislation. The UK has done much to promote the confidentiality aspect in whistleblowing.

It may also be worth considering *qui tam*² or the common informer action (available in the US for false claims) in the context of bribery. The US in 1863 enacted the False Claims Act (hereinafter “FCA”) to root out fraud such as false records, and false claims for payment on the part of contractors against the Government. Since the aim of the FCA was to encourage informers to come forward with information in return for a share of the fine in respect of such fraud it empowered citizens³ to bring suit on behalf of the Government for fraud against the Government. *Qui tam* suits were fairly common until amendments to the

¹ P. 17.

² Short for the Latin phrase *qui tam pro domino rege quam pro se ipso in hac parte sequitur* (“who pursues this action on our Lord the King’s behalf as well as his own”).

³ Known as ‘relators’ since the action is brought on relation of the citizen.

Act in 1943 following a controversial decision in *US ex rel. Marcus v Hess*⁴, a case that held that the relator could bring a suit based on information already possessed by the Government. The 1943 amendments put an end to ‘parasitical suits’ by disallowing actions based on information already known to the Government. However, in the 1980s there was renewed interest on the part of the US Congress in the FCA due to growing concerns about fraud against the Government,⁵ especially relating to defence contracts. The FCA was amended in 1986 so as to allow a relator to bring a suit as long as he was the original source of the information and the financial rewards were also substantially increased. As a consequence of these amendments there has been a marked increase in *qui tam* actions and according to a report from the US Department of Justice in 2005 the Justice Department recovered \$1.4 billion in fraud and false claims. Of this figure \$ 1.1 billion was recovered in association with *qui tam* actions. The FCA, seen as a “primary weapon to fight government fraud”, has been heralded by the Assistant Attorney General of the Civil Division of the US Department of Justice as giving “ordinary citizens the courage and protection to blow the whistle on government fraud”.⁶

It seems from the US experience that *qui tam* action has the potential to play an important role in fighting corruption. The US success story in recovering huge amounts in fraud and false claims is sufficiently persuasive for arguing for the introduction of *qui tam* actions in exposing corruption. Of course, there is the danger of spurious actions and legalised blackmail in the form of threats of initiating action to elicit money from the law breaker, but it is possible to insert suitable safeguards to reduce the number of spurious claims as in the FCA⁷ and to introduce stiff penalties for those abusing or misusing *qui tam* actions for malicious ends. Perhaps the main disincentive is that it would add another layer of bureaucracy and extra pressures on the Attorney General and other relevant institutions within a country.

D. ARTICLE 5 AND NATIONAL SECURITY

The recent developments in respect of the UK Serious Fraud Office discontinuing the BAE investigation in the interests of national and international security highlight the lack of clarity in Art 5. The difficulty arises because it does not expressly exclude national (or international) security interests.

Governed by the principle of *pacta sunt servanda*⁸ a State, in ratifying an international convention, agrees to meet its international legal obligations by complying with that convention. However, there are occasions in which States have violated their international obligations. The decision of the SFO possibly illustrates such a situation, assuming that the decision to end the investigation on national and international security grounds was contrary to Art 5. Where a State violates its international obligations, for example through non-compliance with treaty obligations, it will usually attract responsibility for the wrongdoing under international law unless there are circumstances which preclude or excuse this responsibility.⁹

⁴ 317 U.S. 57 (1943).

⁵ US Code Congress & Administration News, 1986, 5266.

⁶ ‘Justice Department Recovers \$1.4 Billion in Fraud & False Claims in Fiscal Year 2005; More than \$ 15 Billion since 1986’ November 7, 2005 available at <<http://www.usdoj.gov/civil/press>> . Many of these actions revolved round false and fraudulent claims in the health sector.

⁷ The filing of a claim under FCA is an extremely detailed procedure and the Attorney General must investigate the allegations diligently. The FCA gives great powers to the Department of Justice to examine the merits of the *qui tam* action and it may move to dismiss the relator’s complaint, “either because there is no case, or the case conflicts with significant statutory or policy interests of the United States”. See *US ex rel. Sequoia Orange Co v Sunland Packing House Co* 912 F. Supp 132 (D Cal 1995) and *Kovacic* (1996).

⁸ Promises must be kept.

⁹ See International Law Commission’s Articles on Responsibility of States for Wrongful Acts (2001)

Reliance by a State on the doctrine of necessity indicates that the State has acted in such a way as to incur international responsibility based on wrongful acts, but that the wrongfulness is precluded because of the existence of a state of necessity. One question arising in this context from an international perspective is whether, in circumstances such as those arising from the BAE investigation, a State can invoke necessity as a defence when it violates its obligations under the OECD Convention. If this is the case then the decision of the UK might be justifiable even if it conflicts with Art 5.

