

UNITED KINGDOM

REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION

A. IMPLEMENTATION OF THE CONVENTION

Formal Issues

The United Kingdom signed the Convention on December 17, 1997, and deposited the instrument of ratification on December 14, 1998. Parliament concluded in a review of the existing legislative and common law provisions on corruption, which was completed on November 16, 1998, that the law already in place is sufficient to implement the Convention. However, the U.K. authorities state that although the existing anti-corruption legislation and relevant common law has provided it with generally effective measures to combat crimes of corruption, a further review of these laws is nearing completion. The U.K. has accepted, in principle, that its laws in this area should be restated in a modern statute.

Convention as a Whole

The United Kingdom relies on the Prevention of Corruption Act 1906, which is aimed at the bribery of agents, and the common law offence of bribing a person in a public office. Other existing laws relevant to the obligations under the Convention include the Criminal Law Act 1997 and the Criminal Justice (Terrorism and Conspiracy Act) 1998, with respect to conspiracy; the Criminal Justice Act 1998 and the Proceeds of Crime Act 1995, with respect to seizure and confiscation; the money laundering provisions in the Criminal Justice Act 1993; the accounting provisions in the Companies Act 1985; the Criminal Justice (International Co-operation Act) 1990; the Extradition Act 1989 and the Income and Corporation Taxes Act 1988.

The U.K. authorities explain that legislation enacted in the Westminster Parliament applies to England and Wales. It also applies to Scotland and Northern Ireland where such application is specified. In cases where a statute does not apply to Scotland¹ and Northern Ireland, equivalent provision is made elsewhere, either in primary or secondary legislation. The common law applies everywhere in the United Kingdom except in Scotland, which has its own legal system.

All the Crown Dependencies and the U.K. Overseas Territories are internally self-governing and enact their own legislation. U.K. Acts of Parliament may be extended to them, subject to the agreement of the Insular Authorities. The ratification of international conventions and treaties may be extended to them, subject to the agreement of the Insular Authorities.² Ratification of the Convention by the U.K. has not been extended to the Crown Dependencies. However, the U.K. indicates that negotiations are currently taking place with the Crown Dependencies with a view to extending ratification of the Convention to them. Ratification cannot be extended to them until the U.K. is satisfied that they have satisfactory legislation in place to implement the obligations under the Convention.

International treaties do not become part of U.K. domestic law and can only be implemented when domestic law is in place to ensure compliance with the treaty provisions. For this reason, the U.K. does not ratify international treaties until such legislation is in force.

¹ Criminal law power has been devolved to the Scottish Parliament, and in future criminal statutes applying only to Scotland will be enacted in the Edinburgh Parliament.

² Such an extension is not necessarily made at the same time as ratification by the U.K.

1. ARTICLE 1. THE OFFENCE OF BRIBING A FOREIGN PUBLIC OFFICIAL

Legislation

The U.K authorities cite the Prevention of Corruption Act 1906 (1906 Act) as relevant to the requirements in Article 1.1 of the Convention in respect of the offence of bribing a foreign public official. The 1906 Act applies to all of the United Kingdom but not the dependencies. It contains a bribery offence that is aimed at the bribery of any “agent” in relation to his/her “principal’s affairs or business”. Subsection 1(2) of the Act defines an “agent” as including “any person employed by or acting for another” and subsection 1(3) states that “a person serving under the Crown or under any corporation or any borough, county or district council, or any board of guardians, is an agent within the meaning of this Act”. The aim of subsection 1(3) is to clarify that the broad definition of agent in subsection 1(2) includes “a person serving under the Crown or under any corporation or any borough, county or district council, or any board of guardians”. It seems clear that subsection 1(3) is restricted to persons serving under domestic public bodies.

The offence is defined as follows in subsection 1(1) of the 1906 Act:

If any person corruptly gives or agrees to give or offers any gift or consideration to any agent as an inducement or reward for doing or forbearing to do, or for having after the passing of this Act done or forborne to do, any act in relation to his principal’s affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal’s affairs or business ... he shall be guilty of a misdemeanour ...

Pursuant to subsection 2(1) of the 1906 Act, prosecution for an offence under that Act cannot be instituted without the consent of the Attorney-General or Solicitor-General. In determining whether to provide or withhold consent, the Attorney-General or Solicitor-General applies the same tests as the Crown Prosecution Service or the Serious Fraud Office (the normal prosecutorial authorities). The U.K. authorities state that this ensures that proceedings for corruption offences are given the fullest consideration at the highest level and is a measure of the seriousness with which the offence is treated in England and Wales. They state further that it is an appropriate safeguard against vexatious and improperly motivated prosecutions.

Common Law

The U.K. authorities state that there are differing legal opinions as to whether there is one common law offence of bribery that applies to a range of different offices or functions or a number of common law offences that apply in relation to different offices or functions. They state that it is, however, certain that there is a common law offence of bribing a public official. Although there is no definitive way of describing it, in the leading case of *R v. Whitaker* [1914] 3 K.B. 1283 it is stated that the common law offence of bribery is committed when a bribe is given or offered to induce a public official to fail to act in accordance with his duty. It has also been described as follows in *Russell on Crime*:

Bribery is the receiving or offering [of] any undue reward by or to any person whatsoever, in a public office, in order to influence his behaviour in office, and incline him to act contrary to the known rules of honesty and integrity³.

In addition, it is a crime under the Scottish common law to bribe a judicial officer, which includes judges, sheriffs, magistrates and justices as well as clerks and procurator fiscals. It may also be criminal at

³ (12th ed 1964) p 381.

Scottish common law to bribe a non-judicial officer, such as a public official or a councillor, but such cases are always prosecuted today under statute.⁴

Application of the Offences in Legislation and the Common Law to the Bribery of Foreign Public Officials

Subsection 1(3) of the 1906 Act clarifies that the definition of “agent” includes persons serving under certain domestic public bodies (i.e. “persons serving under the Crown or under any corporation or any borough, county, or district council, or any board of guardians”), but does not contain any clarification that the term “agent” includes foreign public officials. However, it is the view of the U.K. authorities that the language used in the 1906 Act is wide by design and covers foreign public officials. In support of their position they cite the Law Commission Report on the law on corruption⁵ and the decision of *Rv. Raud* [1989] Crim. L.R. 809 (C.A.). In *Raud* the Court of Appeal upheld a decision in which the accused, Raud, was convicted of conspiring, contrary to the Criminal Law Act 1977, with an agent of the Government of Ireland and other persons to promote the activities of the agent, which were to corruptly agree to obtain money in exchange for providing Irish passports, contrary to section 1 of the 1906 Act.⁶

Similarly, the common law offence as described in the case of *R v. Whitaker* [1914] and *Russell on Crime* does not contain any express language in relation to the bribery of foreign public officials and there does not appear to be any case law in which it has been applied thereto.

Moreover, the Home Secretary states that there have been no prosecutions under the common law offence or the corruption statutes in relation to the bribery of foreign Ministers, members of Parliament or Judges⁷.

The U.K. authorities provide that there is no legal impediment to applying these offences to the bribery of foreign public officials. They state that to a degree the courts interpret an uncertain offence in favour of the accused, but they balance this principle with the common law principle that laws should be given a broad interpretation.

The U.K. authorities explain that where there is overlap between the applicability of the common law and the offence in the 1906 Act, the prosecution chooses between the statute and the common law according to the facts of the case.

⁴. *The Laws of Scotland—Stair Memorial Encyclopedia* (Volume 7, Criminal Law) at p. 303.

⁵. Law Commission Report: *Legislating the Criminal Code: Corruption* (Report Law Com No. 2480) published 3 March 1998. (This report is available at: <http://www.open.gov.uk/lawcomm/>) At page 24 of the report the Law Commission states “it is not entirely clear whether a public body existing outside the United Kingdom is a ‘public body’ within the meaning of the Acts” (i.e. the 1889, 1906 and 1916 Acts). It states further that if an official were “employed by or acting for” a public body existing outside the U.K., “he or she would be an agent within the original definition in section 1(2) of the 1906 Act”. However, at page 20 of the report, the Law Commission concludes that the present law on corruption is “in an unsatisfactory state” and recommends that the “common law offence of bribery and statutory offences of corruption should be replaced by a modern statute”.

⁶. The issue of law under appeal was jurisdictional in nature.

⁷ This comment is taken from a “Statement by the Home Secretary” on the bribery of foreign public officials.

Defences

There are no statutory defences to the offence in the 1906 Act. The general common law defence of duress, which requires proof of threats of physical violence unless the conduct is carried out, would be available in relation to the offence in the 1906 Act and the common law offence.

