



**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS**

**UNITED KINGDOM: PHASE 2**

**REPORT ON THE APPLICATION OF THE CONVENTION ON  
COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN  
INTERNATIONAL BUSINESS TRANSACTIONS  
AND THE 1997 RECOMMENDATION ON COMBATING BRIBERY  
IN INTERNATIONAL BUSINESS TRANSACTIONS**

*This report was approved and adopted by the Working Group on Bribery in  
International Business Transactions on 17 March 2005.*

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## A. INTRODUCTION

### 1. Nature of the on-site visit

1. From 19 to 23 July 2004, a team from the OECD Working Group on Bribery in International Business Transactions (Working Group) conducted an on-site visit of the United Kingdom (UK) pursuant to the procedure for the Phase 2 self- and mutual evaluation of the implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Convention) and the 1997 Revised Recommendation (Revised Recommendation). The purpose of the on-site visit was to study the structures in the UK which enforce the laws and rules implementing the Convention, to assess their application in practice and to monitor the UK's compliance in practice with the Revised Recommendation.

2. The OECD team was composed of lead examiners from Canada<sup>1</sup>, France,<sup>2</sup> and representatives of the OECD Secretariat.<sup>3</sup> During the on-site visit, the team met officials from the following ministries and other government bodies: Home Office (HO); HM Treasury; Department of Trade and Industry (DTI); Foreign & Commonwealth Office (FCO); Department of Defence; HM Custom and Excise (HMCE); Inland Revenue (IR); UK Trade and Investment (UKTI); Export Credits Guarantee Department (ECDG); Department for International Development (DFID); Defence Export Services Organisation (DESO); representatives of judicial bodies (Criminal Division of Court of Appeal and Crown Court); Attorney General's Office of Guernsey; Attorney General's Office in the British Virgin Islands (BVI); Attorney General's Office of Jersey; Judicial Studies Board (JSB); Law Officers Office; Crown Prosecution Service (CPS); Serious Fraud Office (SFO); Crown Office (Scotland); Department of Public Prosecutors (DPP) of Northern Ireland; National Criminal Intelligence Service (NCIS); National Crime Squad (NCS); Independent Police Complaints Commission (IPCC); Metropolitan Police Service (MPS); Metropolitan Police Authority; City of London Police; Association of Chief Police Officers (ACPO); West Midlands Police; Scottish Police; Police Service of Northern Ireland (PSNI); Ministry of Defence Police (MDP); Representatives of Law Enforcement Agencies in Bermuda and Turks and Caicos; Guernsey Financial Intelligence Service; Financial Services Authorities (FSA); Joint Money Laundering Steering Group (JMLSG); Law Society's Money Laundering Task Force; Asset Recovery Agency (ARA); Parliamentary Commissioner for Standards; Clerk of House of Commons' Committee on Standards and Privileges; The Gaming Board for Great Britain; The Jockey Club; Companies House; Financial Reporting Council.

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<sup>1</sup> In alphabetical order, Canada was represented by: Simon Cridland, Criminal, Security and Treaty Law Division, Foreign Affairs Canada; Chief Superintendent Peter M. German, Director, General Financial Crime, Royal Canadian Mounted Police; Lisette Lafontaine, Senior Counsel, Criminal Law Policy, Department of Justice Canada; and Giles Norman, Second Secretary, Embassy of Canada, Ankara, Turkey.

<sup>2</sup> In alphabetical order, France was represented by: Valerie Dervieux, Judge, Tribunal de Grande Instance in Pontoise; Anne Muxart, Direction of Treasury, Ministry of Economy and Finance; and Pierre-Christian Soccoja, Executive director, Central Agency for the Prevention of Corruption.

<sup>3</sup> The OECD Secretariat was represented by: Rainer Geiger, Deputy Director, Directorate for Financial and Enterprise Affairs (DAF); Silvio Bonfigli, Principal Administrator, Anti-Corruption Division; David Gaukrodger, Principal Administrator, Anti-Corruption Division; and France Chain, Administrator, Anti-Corruption Division.

3. Additionally, the OECD team met the following representatives of civil society: Transparency International-UK; Institution of Business Ethics (IBE); Crime Stoppers; Public Concerns at Work (PCAW); Corner House; Global Witness; TUC; Christian Aid; RAID/OECD Watch; Tax Justice Network; Trade Union Anti-corruption Network (UNICORN); journalists from The Guardian newspaper. The private sector was represented by the British Chamber of Commerce; the London Chamber of Commerce; the Confederation of British Industries (CBI); Barclays Bank; HSBC; Lloyds of London; Extractive Industries Transparency Initiative (EITI); Control Risks; Institute of Chartered Accountants (ICAEW); Accounting Standards Board (ASB); KPMG; Robson Rhodes; London Stock Exchange (LSE); British Trade Association. The following companies participated: BAE Systems; BG Group (British Gas); BP (British Petroleum); Rio Tinto; The Royal Dutch Shell and Diageo. The UK legal profession was represented by the Law Society, the Bar Council, defence lawyers and academics. Members of the House of Parliament also participated in the meetings.

4. A separate panel was held with representatives of the embassies of the United States, South Korea, Argentina, Hungary, the Czech Republic, Turkey, Bulgaria and Switzerland. The purpose of this panel was to gain insight on the level of corruption in the UK and the effectiveness of UK's structure and policy for fighting the bribery of foreign public officials from the point of view of countries with substantial business interests in the British economy.

5. In preparation for the on-site visit, the UK authorities provided the Working Group with responses to the Phase 2 Questionnaire and to a supplementary questionnaire which contained specific questions about the implementation of the Convention in the UK (hereinafter, the "Responses" and the "Supp. Responses"). In addition, the UK authorities supplied relevant legislation and case law. These materials were reviewed and analysed by the OECD team, and independent research was done to obtain non-governmental viewpoints as well. Following the on-site visit, the UK authorities provided follow-up information requested by the OECD team.

6. The on-site visit was characterized by the highest level of transparency, professionalism and co-operation on the part of the UK authorities. The OECD team also appreciates the hard work of the UK authorities in preparing for and hosting the on-site visit<sup>4</sup>. The OECD team was provided with access to all the persons and bodies whose presence was requested at the meetings, thus ensuring a thorough review of the UK's efforts to combat foreign bribery.

## **2. General observations**

### ***a) Observations about system of government and legal system***

7. The UK is a constitutional and hereditary monarchy with a democratically-elected government (parliamentary monarchy). The Parliament consists of the House of Lords and the House of Commons. Although legislation must pass the vote of both houses, effective power lies with the lower house of Parliament (House of Commons). The House of Lords may propose amendments to laws passed by the House of Commons, but such proposals may be overruled by the lower Chamber. Acts of Parliament can override judicial decisions.<sup>5</sup>

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<sup>4</sup> More than 100 participants attended the various panels during the on-site visit which was opened by preliminary remarks made by the UK Attorney General.

<sup>5</sup> World Factbook of Criminal Justice Systems, US Dept. of Justice, Bureau of Justice Statistics, 1993, at 1.