In order to address this question the availability of the defence of ‘necessity’ in international law, its meaning, and the conditions that need to be met for a successful plea, must be examined. There is no doubt that ‘necessity’ is recognised in customary international law. The doctrine has a long history traceable to the writings of Grotius. Necessity was historically associated with self-preservation, as where a State in war time occupies neutral territory where the enemy State’s occupation of that neutral territory would pose a threat to its power or very existence. The twentieth century saw an expansion of the concept from safeguarding the existence of the state, to safeguarding an “essential interest” of the state.

Recent cases in the International Court of Justice (ICJ) also confirm that necessity as a defence to State responsibility for international wrongdoing can be invoked in relation to threats other than the threat to a State’s existence.¹⁰ In the *Gabčíkova-Nagymaros* case, the dispute between Hungary and Czechoslovakia arose out of a bilateral treaty for a joint project for building dams on the River Danube for the purposes of electricity generation, flood protection, and improved navigation. Hungary initially suspended and later abandoned its obligations under the treaty twelve years into the project, claiming grave ecological risks to the region as well as a threat to the water supply to Budapest. Hungary relied on an ecological state of necessity for its failure to meet its obligations. The ICJ did not find any problems with invoking necessity on the basis of an ecological threat.

This wider concept of necessity is now embodied in Art 25 of the International Law Commission’s (ILC) Articles on Responsibility of States for Wrongful Acts (Articles on State Responsibility) which states:

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:

(a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and

(b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.

2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:

(a) The international obligation in question excludes the possibility of invoking necessity; or

(b) The State has contributed to the situation of necessity.

¹⁰ In *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* I.C.J. Reports 1997 (25 September 1997,) the ICJ stated that [T]he state of necessity is a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation. (para 51)

E. SUGGESTIONS FOR A GAP IN THE OECD CONVENTION

As made apparent by its title, the focus of the OECD Convention is “international business transactions” and the opening paragraph of the preamble indicates that international business transactions include trade and investment. While there is no doubt that a core of transactions fall squarely within this phrase there are some that fall within the penumbra of uncertainty. The provision of higher education across borders provides an illustration. Education, regarded as a public good provided by the State has undergone massive changes since the infusion of neo-liberal policies into education since the 1980s. The gradual introduction of fees and institutional reliance on sources of funding other than the government seems to have shifted higher education in particular from the public to the commercial realm. Universities are increasingly viewed as business institutions with export potential and subject to market forces. Seen as a major industry in its own right with the potential for substantial economic impact, many higher education establishments from developed countries, Australia and the United Kingdom for instance, have set up off-shore campuses or have entered into contracts with foreign agents for the recruitment of students from that country. Educational institutions in most countries require government licences. The qualifications to be awarded by the institutions also need government recognition and, where relevant, recognition by professional bodies such as associations for chartered accountants, engineers, computer scientists and lawyers. The issuing of licences or permits and recognition of qualifications is usually channelled through the Ministry of Education and professional bodies (e.g. the Bar Association) thus providing opportunities for corruption. The issue of course is whether the offer of a bribe to X (bribe taker), a public official in the Ministry of Education in Country B, by Y (bribe giver), a representative from University of Poppleton in Country A, is caught by the OECD Convention. That will depend on how the provision of education and the cross border arrangements are viewed.

In providing higher education in foreign countries an institution is operating like a business enterprise and offering a service that is no different from a company selling a service. This approach to education as a commodity is supported by the World Trade Organisation’s (WTO) General Agreement on Trade in Services (GATS). According to Art. I (3) (a) – (b):

- (a) “services” includes any services in any sector except services supplied in the exercise of governmental authority.
- (b) “a service is supplied in the exercise of governmental authority” means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers.¹¹

The major changes to education provision in many countries seems to have resulted in a shift where education is viewed (rightly or wrongly) as an industry in its own right competing in the market with other education providers suggesting that education should fall within international business transactions and would therefore be within the OECD Convention’s ambit. This argument becomes even stronger as states license commercial profit making organisations to award degrees and other qualifications, but others have taken a different view. It must be noted that the issue of corruption in education is a subject that has not been closely studied but there are indications from various surveys in third world countries¹² that corruption within the education sector is not unknown.

¹¹ The examples cited by the WTO in relation to Arts 1(3)(a) – (b) are police, fire protection, mandatory social security, tax and customs administration and monetary policy operations.

¹² Transparency International – Kenya, *Corruption in Kenya: Findings of an Urban Bribery Survey* (2001), available at <http://www.transparency.org>; The United Republic of Tanzania, Presidential Commission of Inquiry Against Corruption, Report on the Commission on Corruption, (President’s Office: Dar es Salaam, 1996).

As the above discussion indicates, the phrase “international business transactions” is likely to take on new hues as a result of liberalisation and changing perceptions and attitudes towards State provided basic services such as education and health. The lack of clarity resulting from the absence of a definition in the OECD Convention could be a serious hindrance to harmonisation since it leaves room for a variety of interpretations when a particular sector’s inclusion or non-inclusion falls within the penumbra of uncertainty. One way to address this lack of clarity would have been to elucidate on the phrase in the Commentaries, for example, by reference to what the international mercantile community regards as business transactions and developments in WTO law for the purposes of interpretation.