1.1 The Elements of the Offence

The offence prescribed by subsection 1(1) of the 1906 Act and the common law offence are analysed below under the discussion of each element required by the Convention. For the purpose of analysing the common law offence of bribing a public official, the offence as described in Russell on Crime is used. The U.K. authorities emphasise that the description of the offence in Russell on Crime is not definitive, but it is used here because of its comprehensiveness.

1.1.1 any person

The offence in the 1906 Act and the common law offence apply to “any person”. The U.K. authorities indicate that “person” is given its ordinary dictionary meaning and is augmented by the definition of “person” in Schedule 1 of the Interpretation Act 1978, which states that “person” includes a body or persons corporate or unincorporate”.

1.1.2 intentionally

Under subsection 1(1) of the 1906 Act, an offence is committed where the person “corruptly” gives or offers any gift, etc. to an agent as an inducement for doing any act in relation to his/her principal’s business, etc. The courts have interpreted the requirement of acting “corruptly” in the 1906 Act as purposely doing an act that the law forbids as tending to corrupt.⁸ They emphasise that “corruptly” does not mean dishonestly, and that the purpose of the corruption statutes is to prevent agents and public servants from being placed in a position of temptation.⁹ The U.K. authorities explain that the extent to which an offer or gift is corrupt is indicated by its nature and the circumstances in which it is offered or conferred. A large consideration to a foreign public official whose duties are of particular interest to the giver tends to show that the offer or conferring is corrupt. A small gift is less likely to have been offered, etc. corruptly in the absence of other evidence of corruption. It is not necessary under the 1906 Act to prove that the offer or conferring was intended to influence the recipient in any specific way; it is sufficient if the intent was to influence the recipient in a general way.

The Home Office comments that the courts have indicated that it is difficult to interpret the word “corruptly”, and that much of the concern about the existing statutes “relates to the archaic language and formulations and...in particular to the definition of the offence of corruption as acting ‘corruptly’”.¹⁰

The common law offence requires that a reward be offered “in order to influence” the behaviour of the person in public office “and incline him to act contrary to the known rules of honesty and integrity”. The U.K. authorities comment that there is no practical difference between the formulation of the mental element of the offence in the 1906 Act and the common law.

⁸ *R. v. Wellburn* and others (1979) 69 Cr App Rep 254 CA.

⁹ *Ibid.*

¹⁰ Page 6 of Statement of the Home Office on the prevention of corruption (June 1997).

1.1.3 to offer, promise or give

Pursuant to subsection 1(1) of the 1906 Act, it is an offence to “give, promise or offer” any gift, etc. The common law offence covers the “offering” of any undue reward.

It is assumed that the common law offence would cover the promising of a reward, etc. because the ordinary meaning of “offer” would include an offer where the party to whom the offer is made agrees to accept the offer. It is also assumed that the common law offence would cover giving, according to the ordinary meaning of the term “offering”.

1.1.4 any undue pecuniary or other advantage

Subsection 1(1) of the 1906 Act applies to the giving, etc. of “any gift or consideration”. Under subsection 1(2) “consideration” is defined as including “valuable consideration of any kind”, which has been interpreted by the courts as including non-pecuniary gifts and consideration and also intangible gifts and consideration.¹¹

The common law offence in respect of persons in a public office applies to offers of “any undue reward”.

1.1.5 whether directly or through intermediaries

Neither the offence in the 1906 Act nor the common law offence expressly applies where an offer, etc. is made through an intermediary. The U.K. authorities explain that under the offence in the 1906 Act a person who gives or offers, etc. a bribe to a foreign public official with the assistance of an intermediary would be guilty of an offence as well as the intermediary, because the offence is aimed at any person who corruptly “gives or agrees to give or offers any gift or consideration to any agent...”

The U.K. authorities explain that the same principles apply to the common law offence in this regard.

1.1.6 to a foreign public official

The offence under subsection 1(1) of the 1906 Act operates in relation to bribes given to “any agent”. “Agent” is defined under subsection 1(2) as including “any person employed by or acting for another”, and subsection 1(3) clarifies that “a person serving under the Crown or under any corporation or any borough, county or district council, or any board of guardians, is an agent”. Thus, there is clarification that the offence applies to the bribery of certain domestic public officials but there is no clarification that it applies to the bribery of foreign public officials. In addition, the common law offence does not employ express language applying it to the bribery of a foreign public official, and it appears that during the 85 years following the decision in *R v. Whitaker*, it has never applied to foreign public officials. In the absence of express language in the offences and the absence of sufficiently clear case law to show how these offences apply to the bribery of foreign public officials, it is impossible to assess whether the U.K. offences conform with the requirements under the Convention with regard to the definition of “foreign public official”. Therefore, for the purpose of this part of the assessment, the offences are examined to determine the types of domestic public officials that appear to be covered therein corresponding to the types of foreign public officials covered by the definition in Article 1.4 of the Convention.

¹¹ See *R v. Braithwaite*, 77 Cr. App. R. 34, CA; and *Currie v. Misa* (1875) L.R. 10 Exch. 153, 162.

Offence in 1906 Act

It appears that the definition of agent in the 1906 Act is broad enough to apply to most of the categories of domestic public officials corresponding to the “foreign public officials” covered by Article 1.4.a of the Convention. The Home Secretary has stated that the bribery of judges is not covered by the 1906 Act, and the bribery of Members of Parliament is also not covered because Parliament is not a public body.¹² On the other hand, the U.K. authorities state that the bribery of a Member of Parliament and a member of the judiciary would be covered by the offence in the 1906 Act if they were not acting in their official capacity. However, the offence specifically applies to bribes offered, etc. for an agent to do or omit to do any act “in relation to his principal’s affairs or business”, which in the case of a Member of Parliament or member of the judiciary would necessarily involve acts in his/her official capacity. Moreover, Article 1.1 of the Convention addresses the bribery of a foreign public official “in order that the official act or refrain from acting in relation to the performance of official duties”. The U.K. authorities also point out that in certain cases the 1906 Act might apply to the bribery of a foreign judge or a foreign member of Parliament, because the courts would look at the status of that category of official under the relevant foreign constitution. However, this solution would not appear to be consistent with the requirement of an autonomous definition in the Convention.

Common Law Offence

The common law offence applies to bribes offered to “any person whatsoever, in a public office”. *R v. Whitaker* provides the following definition of “public officer”:

*An officer who discharges any duty in the discharge of which the public are interested, more clearly so if he is paid out of a fund provided by the public.*¹³

This definition would appear broad enough to cover practically every domestic public official corresponding to the first part of the definition of “foreign public official” contained in Article 1.4.a of the Convention (i.e. “any person holding a legislative, administrative or judicial office”). However, there is “some uncertainty” as to whether the common law offence applies to members of Parliament, because it is the view of some legal scholars that membership in Parliament does not constitute public office.¹⁴ Furthermore, it appears that, contrary to Article 1.4 of the Convention, the bribery of persons exercising a public function for a “public enterprise” or any official or agent of a “public international organisation” is not covered by the common law offence because “public enterprises” and “public international organisations” are not necessarily funded directly or wholly by the public.

Since the bribery of Members of Parliament is definitely not covered by the 1906 Act when they are acting in their official capacity, and there is some uncertainty as to whether they are covered by the common law offence, there appears to be a potential gap in the bribery offences with respect to them.

1.1.7 for that official or for a third party

Neither the offence in the 1906 Act nor the common law offence expressly applies where a third party receives the benefit. However, the U.K. authorities state that in the case where the briber and a public official enter into an agreement to transmit the bribe directly to a third party (e.g. spouse, friend or political

¹² The Home Secretary does, however, state that Members of the European Commission “may” be covered as persons “employed for or acting for another”.

¹³ 3 KB 1283.

¹⁴ This view is discussed in the Nicholls Report on Parliamentary Privilege, and reference therein is made to the 1975 Royal Commission on standards in public life, presided over by Lord Salmon.

party) in exchange for an act or omission by the foreign public official, the foreign public official will be considered to have received valuable consideration.

1.1.8 in order that the official act or refrain from acting in relation to the performance of official duties

Subsection 1(1) of the 1906 Act applies to offers of gifts, etc. to an agent as an inducement “for doing or forbearing to do...any act in relation to his principal’s affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal’s affairs or business”. This provision applies to acts as well as omissions, as contemplated by the Convention. The language differs from the language in the Convention to the extent that it does not specifically apply to the “performance of official duties”. However, acts by an agent employed by or acting for the public authorities that concern his/her “principal’s affairs or business” would invariably involve acts “in relation to the performance of official duties”.