8. The constitution of the UK is not written; it is reflected in a body of statutes, common law and convention. Its adversarial legal system is based on statute and common law. Scotland has a separate legal system (based on common law but influenced by Roman law with proceedings differing from those in the UK). Judicial independence is a fundamental principle in British unwritten constitution. Judges have absolute power over the decision within their courts which can only be overturned by decisions of senior judges in higher courts. The courts also perform judicial review which is a process by which actions and powers of the government, public authorities and other public bodies are challenged in the courts. The Law Lords in the House of Lords is the highest court of appeal for England, Wales and Northern Ireland in civil and criminal cases. It hears only civil cases from Scotland.<sup>6</sup>

9. Cases are first heard in a magistrates' court (court of first instance), usually composed of three lay members who are counselled by a legally qualified clerk. The magistrates' court can decide whether to refer the matter to the Crown Court (*e.g.* if the magistrates' court is incompetent to hear the case). The magistrates' court may also rule on a matter and refer it to a Crown Court for sentencing if the sentence to be imposed exceeds its powers. The Crown Court sits in approximately 90 centres in England and Wales. Lay magistrates assist judges in adjudicating appeals from the magistrates' courts against conviction and/or sentences, and committals for sentences. A 12-person jury determines matters of fact and delivers verdicts<sup>7</sup>.

10. A person may appeal his/her conviction by a magistrates' court to the Crown Court. Appeals from the Crown Court are heard by the Court of Appeal Criminal Division. Any important points of law may be further appealed to the House of Lords. The Attorney General, as the overseer of the prosecution process, may also refer a case to the Court of Appeal if he/she considers that a sentence is too lenient, or if a point of law of general importance has arisen in Crown Court trial which resulted in an acquittal.<sup>8</sup>

**b) Economic factors**

11. The UK is one of Europe's most robust economies. Between 1997 and 2001, the UK economy expanded by an average of 2.7% per year compared with the EU average of 2.3% over the same period. During that time, the rate of unemployment fell from 10% to 5%, which was among the lowest in the EU. Inflation has remained stable and is also one of the lowest in the EU (1.3% in 2002 and 1.4% in 2003 compared to 1.9% in the EU).<sup>9</sup>

12. London is one of the three prominent world financial centres and a leader in several international financial markets (cross-border bank lending, international bonds, etc.).<sup>10</sup> The banking, insurance and business sectors represent the greatest portion of GDP (two-thirds)<sup>11</sup> while

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<sup>6</sup> UK Country Profile 2003, The Economist Intelligence Unit, at 15 & 16.

<sup>7</sup> A unanimous verdict is always sought. It is only after a jury has been retired for a considerable time without reaching a verdict that a judge may allow a majority verdict to be given.

<sup>8</sup> The World Factbook of Criminal Justice Systems, Dept. of Justice, Bureau of Justice Statistics 1993, at 10.

<sup>9</sup> UK Country Report 4/2004, The Economist Intelligence Unit, at 11.

<sup>10</sup> London boasts the world's largest insurance market, ship broking market and non-precious metals exchange. The London Stock Exchange is Europe's largest exchange and the world's third largest stock market.

<sup>11</sup> UK Country Profile 2003, The Economist Intelligence Unit, at 30.

manufacturing's share has declined to less than 20% of GDP.<sup>12</sup> The export-driven industrial sector has suffered from the relatively overvalued exchange rate while external demand has declined.

13. The UK's major export partners in 2002 were the EU (58.7%), and the US (15.3%). Its major export goods in the same year were petroleum and petroleum-related products, chemical products, tobacco, beverages and mechanical machinery. The UK's major import partners in 2002 were the EU (53.7%) and the US (11.2%). Its major import goods in the same year were semi-manufactured goods, chemicals, finished manufactured goods, foodstuffs and raw materials (other than fuels), clothing and footwear, electrical machinery and motor vehicles.<sup>13</sup> The top countries for investment by the UK firms in 2002 were: US (33%), Australia and New Zealand (7%), Ireland (4%), France (4%), and Belgium/Luxembourg (4%).<sup>14</sup> In 2002, the top countries for foreign direct investment in the UK were: Germany (GBP 11.7bn) and the Netherlands (GBP 4.4bn).<sup>15</sup> The UK is also the largest EU investor in China (with investments of approximately GBP 6.1bn) and one of the largest investors in Indonesia (financial services and oil/gas sectors) and Singapore (with UK investments totalling more than GBP 4.5bn)<sup>16</sup>.

14. Where foreign aid is concerned, the United Kingdom plays a significant role as a donor of official development assistance (ODA). For 2003, based on preliminary data, the UK's net official development assistance amounted to GBP 3.4bn, making it the fifth largest aid donor in volume terms after Germany. Africa (mainly the Sub-Sahara) was the primary regional recipient of aid; the top ten country recipients in order of amount of aid received, being India, Serbia & Montenegro, Tanzania, Mozambique, Bangladesh, Ghana, Uganda, Afghanistan, Zambia and Malawi.<sup>17</sup>

**c) *General observations about the United Kingdom's implementation of the Convention and 1997 Recommendation***

15. At the time of the on-site visit, there had been no significant progress in the implementation of the conclusions under the Phase 1bis examination, which gave rise to the lead examiners' concerns about the level of implementation of the OECD Convention by the UK authorities. Although the recommended legislative changes have not been implemented, the examiners recognise that the UK authorities have made substantial efforts to prepare draft legislation and engage in wide consultations in that regard. Generally, the absence of specific case law on the bribery of foreign public officials in a common law country makes it difficult to evaluate how effectively the current system works (with regard, for instance to the scope of application, relevance and clarity of the terms used, efficiency of sanctions, etc.). The lack of available statistical analysis for relevant issues (detection, investigation, prosecution, sanction, etc.) in the fight against foreign bribery is also regrettable. Finally, the

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<sup>12</sup> UK Country Profile 2003, The Economist Intelligence Unit, at 30.

<sup>13</sup> UK Country Profile 2003, The Economist Intelligence Unit, at 52.

<sup>14</sup> From Global Britain Briefing Note "*Foreign Direct Investment: the Netherlands Distortion*", 4 June 2004. Although the Netherlands accounted for 56% of total direct investment in 2002, the extent to which investment is channelled through Dutch holding companies distorts the underlying flow of investment. See GNN-UK Government Press Releases, 11 December 2003, at note 5.

<sup>15</sup> GNN-UK Government Press Releases, 11 December 2003, at 2.

<sup>16</sup> See [www.britcham.or](http://www.britcham.or).

<sup>17</sup> From OECD Donor Aid at a Glance Chart (updated January 9, 2004), [www.oecd.org/dataoecd/42/53/1860562.gif](http://www.oecd.org/dataoecd/42/53/1860562.gif). See also UK Statistical Office, "Statistics on International Development (2002 ed.): Bilateral aid by country (summary)". Available from following website: [www.statistics.gov.uk](http://www.statistics.gov.uk).

examining team noted significant fragmentation within investigation and prosecution authorities; practitioners interviewed during the on-site visit indicated a lack of clarity among the different legislative and regulatory instruments in place.

16. In addition, given the size of the UK economy and its level of exports and outward FDI, along with its involvement in international business transactions in sectors and countries that are at high risk for corruption, it is surprising that no company or individual has been indicted or tried for the offence of bribing a foreign public official since the ratification of the Convention by the UK.

17. There have, however, been several allegations of foreign bribery involving UK companies in the press. Although it is obviously not a formal investigative agency, the UK press has engaged in serious, vigorous and high profile reporting about the investigation of foreign corruption issues in the UK. This active reporting has revealed numerous facts and allegations both about cases and about issues in the investigative process in the UK. This type of reporting is facilitated by the government's general commitment to open government, as exemplified by a Freedom of Information Act which will enter into force on 1 January 2005, and by an existing non-statutory code.

18. Although the lead examiners recognise that information in the press is not necessarily reliable, in the given circumstances both press allegations and discussions with representatives of law enforcement agencies tend to confirm that it is realistic to expect some degree of prosecutorial activity in at least a few cases.