In *R v. Whitaker* the common law offence applies when a bribe is given or offered to induce a public official “to fail to act in accordance with his duty”. This would clearly cover acts as well as omissions of a public official.

1.1.9 in order to obtain or retain business or other improper advantage

The offence in the 1906 Act does not contain any requirement that the bribe be offered, etc. “in order to obtain or retain business or other improper advantage”. The 1906 offence is triggered simply if the offer, etc. to an agent is intended to induce an act (or omission) in relation to the affairs of his/her principal’s affairs or business.

On the other hand, the common law offence requires that the reward be offered, not only to influence the behaviour of a public officer, but also to incline him/her “to act contrary to the known rules of honesty and integrity”. In *R v. Whitaker* [1914] the court stated that “when an officer has to discharge a public duty in which the public is interested, to bribe that officer to act contrary to his duty is a criminal act”. The U.K. authorities add that an offence is committed where a bribe is offered or conferred with the intention that it should influence the public officer in the discharge of his/her public duties.

1.1.10 in the conduct of international business

There is no qualification in the relevant offences that the bribe is offered, etc. to obtain business of any type.

1.2 Complicity

Article 1.2 of the Convention requires Parties to establish as a criminal offence the “complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official”.

The U.K. authorities indicate that it is a principle of the common law that two or more persons may be a principal in the same crime. In addition, pursuant to section 8 of the Accessories and Abettors Act 1861, any person who aids, abets, counsels or procures a criminal offence, statutory or at common law, may be prosecuted as a principal.

1.3 Attempt and Conspiracy

Article 1.2 of the Convention further requires Parties to criminalise the conspiracy and attempt to bribe a foreign public official to the same extent as they are criminalised with respect to their own domestic officials.

Attempt

Section 1 of the Criminal Attempts Act 1981, which applies to any offence that would be triable in England and Wales if it were completed¹⁵, provides that a person who “does an act which is more than merely preparatory to the commission of the offence” is guilty of an attempt.

Conspiracy

Pursuant to subsection 1(1) of the Criminal Law Act 1977, the offence of conspiracy to commit an offence is committed “if a person agrees with any other person or persons that a course of conduct shall be pursued which will necessarily amount to or involve the commission of any offence or offences by one or more of the parties to the agreement if the agreement is carried out in accordance with their intentions”. Subsection 1(4) of the Criminal Law Act 1977 provides that “‘offence’ means an offence triable in England and Wales”, and does not differentiate between offences in statutes and offences in the common law.

2. ARTICLE 2. RESPONSIBILITY OF LEGAL PERSONS

Article 2 of the Convention requires each Party to “take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official”.

The U.K. authorities explain that there is a presumption that offences in statutes can be committed by a legal person.¹⁶ Entities that do not have legal personality, such as partnerships, cannot commit offences. It is the partners themselves who are individually liable for an offence. Thus, the bribery offence in the 1906 Act can be applied to entities, both incorporated and unincorporated, that have legal personality. On the other hand, an unincorporated body is not a legal person at common law and, therefore, cannot incur legal liability.

The criminal responsibility of a legal person depends on a culpable act by a representative of the company. However, for criminal liability to be imposed on a legal person, it is not necessary that the representative has been convicted of the offence in question. Where an offence involves *mens rea* (e.g. intention or negligence), a finding of corporate responsibility depends on identification of someone in the organisation with an appropriate level of authority who possesses the mental state in question. The U.K. authorities explain that there is no simple rule for determining whether a particular person has the appropriate level of authority, and such a determination may depend on the nature of the offence. They refer to the recent decision of the Privy Council in the case of *Meridian Global Funds Management Asia Ltd. v. Securities Commission*¹⁷, which suggests that the U.K. courts will adopt a flexible approach in making these determinations, having regard to the purpose of the provisions creating the relevant offence. They also provide that it is clear that the act of the representative of the company must have been done in connection

¹⁵ Conspiracy and aiding, abetting, counselling, procuring or suborning an offence are exceptions.

¹⁶ The presumption only applies to statutes passed after 1889 in respect of legal persons that are not incorporated.

¹⁷ [1995] 2 AC 500. This case does not have binding authority because it is a decision of Privy Council rather than the House of Lords.

with the business of the legal person. Other factors may also be relevant, such as whether the act was within the scope of the authority of the representative.

3. ARTICLE 3. SANCTIONS

The Convention requires Parties to institute “effective, proportionate and dissuasive criminal penalties” comparable to those applicable to bribery of the Party’s own domestic officials. Where a Party’s domestic law does not subject legal persons to criminal responsibility, the Convention requires the Party to ensure that they are “subject to effective, proportionate, and dissuasive non-criminal sanctions, including monetary sanctions”. The Convention also mandates that for a natural person, criminal penalties include the “deprivation of liberty” sufficient to enable mutual legal assistance and extradition. Additionally, the Convention requires each Party to take such measures as necessary to ensure that the bribe and the proceeds of the bribery of the foreign public official are subject to seizure and confiscation or that monetary sanctions of a “comparable effect” are applicable. Finally, the Convention requires each Party to consider the imposition of additional civil or administrative sanctions.

3.1/3.2 Criminal Penalties for Bribery of a Domestic and Foreign Public Official

Pursuant to subsection 1(1) of the 1906 Act, the penalty for an offence under that Act is, on summary conviction, imprisonment for a maximum term of 6 months and/or a fine not exceeding the statutory maximum, which is 5,000 (GBP)¹⁸; and on conviction on indictment, imprisonment for a maximum term of 7 years and/or a fine with no upper limit.¹⁹

The U.K. authorities state that maximum penalties are not prescribed for most common law offences. Although the courts may use the penalties for similar offences prescribed by statute as a guide, they are permitted to exceed the statutory limits.

The penalty for conspiracy to commit a criminal offence is the same as for the substantive offence. Joint principals and secondary parties are also subject to the same penalties as principals.

The U.K. authorities explain that there is little in the way of statutory guidance to assist the court in determining an appropriate penalty. The fundamental principle is that an independent judiciary has discretion in sentencing, within the limits placed by relevant court precedents. In addition, sentencing guidelines provide some assistance with respect to mitigating factors that may be considered. These include whether the offender acted under provocation. In addition, subsection 72(5) of the Criminal Justice Act 1988 provides that where a court makes a confiscation order against a defendant in any proceedings, it is the duty of the court to take into account that order before imposing any fine on him/her.

3.3 Penalties and Mutual Legal Assistance

Pursuant to the Criminal Justice (International Co-operation) Act 1998, the maximum term of imprisonment is not a relevant factor in determining whether to provide mutual legal assistance.

¹⁸ On November 22, 1999, 0.64 (GBP) was valued at \$1.00 U.S.

¹⁹ See the discussion under 5.1 on the “Rules and Principles Regarding Investigations and Prosecutions” regarding the procedures for summary conviction and conviction on indictment.

3.4 Penalties and Extradition

Pursuant to subsection 1(1) of the Extradition Act 1989, where extradition procedures under Part III of the Act are available between the United Kingdom and a foreign state, a person may be arrested and returned to the requesting foreign state if accused in that state of committing an “extradition crime” or alleged to be unlawfully at large after being convicted of an “extradition crime” in that state. Under subsection 2(1) of the Act, “extradition crime” is defined as conduct in the territory of a foreign state punishable with a term of imprisonment of at least 12 months in that state and which, if it had occurred in the United Kingdom, would be punishable by at least 12 months of imprisonment. The U.K. authorities indicate that this 12-month threshold does not have to be met in relation to the treaties with the United States and Mexico.

The U.K. authorities add that where the maximum penalty for a common law offence is not specified, there is no reason why it should not be extraditable.

3.6 Seizure and Confiscation of the Bribe and its Proceeds

Confiscation

Pursuant to the Criminal Justice Act 1988, which has been amended by the Proceeds of Crime Act 1995, where an offender has been convicted of a relevant offence in any proceedings before a Crown Court or a magistrates’ court, the court has the power to order the offender²⁰ to pay a sum equal to “the benefit” that he/she has received from the commission of the offence or the “amount that might be realised” (i.e. the property actually available for confiscation, where lower).

Pursuant to subsection 71(4), “a person benefits from an offence if he obtains property as a result of or in connection with its commission and his benefit is the value of the property so obtained”. This would appear to cover the proceeds of bribing a public official.

A confiscation order under Part VI of the Criminal Justice Act 1988 is also enforceable against property in the possession of third parties who have received a gift from the defendant. The U.K. authorities explain that the overall effect of the provisions on third parties is to allow property up to the value of any gift made by the defendant to be recovered from a third party. Confiscation of a gift from a third party can be accomplished regardless if he/she was aware of the criminal origins of the gift. In fact, to be confiscable, a gift to a third party does not have to be made out of the proceeds of a crime.

The prosecutor may initiate the procedure by giving written notice to the court that he/she intends to request a confiscation order, or the court may initiate the procedure itself where it considers it appropriate.²¹

In determining whether to order confiscation, the court may consider whether a victim of the offence has taken or intends to institute proceedings in respect of loss, injury or damage suffered in connection with the offence.²²

²⁰ According to the U.K. authorities, the courts have the power to order confiscation in this respect from a legal as well as a natural person.

²¹ See subsection 1(2) of the Proceeds of Crime Act 1995, which substitutes new subsections 71(1)-(1E) for subsections 71(1)-(3) of the Criminal Justice Act 1988.

²² See subsection 1(2) of the Proceeds of Crime Act 1995, which substitutes a new subsection 71(1C) for subsections 72(3) of the Criminal Justice Act 1998.

Forfeiture²³

Pursuant to section 43 of the Powers of Criminal Courts Act 1973, following conviction a court may order forfeiture of any property lawfully seized from the offender that was used to commit or facilitate the commission of the offence. This would appear to cover forfeiture of the bribe payment in relation to the offence of bribing a public official. Forfeiture of lawfully seized property can also be effected where possession of the property constituted the offence.

In making a forfeiture order, the court is required to consider the value of the property and the effect, financial or otherwise, that the order will have on the offender. The court is not required to consider any other penalty that might have been imposed on the offender for the offence.

Restraint Order

In order to prevent the dissipation of assets that might eventually be the subject of a confiscation order, a court may order a restraint order when criminal proceedings have been or are about to be instituted.²⁴ Such an order may remain in force until a confiscation order is fully satisfied.

4. ARTICLE 4. JURISDICTION

4.1 Territorial Jurisdiction

Article 4.1 of the Convention requires each Party to “take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory”. Commentary 25 on the Convention clarifies that “an extensive physical connection to the bribery act” is not required.

Generally

The U.K. authorities provide that the law establishes jurisdiction over any part of the offence that takes place within the territory of the United Kingdom. They indicate that this means jurisdiction would be established where the offer, acceptance or agreement to accept a bribe takes place in the United Kingdom. The U.K. authorities further indicate that, for instance, a telephone call into the U.K. would be sufficient to secure jurisdiction. The territorial application of U.K. law is not set out in legislation.

Conspiracy

In addition to general territorial jurisdiction, the recently enacted Criminal Justice (Terrorism and Conspiracy) Act 1998 extends jurisdiction over a conspiracy offence to the case where a person agrees with another person or persons in England and Wales to pursue a course of conduct intended to take place outside of the United Kingdom, where the following conditions are met:

1. The conduct would constitute an offence under the law in force in the other country.²⁵

²³ The U.K. authorities indicate that the power of forfeiture was used by the courts on 352 occasions in 1998.

²⁴ See Sections 76 and 77 of the Criminal Justice Act as amended by section 8 of the Proceeds of Crime Act 1995.

²⁵ See subsection 5(1) – 1A (3) of the Criminal Justice (Terrorism and Conspiracy) Act 1998. Pursuant to subsection 5(1) – 1A(8), this condition is considered satisfied unless the defence serves on the prosecution a notice that requiring the prosecution to show that it is satisfied. Pursuant to subsection 5(1) – 1A(3), the

2.The conduct would constitute an offence under the law of the United Kingdom, if it took place in the United Kingdom.²⁶

3.A party to the agreement must have become a party in England and Wales, or a party to the agreement or his/her agent must have done something in England and Wales in relation to the agreement or done or omitted to do something in England and Wales in pursuance of the agreement.²⁷

The U.K. authorities state that this legislation would apply to cases of conspiracy to bribe a foreign public official.

4.2 Nationality Jurisdiction

Article 4.2 of the Convention requires that where a Party has jurisdiction to prosecute its nationals for offences committed abroad it shall, according to the same principles, “take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official”. Commentary 26 on the Convention clarifies that where a Party’s principles include the requirement of dual criminality, it “should be deemed to be met if the act is unlawful where it occurred, even if under a different criminal statute”.

The U.K. authorities explain that nationality jurisdiction has been established over only certain offences, and corruption is not currently one of these.

In a report of a Steering Committee established to review the policy on nationality jurisdiction in respect of the criminal law²⁸, it is stated that extra-territorial jurisdiction has been established, from time to time, over certain offences “very often with the specific objective of implementing an international convention or protecting a particular domestic interest”²⁹. Examples of offences over which nationality jurisdiction has been established include³⁰ murder, high treason against the Crown and piracy. Extensive nationality jurisdiction applies under the Official Secrets Act with respect to the offence of passing on secret or confidential information. Nationality jurisdiction has also been accepted in respect of certain international crimes, where the stability of states or of the international community is threatened, including war crimes, terrorist offences and hijacking.

The Steering Committee commented that to date, a “piecemeal and pragmatic” approach had been taken in determining whether to exercise extra-territorial jurisdiction over a particular offence.³¹ It concluded “there were attractions” in adopting “a consistent and principled approach” if cases for extending extra-territorial jurisdiction “could be considered against a series of guidelines as suggested by the Committee”. The Committee created a list of tests for deciding whether extra-territorial jurisdiction should be established over a particular offence. It suggested that extra-territorial jurisdiction should only be established where at least one of the tests in the following list was satisfied:³²

court may permit the defence to require the prosecution to prove that this condition is satisfied without prior service of notice.

²⁶ Ibid, subsection 5(1) – 1A(4).

²⁷ Ibid, subsection 5(1) – 1A(5).

²⁸ On February 1, 1996 a review of policy on extra-territorial jurisdiction in respect of the criminal law was commenced by a Steering Committee of representatives of all interested government departments. The conclusions of the review are reported in a paper provided by the U.K. authorities.

²⁹ Ibid, page 2.

³⁰ All the examples are provided in the Steering Committee report, supra, 28, at pp. 2-3.

³¹ Supra, 28, at page 2.

³² Supra, 28, at page 12. The list produced is only a partial list of the tests created by the Steering Committee.

- The offence is serious. This could be determined by the length of the sentence.
- Due to the nature of the offence, the witnesses and evidence are likely to be available in the U.K.
- There is international consensus that certain conduct is reprehensible and concerted action involving the taking of extra-territorial jurisdiction is necessary.
- Exercising extra-territorial jurisdiction appears to be in the interests of the standing and reputation of the U.K. in the international community.

The U.K. authorities recognise that some of the above criteria would apply to the foreign bribery offence, but they emphasise that a key factor in not establishing nationality jurisdiction over the offence could be the difficulty in obtaining evidence abroad.

4.3 Consultation Procedures

Article 4.3 of the Convention requires that where more than one Party has jurisdiction, the Parties involved shall, at the request of one of them, consult to determine the most appropriate jurisdiction for prosecution.

The U.K. authorities indicate that cases are infrequently transferred, and that this procedure is reserved for the most serious crimes, such as murder or manslaughter.

4.4 Review of Current Basis for Jurisdiction

Article 4.4 of the Convention requires each Party to review whether its current basis for jurisdiction is effective in the fight against the bribery of foreign public officials, and if it is not, to take remedial steps.

The U.K. Government expects to publish its proposals shortly on the reform of the law of corruption, and jurisdiction is one of the issues under consideration.

5. ARTICLE 5. ENFORCEMENT

5.1 Rules and Principles Regarding Investigations and Prosecutions

Generally

Article 5 of the Convention states that the investigation and prosecution of the bribery of a foreign public official shall be “subject to the applicable rules and principles of each Party”. It also requires that each Party ensure that the investigation 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”.

The U.K. authorities explain that the investigation and prosecution of the offence of bribing a foreign public official would be subject to the same procedural rules as any investigation and prosecution in the United Kingdom.³³ The police investigate an allegation, sometimes acting on the advice of the Crown Prosecution Service (CPS) or the Serious Fraud Office (SFO).³⁴ In addition, the SFO has some limited

³³ The provisions that govern criminal investigations and proceedings are contained in statutes including the Magistrates Courts Act 1980, the Police and Criminal Evidence Act 1984 (and the Code of Conduct issued under that Act), and the Criminal Procedure and Investigations Act 1996.