*d) Developments since the Phase 1 Examination*

*(i) Phase 1 and Phase 1 bis Examinations*

19. The U.K.'s legislative and common law provisions were reviewed under a process of monitoring carried out by the OECD Working Group on Bribery in International Business on 14-15 December 1999 (Phase 1). The conclusion was that "On the basis of the ample information provided, the Working Group is ... not in a position to determine that the U.K. laws are in compliance with the standards under the Convention." It urged the United Kingdom "to enact appropriate legislation and to do so as a matter of priority, taking into account the observations of the Working Group", and stated its intention "to re-examine the U.K. in Phase 1 as soon as this legislation is enacted."<sup>18</sup>

20. In December 2001, the UK implemented the Convention by enacting Part 12 of the Anti-Terrorism, Crime and Security Act 2001 (the "2001 Act"),<sup>19</sup> which was the UK's emergency anti-terrorism legislation. The Working Group conducted a Phase 1 bis review of the legislation in October 2002 and concluded that the UK Law addressed "the requirements set forth in the Convention". However, the WG recommended that the UK enacted a comprehensive anti-corruption statute. The Working Group further noted that areas of uncertainties remained concerning some essential elements of the offence, including the definition of foreign public official, and invited the UK to proceed with

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<sup>18</sup> <http://www.oecd.org/dataoecd/8/24/2754266.pdf> . At the time of Phase 1 the UK was relying on the Prevention of the Corruption Act 1906 and the common law offence of bribery for the implementation of article 1 of the Convention. However, the 1906 Act does not apply expressly to the bribery of foreign public officials.

<sup>19</sup> Part 12 of the 2001 Act imports a "foreign" element into the offences of domestic bribery under the Prevention of Corruption Act 1906 and the common law, and establishes nationality jurisdiction for these offences. Part 3 of the Act contains a provision lifting restrictions on the sharing of information by tax and customs authorities in order to facilitate criminal investigations or proceedings.



consultations regarding the application of the Convention to Scotland,<sup>20</sup> Overseas Territories and Crown Dependencies.<sup>21</sup> Finally, the Working Group proposed to review, as part of the Phase 2 evaluation, whether the requirement of the Law Officer's consent and the exercise of prosecutorial discretion would impede the effective implementation of the Convention.<sup>22</sup>

(ii) *The Draft Corruption Bill*

21. The Draft Corruption Bill<sup>23</sup> was presented to Parliament in March 2003.<sup>24</sup> The Bill was largely based upon proposals of the UK Government for the reform of the criminal law of corruption in England and Wales (UK White Paper),<sup>25</sup> which were in turn largely based upon the Law Commission Report published in March 1998.<sup>26</sup> The Draft Corruption Bill was then referred to a Joint Parliamentary Committee (JPC) which produced its report on 17 July 2003. In its replies to the JPC's report<sup>27</sup> the UK Government rejected the JPC's principal recommendations on the definition of corruption<sup>28</sup> and decided to press on with the Bill's approach. During the discussions at the on-site visit, however, the UK authorities were not in a position to indicate when sufficient space in the legislative timetable would be found for the enactment of the Draft Corruption Bill.

(iii) *Other Legislative Developments since Phase 1bis*

22. After the Phase 1 bis examination of the UK by the Working Group, the following laws and amendments came into force:

- The Proceeds of Crime Act 2002, which strengthens the law on money laundering and sets up an Assets Recovery Agency to investigate and recover assets and wealth derived from unlawful activity;

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<sup>20</sup> After the Phase 1 bis review Scotland enacted the Criminal Justice (Scotland) Act 2003. Sections 68 and 69 of the Criminal Justice (Scotland) Act 2003 gave Scottish courts extra-territorial jurisdiction over bribery and corruption offences committed abroad by UK nationals, Scottish partnerships and UK companies.

<sup>21</sup> The application of the Convention to the OTs and CDs is discussed in further detail later in this report.

<sup>22</sup> The two issues are discussed in further detail later in this report.

<sup>23</sup> The Bill is discussed in further detail later in this report.

<sup>24</sup> The Bill is divided in three parts. Part 1 (*clauses 1-21*) establishes the offences of corruption, including what is meant by the term "corruptly". It also defines the terms "agent" and "principal". Clause 12 sets aside Parliamentary privilege for offences under the Bill and Clause 13 confers extra-territorial jurisdiction for offences committed abroad by UK nationals and incorporated bodies. The new offences apply in England, Wales and Northern Ireland.

<sup>25</sup> The proposals were published by the Home Office in June 2000 in the paper "Raising Standards and Upholding Integrity: The Prevention of Corruption".

<sup>26</sup> See the Law Commission Report No. 248, "Legislating the Criminal Code: Corruption".

<sup>27</sup> See the Government Reply to the Report from the Joint Parliamentary Committee on the Draft Corruption Bill, Session 2002-2003, HL Paper 157, HC 705.

<sup>28</sup> In the view of the JPC, the notion of agency and "corrupt" behaviour as defined in the Bill would not be readily understood by "the police, prosecutors, and the business community". The JPC also recommended that the essence of corruption be defined by reference to conduct which involves the giving or receiving of "improper advantage".

- The Extradition Act and the Judicial Co-operation Act enacted in 2003;
- The Financial Services Authorities Act 2003, which includes provisions on the regulation and accounting transparency of financial services companies. The law also sets the new structure of the Financial Reporting Council (the independent regulator of the accounting profession) and its subsidiary boards.

(iv) *Focus of Report*

23. Taking account of the information obtained from the on-site visit, the responses to the Phase 2 Questionnaire and supplemental questionnaire, and other sources, the following analysis focuses on how the UK can increase the effectiveness of its measures in preventing, detecting and enforcing the offence of bribery of a foreign public official.

## **B. PREVENTION AND DETECTION**

### **1. Awareness and training**

#### **a) Government awareness and training**

##### *(i) Key governmental agencies*

24. At the on-site visit discussions with all of the representatives of key governmental agencies demonstrated a good level of awareness of the OECD Convention and Part 12 of the 2001 Act.

25. In January 2002 the Department of Trade and Industry (DTI) has held a conference entitled “Global Business and Change in Anti-Corruption Law” to publicise the Convention and the changes (in February 2002) in corruption legislation. In addition, the Foreign and Commonwealth Office (FCO) has taken specific measures to raise awareness of the OECD Convention through presentations to officials and businesses in the UK and a number of overseas posts including Moscow (10/02), Panama City (03/03), Mexico City (03/03), Bogota (06/03), Tehran (12/03), Kuwait City (12/03) and Nairobi (03/04), Buenos Aires (06/04), Lagos and Johannesburg (09/04) and Brasilia and Lima (12/04), as part of an ongoing program.

26. The FCO and UK Trade and Investment have also issued guidance on the Convention and relevant bribery legislation to businesses and diplomatic posts overseas. In particular, guidance issued by the UK Trade and Investment <sup>29</sup> addresses the main changes occurred in the UK anti-bribery legislation after the enactment of the 2001 Act. On the application of the new law to foreign subsidiaries, however, the brochure of the UKTI states: “*No, it does not [apply to foreign subsidiaries]. Like most countries throughout the world, we do not think it appropriate to take jurisdiction over a foreign company for actions which take place entirely in a foreign country. To do so could well be regarded as interference in the internal affairs of another country*”. It is the view of the examiners that this statement fails to identify other important situations that should be covered by the UK legislation- e.g. cases where the parent UK company has authorized or conspired with the foreign subsidiary to bribe a foreign public official abroad or is complicit in a foreign bribery transaction by its subsidiary.

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<sup>29</sup> The UK Trade and Investment brochure is available at <http://www.trade.uktradeinvest.gov.uk/files/bribery.pdf>

27. The Convention and implementing legislation form part of pre-posting training for all Foreign and Commonwealth Office Commercial Officers (FCOCO)<sup>30</sup>. As part of its anti-fraud and corruption policy, the Department for International Development (DFID) has recently issued the leaflet “Fighting Fraud and Corruption” which contains guidelines for staff who suspect fraudulent or corrupt activities involving DFID funds committed by staff, contractors or partner governments.