³⁴ In Scotland the principal prosecuting authority is the Procurator Fiscal’s Office and in Northern Ireland it is the office of the DPP of Northern Ireland.

investigative powers. Once a case is submitted to the CPS it is reviewed in accordance with the principles in the Code for Crown Prosecutors. If it is determined that there is sufficient evidence to provide a realistic prospect of a conviction, it is decided whether the prosecution is required in the public interest. Factors including whether the accused is elderly or infirm may be considered in such a determination. The U.K. authorities state that as corruption is a serious offence, the public interest is usually served best by prosecuting in cases where there is sufficient evidence.

Moreover, a prosecution for a bribery offence under the 1906 Act cannot be instituted without the consent of the Attorney-General or Solicitor-General.³⁵ The U.K. authorities state that the Attorney-General or Solicitor-General applies the same tests as the CPS and the SFO in determining whether a bribery case should be prosecuted. However, in practice these tests will already have been applied by the CPS or SFO before a case is submitted for consideration by the Attorney-General or Solicitor-General.

In England and Wales, all prosecutions commence in the magistrates' courts. Summary conviction offences are tried in the magistrates' courts, and proceedings for indictable offences begin with a preliminary hearing in the magistrates courts before being tried in the Crown Court. The U.K. authorities state that a serious allegation of corruption of the kind contemplated under the Convention would likely be proceeded with as an indictable offence.

Special Procedures for Investigations

The Home Office points out that an offence under the 1906 Act is "arrestable" pursuant to section 24 of the Police and Criminal Evidence Act 1984. However, special procedures, such as the examination of bank records, will only be authorised by a Crown Court Judge for the investigation of a "serious arrestable offence". Pursuant to section 116 of the Police and Criminal Evidence Act 1984, to fall within the definition of a "serious arrestable offence", it must be shown that the offence in question would "lead to substantial financial gain or serious financial loss to any person".³⁶ The U.K. officials comment that "serious financial gain" requires no further definition. "Serious financial loss" is defined in subsection 116(7) of the Police and Criminal Evidence Act 1984 as financial loss that "having regard to all the circumstances, is serious for the person who suffers it". The U.K. authorities comment that the type of offence contemplated by the Convention would be considered a "serious arrestable offence" and thus the special procedures under the Police and Criminal Evidence Act would be available.

Injured Parties

Judicial review of the decisions of the Crown Prosecution Service is available pursuant to subsection 31(3) of the Supreme Court Act 1981. Leave of the High Court must be obtained, which shall not be granted unless the court is satisfied that the applicant has "a sufficient interest in the matter to which the application relates". In order to obtain leave of the Court, an injured party would have to show that there is a clear link between the conduct of the person under investigation and the harm he/she has suffered. A general complaint that the business interests of the applicant have been adversely affected by the corrupt acts of the person under investigation would not be sufficient. However, if, for example, the applicant could show that the person under investigation subverted a competitive tendering exercise in which the applicant participated and suffered economic loss as a result of that subversion, leave would probably be granted.

³⁵ This requirement is discussed in the introductory discussion to this review under the sub-heading "Legislation" below "1. Article 1. The Offence of Bribing a Foreign Public Official".

³⁶ Page 5, *Supra*, 10.

5.2 Considerations such as National Economic Interest

The Code for Crown Prosecutors provides the public interest factors that can be considered in determining whether a case should be prosecuted. These include the risk that a prosecution might result in the disclosure of information that could harm sources of information, international relations or national security. The U.K. authorities indicate that the U.K. would seek to meet the requirements of Article 5 of the Convention, but at the same time would have to take into consideration the risk that a disclosure of information could harm any of these interests.

6. ARTICLE 6. STATUTE OF LIMITATIONS

Article 6 of the Convention requires that any statute of limitation with respect to the bribery of a foreign public official provide for “an adequate period of time for the investigation and prosecution” of the offence.

In the United Kingdom, there is no limitation period with respect to the prosecution of corruption offences.³⁷

7. ARTICLE 7. MONEY LAUNDERING

Article 7 of the Convention requires that where a Party has made bribery of a domestic public official a predicate offence for the application of money laundering legislation, it must do so on the same terms for bribery of a foreign public official, regardless of where the bribery occurred.

The Criminal Justice Act 1988 (as amended by the Criminal Justice Act 1993) establishes four money-laundering offences in relation to “proceeds of criminal conduct”, which is defined in the Act as the “benefit” from “criminal conduct”. The U.K. authorities explain that this contemplates the bribe in respect of the offence of accepting a bribe, and the proceeds in respect of the offence of offering or giving a bribe.

“Criminal conduct” is defined as “conduct which constitutes an offence” to which Part VI of the Criminal Justice Act 1988 applies, or would constitute such an offence if it took place in England and Wales. Thus conduct abroad is covered if it would amount to a Part VI offence in England and Wales. All conduct that constitutes an indictable offence under a statute or the common law is covered by this definition. A conviction for the predicate offence is not necessary for the operation of the money laundering offences.

The four money-laundering offences established in the Criminal Justice Act 1988 (as amended by the Criminal Justice Act 1993) can be described as follows:

1. Assisting another to retain the benefit of criminal conduct. Pursuant to subsection 93A(1) it is an offence to enter into or otherwise be involved in an arrangement whereby the retention or control of another person’s proceeds of criminal conduct is facilitated by concealment, removal from the jurisdiction, transfer to nominees, or otherwise, “knowing or suspecting” that the proceeds belong to a person who is or has been engaged in criminal conduct or has benefited from criminal conduct. It is a defence where the person discloses to a constable his/her suspicion or belief that the property has been derived in connection with criminal conduct before acting in contravention of subsection 93A(1) or as soon after as is reasonable, or where he/she intended to do so or where there is a reasonable excuse for his/her failure to do so.³⁸ It is similarly a defence to disclose, etc. one’s

³⁷ There is no legal authority for the absence of a limitation period. Under U.K. law, limitation periods are only stipulated in statutes when they are not indefinite.

³⁸ Subsection 93A (3)(b) and (4) (c) of the Criminal Justice Act 1988 (as inserted by the Criminal Justice Act 1993).

suspicion to the appropriate person in accordance with the procedure established by his/her employer for making such disclosures.³⁹ Additionally, the prosecution does not have to prove the existence of the requisite knowledge or suspicion because the defendant must prove its absence (it is assumed on a balance of probabilities) as a defence.⁴⁰ The penalty for this offence is, on summary conviction, imprisonment for a maximum term of 6 months and/or a fine not exceeding the statutory maximum of 5,000 (GBP), and on conviction on indictment, imprisonment for a maximum term of 14 years and/or an unlimited fine.⁴¹

2. Acquisition or possession or use of another person's proceeds of criminal conduct. Pursuant to subsection 93B(1) it is an offence to acquire, use or possess another person's property "knowing" that it directly or indirectly represents the other person's proceeds of criminal conduct. It appears that all the defences that pertain to the offence under subsection 93A(1) also apply in relation to subsection 93B(1). In addition, it is a defence to this offence that the person acquired or used the property or had possession of it for adequate consideration.⁴² The penalty for this offence is the same as it is for an offence under subsection 93A(1).

3. Concealing or transferring proceeds of criminal conduct. Pursuant to subsection 93(c)(1), it is an offence for a person to conceal, disguise, convert or transfer or remove from the jurisdiction property that in whole or part represents his/her proceeds of crime. Pursuant to subsection 93(c)(2), it is an offence for a person to conceal, disguise, convert or transfer or remove from the jurisdiction property knowing or having reasonable grounds to suspect that it represents another person's proceeds of crime, for the purpose of assisting any person to avoid prosecution or a confiscation order. The penalty for these offences is the same as it is for an offence under subsection 93A(1).

4. "Tipping Off".⁴³ Pursuant to section 93D, it is an offence to disclose to any other person information, etc. that is likely to prejudice an investigation, knowing that the police are acting or proposing to act in connection with a money laundering investigation. (This offence does not apply to the disclosure by a professional legal adviser of information that is protected by the solicitor/client privilege.) It is a defence to this offence if a person proves that he/she did not know that the disclosure was likely to be prejudicial to a money laundering investigation. The penalty for this offence is, on summary conviction, imprisonment for a maximum term of 6 months and/or a fine not exceeding the statutory maximum of 5,000 (GBP), and on conviction on indictment, imprisonment for a term not exceeding 5 years and/or an unlimited fine.

8. ARTICLE 8. ACCOUNTING

Article 8 of the Convention requires that within the framework of its laws and regulations regarding the maintenance of books and records, financial statement disclosures and accounting and auditing standards, a Party prohibits the making of falsified or fraudulent accounts, statements and records for the purpose of bribing foreign public officials or of hiding such bribery. The Convention also requires that each Party provide persuasive, proportionate and dissuasive penalties for such omissions and falsifications.

³⁹ Ibid, subsection 93A (5)

⁴⁰ Supra, 38, subsection 93A (4).

⁴¹ Supra, 38, subsection 93A (6).

⁴² Supra, 38, subsection 93B(2).

⁴³ This offence is described in: G. McCormack, 'Money Laundering and Banking Secrecy in the United Kingdom', P. Bernasconi (ed) *Money Laundering and Banking Secrecy*, 31-48 (1996 Kluwer Law International).

8.1/8.2/8.3 Accounting and Auditing Requirements/Companies Subject to Requirements/Penalties

Accounting Records

Pursuant to section 221 of the Companies Act 1985, “every company” shall keep accounting records that disclose “with reasonable accuracy” the financial position of the company, and enable the directors to ensure that any balance sheet and profit and loss account comply with the requirements under the Act as to their form and content and otherwise. In particular, company records must contain “entries from day to day of all sums of money received and expended by the company, and the matters in respect of which the receipt and expenditure takes place, and a record of the assets and liabilities of the company”.⁴⁴ The U.K. authorities indicate that limited companies, public limited companies, companies limited by guarantee and unlimited companies are subject to these accounting requirements.

Pursuant to section 222 of the Companies Act 1985, a company’s accounting records must be kept at its registered office or other place designated by the directors, and shall at all times be available for inspection by the company’s officers. Section 222 also contains requirements for the period during which accounting records must be preserved.

Section 722 of the Companies Act 1985 states that any register, index, minute book or accounting records required by the Act to be kept by a company shall be kept in a bound book, or by recording the entries in any other manner as long as adequate precautions are taken to prevent falsification and to facilitate its discovery.

Pursuant to section 223, a company officer that fails to comply with the obligations under section 221 or 222 is guilty of an offence unless he/she shows that he/she acted honestly and the default was excusable in the circumstances. The penalties for these offences are, on summary conviction, a maximum term of imprisonment of 6 months and/or a fine of 5,000 (GBP), and on conviction by indictment, imprisonment for a maximum term of 2 years and/or a fine with no upper limit.

Where default is made in relation to the obligations under section 722, the company and every company officer that is in default is liable to a fine with no upper limit and, for continued contravention, to a daily default fine.

False or fraudulent accounting is also an offence under section 17 of the Theft Act 1968. The penalty for an offence under this provision is imprisonment for a maximum term of 7 years.

Auditing Requirements

Pursuant to the Companies Act 1985, companies with a turnover exceeding 350,000 (GBP)⁴⁵ and certain companies irrespective of turnover (e.g. banking, insurance and financial service companies) must have an external audit. Section 27 of the Companies Act 1989 provides the rules to ensure the independence of auditors and the rules of the relevant professional bodies. In addition, channels of communication are available through the relevant professional bodies for the reporting of alleged violations of professional standards or ethics.

⁴⁴ Subsections 221(2) and (3) of the Companies Act 1985.

⁴⁵ The U.K. is currently consulting on increasing the limit at which an audit is required.

Internal Company Controls

Financial service providers (including banks) are subject to statutory requirements in relation to internal controls.

Listed companies are subject to the corporate governance provisions of the Stock Exchange listing agreement, which includes reporting on the effectiveness of internal controls. These provisions require listed companies to include statements in their annual reports about their internal control systems and encourage the establishment of audit committees.

9. ARTICLE 9. MUTUAL LEGAL ASSISTANCE

Article 9.1 of the Convention mandates that each Party co-operate with each other to the fullest extent possible in providing “prompt and effective legal assistance” with respect to the criminal investigations and proceedings, and non-criminal proceedings against a legal person, that are within the scope of the Convention.

In addition to the requirements of Article 9.1 of the Convention, there are two further requirements with respect to criminal matters. Under Article 9.2, where dual criminality is necessary for a Party to be able to provide mutual legal assistance, it shall be deemed to exist if the offence for which assistance is sought is within the scope of the Convention. And pursuant to Article 9.3, a Party shall not decline to provide mutual legal assistance on grounds of bank secrecy.

9.1 Laws, Treaties and Arrangements Enabling Mutual Legal Assistance

9.1.1 Criminal Matters

Pursuant to the Criminal Justice (International Co-operation) Act 1990, the United Kingdom is able to provide a wide range of mutual legal assistance in criminal matters. The different types of assistance available and the requirements for providing each type are summarised as follows:

1. Service of Overseas Process. Pursuant to section 1, the Secretary of State⁴⁶ may cause a summons from outside the United Kingdom to be served on a person in the United Kingdom requiring that person to appear as a defendant or a witness, or may cause a recording of a decision of a court outside the United Kingdom to be served on a person in the United Kingdom. Service by virtue of this provision does not impose any obligation under the law of the United Kingdom to comply with it.

2. Receipt by Court in the U.K. of Evidence to be Used outside the U.K. Pursuant to section 4, the Secretary of State may, if he/she thinks fit, upon a request from outside the United Kingdom for assistance in obtaining evidence inside the United Kingdom, nominate a court to receive such of the evidence to which the request relates as appears appropriate. For the Secretary of State to be able to nominate a court as described, the request must have been made by the appropriate authority for making such requests⁴⁷. In addition, the Secretary of State⁴⁸ must be satisfied that an offence has been committed or there are reasonable grounds for suspecting that an offence has been committed, and that an investigation or proceedings in respect of that offence has been instituted.

⁴⁶ The relevant person in Scotland is the Lord Advocate.

⁴⁷ Pursuant to subsection 4(1) this could be a court or tribunal exercising criminal jurisdiction, a prosecuting authority or any other authority that appears to have the function of making such requests.

⁴⁸ The relevant person in Scotland is the Lord Advocate.

3. Transfer of a prisoner in the U.K. to Give Evidence or Assist in an Investigation outside the U.K. Pursuant to section 5, the Secretary of State may, if he/she thinks fit, issue a warrant for a prisoner serving a sentence in the United Kingdom to be transferred outside of the United Kingdom to give evidence or assist in proceedings or the investigation of an offence. The prisoner must consent to being transferred in order for a warrant to be issued under this section.

4. Search and Seizure of Material Relevant to Investigation outside the U.K. Pursuant to section 7, a warrant authorising a constable to enter premises and search those premises and seize evidence may be issued upon the request of another country when a constable or justice of the peace is satisfied of the following:

a. Criminal proceedings have been instituted against a person in that country or he/she has been arrested in the course of a criminal investigation there.

b. The conduct constituting the offence would constitute a “serious arrestable offence” within the meaning of section 8 and Schedule I of the Police and Criminal Evidence Act 1984 if it had occurred in the United Kingdom. This requirement is discussed above under the sub-heading “Special Procedures for Investigations”, which appears below the heading “5.1 Rules and Principles Regarding Investigations and Prosecutions”.

c. There are reasonable grounds for suspecting that there is on the premises occupied or controlled by the person against whom the criminal proceedings have been instituted, evidence relating to the offence, other than items subject to legal privilege within the meaning of the Police and Criminal Evidence Act 1984.

5. Forfeiture. Part VI of the Criminal Justice Act 1988 enables England and Wales to assist designated jurisdictions outside the U.K. in confiscating the proceeds of all crimes, other than drug trafficking and certain terrorist crimes, to which separate legislation applies. Section 96 of the Act provides for an Order in Council to be made to designate particular countries and territories for assistance. Additionally, section 9 of the Criminal Justice (International Co-operation) Act 1990 enables the three jurisdictions of the U.K. to assist countries designated by Order in Council in forfeiting the instruments of crime. These Orders in Council have been amended on a number of occasions. These provisions would appear to cover the bribe payment and the proceeds in respect of the offence of bribing a foreign public official.

9.1.2 Non-Criminal Matters

The U.K. authorities indicate that assistance in relation to non-criminal proceedings against a legal person is available under the Hague Convention (for civil matters), double taxation agreements and Customs and Excise administrative agreements.

9.2 Dual Criminality

The U.K. authorities explain that in the United Kingdom the provision of mutual legal assistance is not conditional on dual criminality, except in respect of requests for search and seizure. They further explain that since the conduct caught within the scope of the Convention is covered by legislation to combat corruption, dual criminality should exist in all cases where search and seizure is requested, except those cases where the offence is not considered a “serious arrestable offence”⁴⁹.

⁴⁹ See discussion under sub-heading “Special Procedures for Investigations” under heading “5.1 Rules and Principles Regarding Investigations and Prosecutions.