(ii) *Investigative, prosecutorial and judicial authorities*

28. The examining team focused on the awareness-raising and training activities that have been provided to police officers and prosecutors (at central and local levels), as well as other public officials involved in investigating and prosecuting foreign bribery.

29. Representatives of the Crown Prosecution Service (CPS) indicated that a legal guidance manual on money laundering and the 2001 Act has been made available to all of its officers. Internal training courses on fraud, foreign bribery, mutual legal assistance (MLA) and evidentiary issues have also been provided to all CPS lawyers working at the Casework Directorate in London. Similarly, the Serious Fraud Office (SFO) has training courses on the new provisions of the 2001 Act. The Home Office has issued to Police and Courts the Circular No. 2/2003 on the content of Part 12 of the 2001. Furthermore, the National Policing Plan (NPP) 2005-2008 mentions overseas corruption and has been widely publicised among UK police forces<sup>31</sup>. Finally, the UK Central Authority (UKCA) at the Home Office (HO) offers general guidance on MLA and HM Custom and Excise (HMCE) provides training courses on the 2001 Act.

30. The National Criminal Intelligence Service (NCIS) has an internal website which provides guidelines on financial crimes to its officials. The NCIS also organises general training courses three times per year which do not focus specifically on the OECD Convention. Only officials involved in the fight against foreign bribery receive specific training.

31. Where police forces are concerned, the Police Service of Northern Ireland have organised training courses on the new provisions of the 2001 Act. The City of London Police have issued internal guidelines on financial crimes, but have not offered training courses dealing with the OECD Convention and 2001 Act. Similarly, the Scottish Police organise training courses focused on financial-related offences<sup>32</sup>.

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<sup>30</sup> The FCO and the UK Trade and Investment have recently updated its guidance on overseas bribery. The new guidance, which supersedes a previous FCO guidance (March 2003), instructs British diplomats to report allegation of corruption and request diplomatic posts to take appropriate opportunities, during regular business briefings, or on a more ad-hoc basis, to brief their locally based UK business community. The new guidance also warns diplomats that the UK’s record on bribery enforcement would be reviewed by the OECD (phase 2). In the new guidance the FCO omits the statement made in its previous guidance that the UK Government would “prefer to change behaviour by education rather than prosecution”.

<sup>31</sup> The NPP is discussed in further detail in this report under part B.1.a (ii) footnote 74.

<sup>32</sup> Following the on-site visit, the UK authorities indicated that the ACPO National Fraud Working Group has commissioned the Metropolitan Police, the Ministry of Defence Police and British Transport Police to design a two-day 'Anti-Corruption Course' for specialist police officers in England & Wales. The course will cover all aspects of UK corruption legislation including Part 12 of the ATCS Act. ACPO Scotland are exploring the possibility of providing a similar programme to the Scottish police forces.

32. The bribery of foreign public officials is not included in the training programme of the Judicial Studies Board (JSB) which provides training and instruction for all full and part-time judges.

**b) *Level of awareness of the business community and civil society***

*(i) Large companies*

33. The examining team noted a good level of awareness of the OECD Convention and the UK anti-bribery provisions amongst major British companies. At the on-site visit,<sup>33</sup> representatives of four major oil and extractive companies presented their codes of conduct and policies on business integrity. In addition, it was indicated that briefing papers with guidelines on the UK anti-bribery provisions had been distributed to the companies' employees in the UK. These guidelines have also been translated into different languages and distributed to subsidiaries abroad. Similarly, the representative of one world leading premium beverages company presented its code of business conduct and the company's new policy of "zero tolerance" on making facilitation payments (*i.e.* no distinction is made between bribes and facilitation payments). Furthermore, all of the companies interviewed at the on-site visit indicated that they periodically provide education to staff through presentations, workshops and e-learning. Finally, dedicated hotlines have been established where employees can confidentially report wrongdoing as well as any concerns about standards implementation. The allegations are then internally processed and investigated. Serious cases are also reported to the relevant law enforcement agencies. It should be noted, however, that allegations of bribery offences remain relatively scarce.

34. The examining team also interviewed a representative of the UK government-led Extractive Industries Transparency Initiative (EITI).<sup>34</sup> The initiative, which was launched by the British Prime Minister in 2002 and endorsed at the G8 Summit in Evian (June 2003), aims at encouraging governments, extractive companies, international agencies and NGOs to increase transparency over company payments and government revenues in the oil, gas and mining sectors in countries heavily dependent on these resources. The EITI, however, has not engaged in any awareness-raising initiatives or training programmes specifically targeting the Convention and the 2001 Act.

*(ii) Small and medium-sized enterprises (SMEs)*

35. In the Responses, the UK authorities indicated that a seminar (January 2003) co-sponsored by the DTI, DFID and the Birmingham Chamber of Commerce was organised and widely publicised to provide awareness of the OECD Convention and particularly the 2001 Act among British SMEs. According to the UK authorities, however, the attendance of the SMEs was "disappointing". The lead examiners were also disappointed by the non-attendance of representatives of SMEs scheduled to participate in the on-site visit. Thus, the examining team was not able to determine whether their level of awareness of the foreign bribery offence was sufficient. In addition, during the discussions, no information was provided on the training and awareness-raising activities by British SMEs.

*(iii) Efforts by the Government to increase standards of corporate governance*

36. The responsibility for promoting the OECD Guidelines for Multinational Enterprises rests with the DTI (National Contact Point or NCP). The UK authorities stated that responsibility for the

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<sup>33</sup> As most of the major British companies that were invited could not attend the on-site visit in July 2004, an extraordinary session of the on-site visit took place on 9 September 2004 in London..

<sup>34</sup> All of the UK oil and gas companies interviewed during the on-site visit indicated their participation in the EITI.

OECD Principles of Corporate Governance was shared between government, business and labour representative organisations. In the Phase 2 questionnaire,<sup>35</sup> the UK authorities indicated that efforts have been undertaken to raise awareness of the OECD Guidelines for Multinational Enterprises and OECD Principles of Corporate Governance among UK businesses. Over the past few years, the NCP has operated a stand at the annual conferences of the Confederation of British Industry (CBI) and has made presentations to the Matrix Chambers (Human Rights Barristers) and the Commercial Officers. The NCP also has a dedicated telephone contact point and provides information as part of the DTI's website.

37. In addition, the UK government has established a Co-ordinating Group on Audit and Accounting Issues, and conducted an independent review of the role of non-executive directors. Recommendations have been made to improve UK accounting and audit practices and regulation, and UK corporate governance principles. In its written submission to the examining team, however, one NGO (Rights & Accountability in Development/OECD Watch) reported a recent survey which showed that only 15 British companies included in the FTSE 100 (a stockmarket index) had referred to the OECD Guidelines in their annual reports or other public documents. In the view of this NGO, information about the guidelines and the work of the (NCP) were not adequately displayed on DTI's website.