9.3 Bank Secrecy

The U.K. authorities state that section 4 of the Criminal Justice (International Co-operation) Act 1990 applies in respect of requests for bank records⁵⁰. Pursuant to section 4, the Secretary of State may “if he thinks fit”, upon a request from outside the United Kingdom for assistance in obtaining evidence inside the United Kingdom, nominate a court to receive evidence. The Secretary of State must be satisfied that certain conditions exist in order to nominate a court, which are discussed above under Item 2 below the heading “9.1.1. Criminal Matters”. The U.K. authorities explain that where a court has been nominated to receive bank records, the nominated court may issue a witness summons to bank officials to compel such witnesses to give evidence. Pursuant to established precedent, the disclosure of bank information under compulsion of law does not amount to a breach of a bank’s duty of confidence to its customer.

As subsection 4(1) of the Criminal Justice (International Co-operation) Act 1990 provides the Secretary of State with an overriding discretion whether or not to accede to a request for evidence, it would appear that there is some potential for the Secretary of State to consider the threat to banking confidentiality in determining this issue. However, the U.K. authorities indicate that in exercising his/her discretion, the Secretary of State would be obligated to take into account the requirement under Article 9.3 of the Convention.

10. ARTICLE 10. EXTRADITION

10.1 Extradition for Bribery of a Foreign Public Official

Article 10.1 of the Convention obliges Parties to include bribery of a foreign public official as an extraditable offence under their laws and the treaties between them.

The United Kingdom can provide extradition pursuant to the Extradition Act 1989 (Chapter 33) when an extradition request for the surrender of “a person” is made to the Secretary of State, and conditions, including the following, are met:

1. The crime in question must constitute an “extradition crime”.⁵¹ An “extradition crime” is a crime that would be punishable by at least 12 months imprisonment if it had occurred in the United Kingdom.⁵² An “extradition crime” can also be an extra-territorial offence against the law of a foreign state, which is punishable under that law with a minimum term of imprisonment of 12 months, if either the crime would have constituted in corresponding circumstances an extra-territorial offence against the law of the United Kingdom punishable by at least 12 months of imprisonment⁵³, or the following conditions are met⁵⁴:

- a. The extra-territorial jurisdiction is based on the nationality of the offender;
- b. The conduct constituting the offence took place outside the United Kingdom; and

⁵⁰ The U.K. authorities state that section 8 of the Criminal Justice (International Co-operation) Act 1990 contains similar provisions in respect of overseas requests to Scotland.

⁵¹ Subsection 1(1) of the Extradition Act 1989 (Chapter 33)

⁵² See discussion above under 3.4 on “Penalties and Extradition”.

⁵³ Subsection 2(2) of the Extradition Act 1989 (Chapter 33).

⁵⁴ The conditions are listed in subsection 2(3), *Ibid*.

c. If the offence had occurred in the United Kingdom, it would constitute an offence under the law of the United Kingdom punishable with at least 12 months imprisonment.

Since the bribery of a foreign public official is not an extra-territorial crime in the United Kingdom, these conditions would have to be met.

2. The request for extradition must be made pursuant to an “extradition arrangement”.⁵⁵ “Extradition agreements” may be either arrangements of a general nature (“general extradition arrangements”) made with one or more states, or arrangements relating to particular cases (“special extradition arrangements”) made with a state with which there are no general extradition arrangements.⁵⁶

In the case of a “general extradition agreement”, Her Majesty may, by Order in Council, direct that the Extradition Act 1989 applies between the United Kingdom and the foreign state or states, subject to the limitations, etc. contained in the order.⁵⁷ An Order in Council shall not be made unless the “general extradition agreement” to which it relates is in conformity with the Extradition Act 1989.

The United Kingdom has extradition agreements with all the Commonwealth countries, except South Africa, Namibia and Pakistan. The Council of Europe Convention on Extradition of 1957 governs extradition agreements with 29 countries in Western, Central and Eastern Europe. The United Kingdom also has bilateral treaty arrangements with 21 countries.

The requirements of the Extradition Act on the restrictions on return of a person must be satisfied. A person cannot be returned to the requesting country if the offence in question is of a political character, or established under military law (and not under general law), or the object of his/her return is in fact to prosecute him/her on account of his/her race, religion, nationality or political opinions.⁵⁸

10.2 Legal Basis for Extradition

Article 10.2 states that where a Party that cannot extradite without an extradition treaty receives a request for extradition from a Party with which it has no such treaty, it “may consider the Convention to be the legal basis for extradition in respect of the offence of bribery of a foreign public official”.

In the absence of an extradition treaty between the U.K. and a country requesting extradition in respect of the foreign bribery offence, the U.K. could consider an ad hoc extradition request pursuant to section 15 of the Extradition Act. The U.K. authorities state that a request for ad hoc extradition would be viewed favourably if the Convention were cited.

The U.K. authorities explain that in addition the Convention could be considered as a legal basis for extradition, but subsection 22(2) of the Extradition Act would have to be amended in order to add the OECD Convention to the list of conventions under which extradition may be provided. The U.K. would then extradite on the basis of offences under the Convention to a Party with whom they had no other extradition arrangement.

⁵⁵ Subsection 3(1), supra, 53.

⁵⁶ Subsection 3(3), supra, 53.

⁵⁷ Subsection 4(1), supra, 53.

⁵⁸ Subsection 6(1), of the Extradition Act 1989 (Chapter 33).

10.3/10.4 Extradition of Nationals

Article 10.3 of the Convention requires Parties to ensure that they can either extradite their nationals or prosecute them for the bribery of a foreign public official. And where a Party declines extradition because a person is its national, it must submit the case to its prosecutorial authorities.

The U.K. authorities state that nationals of the United Kingdom can be extradited without attaching any conditions in addition to those that are attached when a request relates to a non-national. Thus the same principle of dual criminality applies to nationals as applies to non-nationals (see discussion above under Item 1 in 10.1).

10.5 Dual Criminality

Article 10.4 of the Convention states that where a Party makes extradition conditional on the existence of dual criminality, it shall be deemed to exist as long as the offence for which it is sought is within the scope of the Convention.

The U.K. authorities state that the requirement of dual criminality would be met as long as the offence were punishable by at least 12 months of imprisonment in the requesting country, since the offence is punishable by at least 12 months imprisonment in the United Kingdom.⁵⁹

11. ARTICLE 11. RESPONSIBLE AUTHORITIES

Article 11 of the Convention requires Parties to notify the Secretary-General of the OECD of the authority or authorities acting as a channel of communication for the making and receiving of requests for consultation, mutual legal assistance and extradition.

The United Kingdom has notified the Secretary-General of the OECD that the responsible authority for the making and receiving of requests for consultation, mutual legal assistance and extradition is the Secretary of State for the Home Department.

B. IMPLEMENTATION OF THE REVISED RECOMMENDATION

1. TAX DEDUCTIBILITY

Pursuant to section 577A of the Income and Corporations Tax Act 1988 (ICTA), tax deductibility is denied for any payment “the making of which constitutes the commission of a criminal offence” under U.K. criminal law. The U.K. authorities state that if a payment of a bribe to a foreign public official is an offence contrary to a Prevention of Corruption Act or the common law, pursuant to section 577A, it would not be tax deductible. A conviction is not necessary in order to deny deductibility.

If deductibility is not denied under section 577A because the payment of the bribe does not constitute an offence contrary to a Prevention of Corruption Act or the common law, which would be the case, for example, if the activities in question all occurred outside the U.K., it may still be denied pursuant to another provision under the ICTA. The U.K. authorities state that, for instance, it might be excluded from tax deductibility under section 577, which denies tax relief for expenses incurred in “providing business entertainment”. Pursuant to subsection 577(5), “business entertainment” is defined as “entertainment

⁵⁹ The question is raised above under 3.4 on “Penalties and Extradition” about whether this would necessarily be the case in respect of the common law bribery offences since they do not contain a specific reference to a penalty of imprisonment.

(including hospitality of any kind) provided by a person, or by a member of his staff, in connection with a trade carried on by that person, but does not include anything provided by him for bona fide members of his staff unless its provision for them is incidental to its provision also for others". In determining whether a payment described as a fee for services or a commission is in fact a gift, the tax inspector would be entitled to ask what the services in question were, and if the fee or commission appears excessive, he/she could seek to disallow all or part of it as a gift. This can be done without having to allege that the payment was corrupt in nature.

EVALUATION OF UNITED KINGDOM

General Remarks

The Working Group commends the United Kingdom authorities for their excellent cooperation in providing responses, legislative material and secondary sources of information regarding their laws in relation to corruption.