38. The UK government also supported a number of private initiatives by institutional investors and business representative organisations in the areas of corporate governance, best practice, directors' contracts and shareholder voting. In particular, the Department For International Development (DFID) has provided financial support to various anti-corruption initiatives such as those organised by Transparency International-UK (TI (UK)) (Business Principles on Countering Bribery), the Prince of Wales' International Business Leaders' Forum (anti-corruption initiative in developing and transitional countries) and the Commonwealth Business Council (anti-corruption initiatives between governments and local businesses in Anglophone Africa). In June 2004, a seminar<sup>36</sup> organised by TI (UK) in close association with DFID and the Swedish Ministry of Foreign Affairs brought together representatives from defence companies, governments and NGOs. The initiative aimed at developing a common framework for high-quality standards of business conduct in international defence procurement. According to TI (UK), six defence companies, 5 governments and 6 NGOs from 14 countries attended the seminar.<sup>37</sup>

(iv) *Civil society and Parliamentarians*

39. In the UK, domestic and foreign corruption are often at the centre of media debate and civic criticism. Various non-governmental organisations (NGOs), the media and politicians play a central role. One of the representatives of Transparency International-UK interviewed during the on-site visit indicated that recent legislative changes and increased emphasis on ethics and corporate social responsibility have resulted in a major change in the perception of bribery among UK businesses. Bribery is now increasingly regarded as wrong, whereas only a few years ago it was considered a normal business practice in many international markets. In particular, TI (UK) explained that "many companies now wish to see the elimination of bribery, but need governments and industry in all countries to work together to this end". In the view of TI (UK), trade and professional associations

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<sup>35</sup> Section 3.2, p. 17

<sup>36</sup> The seminar "Preventing Corruption in the Official Arms Trade" was held in Arundel, Sussex, from 8 to 10 June 2004.

<sup>37</sup> See TI (UK) "Preventing Corruption in the Official Arms Trade", Arundel Conference, 8-10 June 2004, Conference Overview Paper, p. 2

should “improve their codes of conduct and disciplinary procedures so as to put greater emphasis on anti-corruption procedures”.

40. Representatives of trade unions interviewed at the on-site visit demonstrated a low level of awareness of the OECD Convention. This perception was also confirmed by one NGO (Unicorn) which complained about the absence of any initiatives by trade unions to raise awareness of the OECD Convention among British employees. Overall, training and awareness-raising activities concerning both the OECD Convention and the UK anti-bribery legislation among trade unions appear insufficient and need to be improved.

41. Representatives of the UK newspapers present at the on-site visit reported a low level of knowledge of the OECD Convention and anti-bribery provisions among the general public. They raised concerns about the lack of transparency and co-operation of the British government in disclosing information about bribery allegations involving UK businesses abroad. Additionally, they pointed out the lack of “political will” in investigating and prosecuting foreign bribery offences, a concern that was echoed by representatives of NGOs participating in the on-site visit.

42. Parliament has also played an important role, especially recently, in raising questions about both the investigative process and the investigation of specific cases in the United Kingdom. The issue of foreign bribery attracts a high degree of interest from the Members of both parliamentary Houses, who regularly put parliamentary questions to the government and investigative agencies on the issue of foreign bribery as well as related issues (new draft bill, available resources, tax deductibility of bribes, mutual legal assistance, etc.), thereby showing a high awareness of these issues and their importance for UK companies. In June 2004, a cross-party group of parliamentarians in association with TI (UK), the Corner House (anti-corruption campaigner) and UNICORN (the Trade Union Anti-Corruption Network) organised a Parliamentary seminar focused on overseas bribery and corruption. Based on the findings of the seminar, the participants made key recommendations to the government for improving its international commitments in respect of foreign bribery. Some of the recommendations highlighted the lack of clear, modern and comprehensible corruption legislation and the need to establish one centralised law enforcement agency to investigate and prosecute offences of foreign bribery.

43. Certain Members of Parliament (MPs) interviewed during the on-site visit stressed the importance of mobilising political will in the fight against corruption, and pointed out that the government had initiated a significant move forward, notably with the adoption of the ATCS Act. An MP with significant oversight responsibilities regarding sensitive industries stated, however, that, in his view, bribery in international business transactions was inevitable, and that disallowing it could be dangerous as companies would then not be able to compete on a level-playing field. Such views, which reflect little awareness or acceptance of the Convention and related changes in UK law, raise serious concerns, particularly in light of the MP’s responsibilities. Other MPs, however, expressed very different views: they stressed the importance of putting in place efficient legislation and institutions in the fight against foreign bribery, and expressed concern that no prosecution had taken place since the Convention.

#### ***Commentary***

***The lead examiners recommend that the National Criminal Intelligence Service (NCIS) and the City of London Police provide training programmes specifically on the Convention and the 2001 Act for current members and new recruits. In addition, the lead examiners recommend that the wording on foreign subsidiaries contained in the UK Trade and Investment promotional material be modified to indicate the conditions under which parent and affiliated***

*companies can be liable in such circumstances. It is also recommended that training specifically targeting the foreign bribery offence be provided to relevant UK public officials, including judges and other who have not received such training.*

*The lead examiners recognise that major British companies have taken important steps to adopt compliance programmes and raise awareness of foreign bribery amongst their employees and agents abroad. However, the lead examiners recommend that increased efforts to raise awareness be undertaken among trade unions and SMEs. Furthermore, the lead examiners recommend that further steps to raise awareness be undertaken within the Extractive Industries Transparency Initiative (EITI).*

## **2. Detection and reporting of the foreign bribery offence**

44. Investigations can be initiated by the police or prosecutors based on information by any source, including, for instance, anonymous reports made to the police or media reports. Statistics regarding the sources of allegations in bribery cases are not available.

45. Prosecutors and police officers interviewed during the on-site visit indicated that the role of victims in foreign bribery cases is extremely limited: the foreign jurisdictions whose public official received the bribe may condone corruption, the bribing company would naturally not divulge the offence (except in exceptional cases where serious threats were involved), and even competing companies rarely come forward (see also below on the issue of competitors). Thus, denunciation by the victim which is an important source of allegations for many other offences is not available for the foreign bribery offence. Reliance on other sources of information, such as reports by whistleblowers, public institutions and certain professions, is therefore all the more important.

### **a) General sources**

#### **(i) Whistleblowers**

46. Disclosure by whistleblowers was generally acknowledged by the police and prosecutors as an important source of detection of crimes committed by corporations. Representatives of the Ministry of Defence Police also indicated that many cases had been raised through internal disclosures.

47. Additionally, the United Kingdom's Public Interest Disclosure Act (PIDA) was introduced in 1998 to protect whistleblowers from victimisation and dismissal where they raise concerns, in good faith, about misconducts and malpractices. With the introduction of PIDA, the UK authorities aim to encourage workers to bring issues to their employer's attention, in order to allow for possible internal solutions to potential problems. Public disclosure is considered a last resort in this respect, given that the legislation is designed to encourage workers to draw wrongdoing to the attention of their employers, and to ensure there is no adverse publicity for the company when either it has done nothing wrong or is prepared to remedy matters. To this end employers are encouraged and given a practical incentive to put in place internal procedures to protect workers from victimisation in the workplace.

48. PIDA covers all employees working in the United Kingdom, whether in the public, private or voluntary sector. A 2002 amendment which entered into force in April 2004 has extended it to police officers, and only members of the armed forces and security services are excluded.<sup>38</sup> Protection is granted for disclosure notably of criminal acts and failures to comply with legal obligations, including acts of bribery of foreign public officials. PIDA promotes especially disclosures made

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<sup>38</sup> Section 37 of the Police Reform Act 2002.

through internal communication mechanisms, but also provides for alternative means of disclosure outside the workplace. Whereas the requirements on the whistleblower is essentially an honest and reasonable suspicion of malpractice<sup>39</sup> where the disclosures are internal (within the workplace) or regulatory (to a regulator such as a statutory agency within a specific sector or industry), the requirements are higher where wider disclosure is made to law enforcement authorities or the media: in such situations, the whistleblower would also have to show that, for instance, there was a serious risk of victimisation for raising the matter internally, the concern had already been raised unsuccessfully with the employer or regulator, or the concern was of an exceptionally serious nature.<sup>40</sup> In light of the emphasis on internal disclosure under PIDA, in particular the higher threshold that must be met to be eligible for protection when a disclosure is made to the law enforcement authorities, the lead examiners wonder whether in certain respects PIDA might be an impediment to the detection and investigation of foreign bribery cases by the law enforcement authorities.

49. The adoption and implementation of PIDA has been welcomed by trade unions and NGOs, notably for its wide coverage of employees in most sectors, but also because legislation is seen as a first step towards the legitimisation of whistleblowing; additionally, it has encouraged employers to put in place internal whistleblowing procedures. Nonetheless, representatives of trade unions and NGOs interviewed during the on-site visit expressed disappointment that insufficient publicity had been given to protection afforded to whistleblowers under PIDA, and that, although whistleblowing procedures and hotlines have been put in place in many companies, these are not being backed up by adequate information and training. With regard to the contents of the Act, they regretted that disclosure to trade unions is not protected and that class actions are not possible under PIDA. It should be noted, however, that PIDA is not an exception in this respect, since class actions are not provided for in any other context under UK law.

***Commentary:***

***The lead examiners recommend that the United Kingdom pursue its efforts to make the measures of encouraging and protecting whistleblowers better known to the general public. They also encourage, business organisations to promote internal mechanisms in this respect. Additionally, the lead examiners encourage the UK authorities to consider affording protections equally to persons who blow the whistle directly to the law enforcement authorities, as to those who make use of the internal disclosure mechanism in cases involving suspicions of foreign bribery.***

(ii) *Competitors*

50. Regarding disclosure by competitors who may have suffered in foreign markets due to bribe payments made to foreign public officials by less scrupulous companies, although law enforcement authorities felt that this was rarely a source of information in foreign bribery cases, the United Kingdom authorities indicated that 16 per cent of the reports received in this respect have come from competing companies.

51. The United Kingdom authorities further explained that dedicated hotlines for companies to report allegations of bribery to the police or other law enforcement agencies were not currently in

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<sup>39</sup> Section 43B of PIDA provides that: “any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show...”.

<sup>40</sup> Naturally, disclosures made for purposes of personal gain cannot trigger protection under PIDA, as provided under section 43G of PIDA.



place, but that reports of any suspicions concerning payments of bribes to foreign public officials could be made to the police at any time or, if overseas, to the local United Kingdom Embassy or High Commission. However, the promotional leaflets for companies developed by the United Kingdom Department of Trade and Industry (DTI) and the Foreign and Commonwealth Office (FCO), and provided to the examining team, suggest that if concrete evidence exists of a foreign rival company acting in a corrupt fashion, UK companies should alert the local judicial authorities and/or the Government where the company is registered. This statement would need to be corrected to indicate that UK diplomatic missions should also be contacted in such situations.

***Commentary:***

***Given the important role that competing companies may play in reporting criminal behaviour on the part of less scrupulous corporations, the lead examiners recommend that the United Kingdom encourage UK companies to report to UK authorities instances of foreign bribery, and facilitate such reporting.***

***(iii) Other sources of detection***

52. Investigative journalism plays an important role in the United Kingdom for reporting allegations of financial crimes, including bribery of foreign public officials. This has been the case for instance in recent articles published by prominent newspapers and concerning operations of large UK corporations. Representatives of the prosecuting authorities indicated that reports in the media could, in theory, trigger the opening of investigations on their part, although this does not appear to have occurred to date.

53. Finally, non-governmental organisations are also very active in the United Kingdom in reporting and keeping records of allegations of bribe payments on the part of companies. Representatives of these NGOs represented at the on-site visit indicated that information kept in their databases concerning foreign corruption situations involving UK corporations emanated in general from the media or information brought forward by trade unions. UK NGOs are also very active in supporting initiatives to encourage and protect whistleblowing.

***b) Within the public administration***

***(i) The public administration***

54. All civil servants are bound by rules set out in the Civil Service Code, which form part of the terms and conditions of service for all civil servants, and are enforceable under employment law. Under section 11 of the Civil Service Code, public officials “*should also report to the appropriate authorities evidence of criminal or unlawful activity by others [...] in accordance with procedures laid down in the appropriate guidance or rules of conduct for their department or Administration.*” This language provides an authority, rather than an obligation, for public servants to report wrongdoing that they become aware of in the course of their work. Furthermore, although the UK authorities contend that disclosure to “the appropriate authorities” may include the police, the Inland Revenue or other appropriate bodies, the Civil Service Code does not clearly indicate that reporting directly to the prosecuting authorities is envisaged. Discussions with representatives of various departments appeared to indicate that it is left to each administration to determine the best route for such reports; in most situations, reports would be made internally, either through the hierarchy or to a specifically designated internal body. The Department for International Development (DFID), for instance, prescribes, in a specific leaflet for its personnel focusing on fighting and detecting fraud and corruption, that suspicions of criminal activity be addressed to the Head of Internal Audit. If civil

servants then consider that their concern has not been probably addressed, they may, pursuant to section 12 of the Civil Service Code, report the matter in writing to the Office of the Civil Service Commissioners. No sanctions, whether disciplinary or criminal, are provided for non compliance with these provisions. In addition, the Public Interest Disclosure Act 1998 requires all public sector organisations to have a whistleblowing procedure in place, and provides for disclosure to a number of prescribed bodies in circumstances set out in the Act (see above on PIDA). Detailed guidance on raising matters under this Act and the Civil Service Code is set out in the Directory of Civil Service Guidance.

55. Statistics regarding the number of reports by public officials are not available. Most representatives of administrations encountered during the on-site visit did not recall whether reports had been made under section 11 of the Civil Service Code, although representatives of DFID did specify that approximately one report was made every week concerning all subjects (and not specifically corruption). In general, the UK authorities were not aware of any cases in which UK officials had reported cases to superiors, prosecutors or other public authorities concerning incidences of bribery of foreign public officials.

56. After the on-site visit, the UK authorities indicated that, on 15 November 2004, the UK Government published consultation proposals for legislation concerning the Civil Service. The draft Civil Service Act would give statutory backing to the Civil Service Code and the Civil Service Commission. The consultations on the Government's draft proposals are scheduled to be completed by the end of February 2005, at which point the Government will decide on how to further proceed.

***Commentary:***

***Given that public officials in departments and agencies involved with UK companies operating abroad are likely to play an important role in detecting and reporting foreign bribery, the lead examiners recommend that the UK authorities regularly remind those officials of the importance of their reporting duty under section 11 of the Civil Service Code, as well as the modalities for reporting. The lead examiners also recommend that the United Kingdom consider putting in place an obligation to report, as well as sanctions for failure to comply with the reporting obligation, in order to enhance the capacity to detect foreign bribery offences.***

(ii) *The Tax Administration*

Non-deductibility of bribe payments

57. Although no specific provision exists prohibiting the deductibility of bribe payments to foreign public officials, section 577A of the Income and Corporation Taxes Act 1988 provides that tax deductibility is denied for any payment the making of which constitutes the commission of a criminal offence in the UK. Additionally, the Finance Act 2002 has further clarified this position by ensuring that the prohibition also applies to payments that take place wholly outside the jurisdiction of the UK.<sup>41</sup> However, while deductibility of bribe payments is clearly prohibited within the United Kingdom, most of the Crown Dependencies and Overseas Territories are not in compliance with provisions of the OECD Council Recommendation on the Tax Deductibility of Bribes to Foreign

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<sup>41</sup> A 2002 amendment to Section 577A of the Income and Corporation Taxes Act 1988 states that “no deduction shall be made for any expenditure incurred making payments outside the UK where the making of a corresponding payment in the UK would constitute a criminal offence”.