The Working Group notes the United Kingdom's view that, in accordance with the general principles of law and the rules of statutory interpretation applicable in the United Kingdom, the bribery of foreign public officials is criminalised by the Prevention of Corruption Act 1906 and the common law. On the basis of the ample information provided, the Working Group, however, is not in a position to determine that the U.K. laws are in compliance with the standards under the Convention. The Working Group urges the U.K. to enact appropriate legislation and to do so as a matter of priority, taking into account the observations of the Working Group. The Working Group will review the situation in the United Kingdom by the end of 2000, and intends to re-examine the U.K. in Phase 1 as soon as this legislation is enacted. However, the U.K. did stress that new legislation is very unlikely to be enacted by the end of the year 2000.

I. Specific Issues

1. Article 1 of the Convention

1.1 The offence

The U.K. believes that the 1906 and the common law complies with the requirements of the OECD Convention for the following reasons:

1. It is the view of the U.K. government that the 1906 Act applies to foreign public officials.
2. It is the U.K.'s position that the 1906 Act contains no restrictions on territoriality—unlike the 1889 Act. Had Parliament wished to restrict the Act, it would surely have done so.
3. In at least one reported decision, the conviction of a person in connection with the bribery of a foreign public official was upheld. In that case, the foreign public official was characterized as his government's "agent", as that term is used in the 1906 Act.
4. The rules of statutory interpretation—in the absence of a clear indication to the contrary, the words in a statute are to be interpreted in accordance with their ordinary English meaning.
5. The U.K. advances in support of its position the conclusion in a report of the Law Commission in England and Wales that the 1906 Act applies to foreign public officials. The report was issued after much public consultation involving prosecutors, legal practitioners, the judiciary and academics. It has not been seen by the Working Group.
6. Although there is no express reference in the 1906 Act to the bribery of foreign public officials, the Commentaries on the Convention recognize that "a statute prohibiting the bribery of agents generally which does not specifically address the bribery of a foreign public official, and a statute limited to the case, could both comply with this Article".

However the Working Group has serious concerns on the applicability of UK law to bribery of foreign public officials. These concerns are based on the following reasons:

1. There is no explicit provision in the UK law that criminalises bribery of foreign public officials.

2. As regards statute law, it is the position of the United Kingdom that the Prevention of Corruption Act (1906 Act), which contains a bribery offence that is aimed at the bribery of any “agent” in relation to his/her “principals affairs or business”, along with the common law offence of bribing a public official, provides a sufficient base for the implementation of the Convention. The Working Group notes that “agent” is defined under subsection 1(2) of the 1906 Act as “any person employed for or acting for another”. The Working Group further notes that subsection 1(3) states that “any person serving under the Crown or under any corporation or any borough, county or district council, or any board of guardians, is an agent” within the meaning of the Act. The Working Group remains concerned that application of the 1906 Act to the bribery of a foreign public official depends entirely upon future judicial interpretation. Therefore, the Working Group urges that the U.K. Government enact a statute specifically prohibiting the bribery of foreign public officials. In the absence of an express provision the Working Group has serious concerns about the applicability of this statute law to cases of bribery of foreign public officials.

3. As regards the common law, there is no definitive way of defining the offence of bribing a public official. The U.K. authorities rely on the description of the common law offence in *Russell on Crime* (12th ed. 1964), which is aimed at the bribery of “any person whatsoever, in a public office”. However, the Working Group notes that the common law offence does not expressly mention the bribery of foreign public officials.

4. The Working Group notes that the United Kingdom has not supported its interpretation of the 1906 Act or the common law offence with sufficiently clear case law.

5. Moreover, a conviction on the basis of this law could be in contradiction with the European Convention on Human Rights, which states that “no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed”.

1.2 Related issues

The Working Group is also concerned that if there is not an offence of bribing a foreign public official under U.K. law, the U.K. will not be able to implement some of the other obligations under the Convention. The U.K. laws governing the money laundering offences, mutual legal assistance in the form of search and seizure, extradition and disallowance of tax deductibility are all linked to the existence of a criminal offence under U.K. law.

2. Applicability of U.K. law to foreign Members of Parliament and foreign members of the judiciary.

The U.K. authorities provide that bribery of Members of the U.K. Parliament as well as members of the judiciary is definitely not covered by the 1906 Act when they are acting in their official capacity. They state that, in any case, bribery of these officials is covered by the common law. The U.K. authorities also state that although bribery of a U.K. judge or U.K. Member of Parliament acting in his/her official capacity is not covered by the 1906 Act, the Act might apply to the bribery of a foreign judge or a foreign Member of Parliament, because the courts would look at the status of that category of official under the foreign constitution. They add that the common law offence is not restricted in this manner.

The Working Group has doubts about whether either the offence in the 1906 Act or the common law offence would cover the bribery of foreign Members of Parliament. There is also concern about an offence that depends on the definition of foreign public official in the foreign public official’s country. Additional doubts were raised as to the coverage of Members of Parliament and members of the judiciary in Scotland.

The Working Group therefore recommends that in the context of the Government's review of the law of corruption, the U.K. ensure that any new law that is proposed is clearly applicable to foreign Members of Parliament and foreign judges.

3. Application of the Convention to U.K. Crown dependencies and overseas territories

The U.K. authorities state that the U.K. Crown Dependencies are internally self-governing and enact their own legislation. The ratification of international treaties and conventions may be extended to them, subject to the agreement of the Insular Authorities.

The U.K. indicates that negotiations are currently taking place with the Crown Dependencies with a view to extending ratification of the Convention to them. However, ratification cannot be extended to them until the U.K. is satisfied that they have satisfactory legislation in place to implement the obligations under the Convention.

The Working Group invites the U.K. to continue efforts to extend the application of the Convention to Crown Dependencies and overseas territories.

4. Nationality jurisdiction

The U.K. authorities emphasize that in accordance with Article 4 of the Convention, an extensive territorial link does not need to be established in order for the U.K. to exercise territorial jurisdiction over an offence. For instance, a telephone call into the United Kingdom is sufficient to secure jurisdiction. The United Kingdom has not established nationality jurisdiction in respect of the foreign bribery offence.

The United Kingdom has only accepted nationality jurisdiction in respect of certain crimes, including murder, sexual offences involving children and offences in relation to the Official Secrets Act. Nationality jurisdiction has not been established over any economic crimes, such as fraud, theft or counterfeiting. A Steering Committee established in 1996 to review the policy on nationality jurisdiction in respect of the criminal law drafted a list of suggested criteria for determining whether nationality jurisdiction should be established over a particular offence. These include the seriousness of the offence, the likelihood that evidence and witnesses will be available in the U.K. and whether there is an international consensus that the conduct is reprehensible and requires concerted action involving the taking of nationality jurisdiction.

The Working Group encourages the U.K. government to consider extending nationality jurisdiction over the foreign bribery offence and recommends that examination of this issue in the ongoing review of the law of corruption involve consideration of the application of the criteria suggested by the Steering Committee.

5. Enforcement

Pursuant to subsection 2(1) of the Prevention of Corruption Act 1906, prosecution for an offence under the Act shall not be instituted without the consent of the Attorney-General or the Solicitor-General. The U.K. authorities explain that in determining whether to provide the requisite permission, the A-G or S-G applies the same criteria as the normal prosecutorial authorities. First he/she determines whether there is sufficient evidence to provide a realistic prospect of a conviction. If this is the case, he/she determines whether the public interest will be satisfied by a prosecution. The Code for Crown Prosecutors provides the public interest factors that can be considered. These include the risk that a prosecution might result in the disclosure of information that could harm sources of information, international relations or national security. The U.K. authorities state that since corruption is considered a serious crime, there is a presumption that the public interest will be served by prosecuting such an offence. They point out that judicial review of a decision of the Attorney-General or Solicitor-General or prosecutor to not prosecute is available to injured parties on the ground that the decision was unreasonable under the circumstances.

The Working Group expects that within the exercise of prosecutorial discretion, the U.K. fully respect Article 5 of the Convention. In addition, the Working Group recommends that the U.K. reconsider the requirement that the prosecution of the bribery of foreign public officials not be instituted without the permission of the Attorney-General or Solicitor-General.

II. Communications between tax authorities and prosecutorial authorities

Tax authorities in the United Kingdom are bound by a duty of confidentiality and therefore they cannot share tax information on bribes with the prosecutorial authorities. The Working Group considers this to be a significant obstacle in the detection of bribery in the U.K. The Working Group therefore recommends that in the context of the review of the U.K. law of corruption, the Government consider taking appropriate steps to allow the exchange of information between the tax authorities and the prosecutorial authorities in cases of foreign bribery.