Public Officials<sup>42</sup> (see below part B.2.e) for specific discussion of the situation in the Crown Dependencies and Overseas Territories).

58. Tax declarations in the United Kingdom are made on the basis of a self-assessment by the taxpayer, with Inland Revenue having one year from when the tax assessment is filed to open enquiries on such declarations. That time limit for opening an enquiry is effectively extended to 20 years in cases of fraudulent or negligent conduct by the taxpayer.<sup>43</sup> Furthermore, these are only time limits within which an enquiry must be opened, and there is no set limit on the time that can be spent on an enquiry once it has been opened. Although the Inland Revenue seeks to avoid any unnecessary delay in enquiry cases, they take as long as is necessary to fully investigate the facts and settle the case. The Inland Revenue issues approximately 1.5 million corporation tax returns each year, with approximately 1200 staff involved in capturing and reviewing (including enquiry work) the returns received. Given the high number of companies in the United Kingdom, and that corporate tax returns by large companies may be complex, it is likely that the one year period open to the tax administration for investigating tax returns may be insufficient to adequately allow for detection of criminal activities, such as bribe payments to foreign public officials.

59. Enquiries opened by the tax administration can be general and concern the tax return in its entirety, or focus on certain aspects only. Specific offices have been put in place within Inland Revenue to deal with corporate returns in individual sectors such as energy or pharmaceuticals. Tax inspectors interviewed at the on-site visit indicated that companies were very aware of the non-deductibility of bribes and would not attempt to deduct such payments, but would be more likely to disguise them under certain other categories of allowable expenses such as commissions, contract facilitation, payments abroad, payments of agents, and consultancy fees. These categories would thus be subject to close examination by the Inland Revenue, as would the methods of payments used such as cash transactions or payments through foreign banks, which would trigger particular scrutiny.

60. When the tax administration denies a deduction because it represents a bribe payment, the onus may be on the taxpayer to prove the legality of the deduction, according to representatives of Inland Revenue in their Responses and at the on-site visit. Where normal procedural rules apply, taxpayers must demonstrate their entitlement to the deduction. On the other hand, when the tax administration believes that a payment sought to be deducted was made in the commission of a criminal offence, the onus shifts to the tax administration to prove the criminal nature of the payment. However, tax inspectors, in their responses to the Phase 2 questionnaire, as well as at the on-site visit, appeared to think that this exception may not apply where the criminal offence that underlies the deduction is bribery of a foreign public official under sections 108 and 109 of the ATCS Act. In their view, for such offences, section 2 of the Prevention of Corruption Act 1916, which provides that a payment to a government official is presumed to have been made corruptly, and imposes a legal burden on the defendant [taxpayer] to displace the presumption and demonstrate that the payment is legal, would be applicable. Representatives of Inland Revenue indicated that this issue remains

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<sup>42</sup> In the Phase 2 supplementing questionnaire the UK authorities indicate that no specific provisions prohibiting the deductibility of bribe payments to foreign public officials have been enacted in the three Crown Dependencies (Jersey, Guernsey and the Isle of Man) and Gibraltar. There is no income or corporation tax in Bermuda, Cayman and Anguilla, and there is no corporation tax in the British Virgin Islands; thus the issue is not relevant for these territories.

<sup>43</sup> Section 36(1) of the Taxes Management Act 1970 states that “*An assessment on any person (in this section referred to as “the person in default”) for the purpose of making good to the Crown a loss of tax attributable to his fraudulent or negligent conduct or the fraudulent or negligent conduct of a person acting on his behalf may be made at any time not later than twenty years after the end of the chargeable period to which the assessment relates*”.

untested in the context of a tax appeal, and recognise that taxpayers could be expected to argue the contrary. The Home Office, however, clearly explained that section 110 of the ATCS Act in fact disapplies section 2 of the 1916 Act; this intent to exclude the presumption is notably to answer possible concerns relating to conformity with European Convention on Human Rights rules. It remains possible that tax inspectors will nonetheless defend this position before the courts, should the case arise, in order to benefit from the presumption.

61. Detailed guidance on the non deductibility of bribes has been issued in the Business Income Manual, which sets out the UK legislation in this regard, describes the various Prevention of Corruption laws, and advises prompt referral to a Head Office specialist of Inland Revenue where suspicions of bribe payments arise. A training exercise including a section on domestic and foreign bribery has also been offered to inspectors involved in related work in 2003. Representatives of Inland Revenue also indicated that further requests for guidance are regularly received by the Head Office concerning section 577A of the Income and Corporation Tax Act 1988. As this legislation relies on interpretation of the Prevention of Corruption Acts, the Head Office specialist therefore often needs to seek legal advice from the Inland Revenue's Solicitor's Office, and the legal interpretation provided will be determined by the specific facts of the case. This provision of specific guidance on particular cases is common to all areas of tax and is one of the main functions of Inland Revenue Head Office technical specialists.

#### Reporting

62. Section 19 of the Anti-terrorism, Crime and Security Act 2001 has modified the possibilities for transmission of information between the tax administration and law enforcement authorities. Where, prior to this Act, voluntary transmission of information by the Inland Revenue to the prosecuting authorities was prohibited, spontaneous disclosures are now possible (but not compulsory) on a case by case basis.

63. As per the Memorandum of Understanding and internal guidelines issued by Inland Revenue, spontaneous disclosures by the tax administration can be made either where there is an ongoing criminal investigation and information discovered by the tax administration may be helpful in this context, or where the tax administration considers that suspicions of criminal activities may need to be brought to the attention of the appropriate law enforcement agency. Individual tax inspectors are not authorised to make reports directly to the police or prosecuting authorities; rather, where a tax inspector becomes aware of criminal acts, he/she is required to refer the matter to the Intelligence Group at the Special Compliance Office of the Inland Revenue who is responsible for deciding whether to pass on the information to law enforcement agencies. As indicated by Inland Revenue, from early 2002 to July 2004, 66 such spontaneous disclosures were made, of which five concerned financial crimes (but none pertaining to bribery). Requests for information from the law enforcement authorities to the tax administration are much more numerous, reaching 14 000 in 2002 and 11 000 in 2003. Representatives of the Special Compliance Office indicated that Inland Revenue provides information in response to the majority of these requests, and the number of requests declined outright is very small. In most cases where a request is not accepted, the requesting agency will be asked to clarify the purpose or extent of the request so that an answer may be provided.

64. Where foreign law enforcement authorities are concerned, section 19 of the Anti-terrorism, Crime and Security Act 2001 provides for the possibility for UK tax authorities to spontaneously disclose information where a double taxation convention exists with the country concerned, specifically allowing for such mutual exchanges. As regards European Union countries, information regarding bribery cases can be exchanged under the EC Mutual Assistance Directive 77/799.

**Commentary:**

*The lead examiners welcome the recently adopted measures allowing for spontaneous disclosure of by the tax administration to the law enforcement authorities. Given the low number of reports to date, they recommend that the UK remind tax officials of this possibility under section 19 of the Anti-terrorism, Crime and Security Act, and encourage them to pay close attention to information which could amount to dissimulation of criminal activity. In this respect, the lead examiners also recommend that sufficient time and resources are made available to the tax authorities in order to allow for the detection of possible criminal conduct, including acts of bribery.*

*In addition, the lead examiners recommend that the Working Group monitor the application of the burden of proof in tax cases, as case law develops.*

**c) Accounting and auditing**

**(i) Accounting and auditing standards**

65. To date, the activities listed under article 8 of the OECD Convention<sup>44</sup> are not specifically prohibited under the United Kingdom legislation, and only basic requirements are imposed by law on companies to produce true and fair accounts. Section 221 of the Companies Act 1985 provides that accounting records must be kept that disclose “with reasonable accuracy” the financial position of the company. Specifications concerning information to be presented in the accounts include “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”. Such requirements are applicable to limited companies, public limited companies, companies limited by guarantee and unlimited companies. Penalties applicable to company officers for fraudulent accounting under the Companies Act carry, on summary conviction a maximum term of 6 months imprisonment and/or a GBP 5 000 fine, and, on conviction by indictment, a maximum term of 2 years imprisonment and/or a fine with no upper limit. Where a company has failed to keep books as prescribed under section 722 of the Companies Act 1985, the company and company officers are liable to a fine with no upper limit or a daily default fine. Over 2 700 persons have been found guilty of a false accounting offence between 2001 and 2002, and over 150 convictions have been pronounced for failure to comply with sections 221 and 222 of the Companies Act between 2001 and 2003. Additional information was not provided regarding the level of sanctions imposed in practice, nor with regard to the enforcement of accounting and auditing related offences, other than to clarify that no such cases have arisen relating to foreign bribery. Some concerns were raised concerning failure to consider the existence of possible accounting offences linked to bribery in certain specific cases.

66. While these specifications may seem insufficiently clear, representatives of the accounting profession indicated that since the 1970s Statements of Standard Accounting Practice (SSAPs) and

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<sup>44</sup> Article 8.1 of the Convention states that:

*“In order to combat bribery of foreign public officials effectively, each Party shall take such measures as may be necessary, within the framework of its laws and regulations regarding the maintenance of books and records, financial statement disclosures, and accounting and auditing standards, to prohibit the establishment of off-the-books accounts, the making of off-the-books or inadequately identified transactions, the recording of non-existent expenditures, the entry of liabilities with incorrect identification of their object, as well as the use of false documents, by companies subject to those laws and regulations, for the purpose of bribing foreign public officials or of hiding such bribery.”*

Financial Reporting Standards (FRS)<sup>45</sup> have been recognised by the profession. The UK authorities indicated that the status of SSAPs and FRS is also supported by authoritative legal opinion to the effect that compliance with them is generally necessary in order to meet the true and fair requirement, but no case law was provided to the examining team in this regard. Furthermore, a wide review of accounting standards is underway with several reforms to be implemented over the next three years. Among the most important will be the legal obligation, as of 1 January 2005, for listed companies to produce accounts based on the International Accounting Standards. The United Kingdom authorities also indicated that a Companies (Audit, Investigations and Community Enterprise) Bill had received Royal Assent on 28 October 2004 and expands powers designed to ensure the reliability of companies' financial statements. More generally, representatives of the Accounting Standards Board<sup>46</sup> informed the examining team of their objective to harmonise international standards and UK standards by 2007. However, in the absence of sufficient case law, and pending adoption of clarified and unified accounting legislation, concerns remain regarding the enforcement in practice of the fraudulent accounting offence, as well as regarding the adequacy of UK accounting requirements to prevent and detect bribery of foreign public officials, in light of Article 8 of the Convention and article V.A. of the Revised Recommendation.

67. Small and medium size enterprises,<sup>47</sup> for their part, enjoy simplifications with respect to accounting requirements. While they are subject to requirements similar to those for larger corporations to produce "true and fair" accounts, they are entitled to present an abbreviated form of accounts. Companies that qualify as small under the Companies Act 1985, and other entities of similar size, are entitled to use the Financial Recording Standards for Smaller Entities (FRSSE), issued in November 1997, which bring together the relevant accounting requirements and disclosures from the other FRS, simplified and modified as appropriate for smaller entities.

68. Neither company law nor accounting standards set out specific requirements in respect of the recognition, measurement, presentation or disclosure of matters relating to bribery offences. The UK authorities are of the view that if a transaction involving a bribery offence were material to the reporting entity, it would probably fall within the definition of an "exceptional item" as defined in the FRS 3 on Reporting Financial Performance, which is required to be disclosed separately, along with an adequate description to enable its nature to be understood. However, in the absence of case law regarding the interpretation of the criteria of materiality, concerns remain concerning appreciation by the courts of the materiality of transactions involving bribery offences.

69. As regards internal company controls and the role of company directors, companies are not obligated to maintain or report on the effectiveness of internal controls. However, financial service providers must comply with statutory requirements for internal controls and listed companies have a "comply or explain" duty in respect of the effectiveness of internal mechanisms under the UK Combined Code on Corporate Governance. Thus, directors are under no obligation to declare that the company complies with UK legal and regulatory requirements or that there are no errors or irregularities contained in the financial information.

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<sup>45</sup> The FRS are the accounting standards issued by the Accounting Standards Board (ASB).

<sup>46</sup> The ASB is the body on charge of developing and reviewing accounting standards, and is recognised for that purpose under the Companies Act 1985. The ASB also collaborates with accounting standard-setters from other countries and the International Accounting Standards Board both in order to influence the development of international standards, and in order to ensure that its standards are developed with due regard to international developments.

<sup>47</sup> The Companies Act definition of "small" encompasses most companies with an annual turnover of up to GBP 5.6 million.

70. Where external auditing is concerned, pursuant to the Companies Act 1985, all companies with a turnover exceeding GBP 5.6 million are required to submit to an external statutory audit. Companies with a turnover below GBP 5.6 million in which there is a significant public interest (e.g. companies whose shares are for sale to the public and those working in regulated financial or insurance activities) are also required to submit to an external statutory audit. Notwithstanding the exemption, those holding 10 per cent or more of the issued share capital of a company may require the company to submit to an audit. This threshold was substantially raised from GBP 350 000 to GBP 1 million in 2003, and to GBP 5.6 million in 2004.<sup>48</sup> The UK authorities point out that the new thresholds meet the limits set by the European Union. Nevertheless, given the recent and significant increase in the threshold in the UK, the lead examiners question whether this threshold is adequate in practice to trigger external audit of companies with substantial overseas operations.

(ii) *The accounting and auditing profession*

71. In the United Kingdom, the accounting profession is not regulated under the law. Chartered accountants, as a specific category, are overseen by the Institute of Chartered Accountants in England and Wales (ICAEW),<sup>49</sup> and can be sanctioned and/or excluded by the Institute as appropriate. Although regular controls already exist, and complaints regarding chartered accountants can be received, the ICA is in the process of setting up a formal Practice Review to examine accountants set up in practices. The ICAEW does not provide extensive training to chartered accountants and auditors on the OECD Convention and foreign bribery.

72. Part 2 of the Companies Act 1989 provides the rules to ensure the competence and independence of auditors by imposing on the ‘recognised supervisory bodies’<sup>50</sup> the requirement for adherence on the part of their member firms to rules of professional conduct that ensure their independence from audit clients. In order to be eligible for appointment as auditors of companies (or other entities requiring auditors), registration with a recognised supervisory body is compulsory. Channels of communication are available through these bodies, which are required to report annually to the Department of Trade and Industry on alleged breaches of professional standards or ethics.

73. Basic principles and essential procedures with which auditors are required to comply are established by law (notably where reporting under the money laundering legislation is concerned, see part A.2.d) below), and by the Auditing Practices Board (APB) in its Statements of Auditing Standards (SAS);<sup>51</sup> the recognised supervisory bodies are required to have arrangements in place for the effective monitoring and enforcement of compliance with the SASs. Auditors who become aware of a suspected or actual instance of non-compliance with the law which gives rise to a statutory duty to report<sup>52</sup> to an

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<sup>48</sup> This is the maximum limit set by the European Union.

<sup>49</sup> The ICA is the UK’s premier accountancy body with over 124 000 members. Its members are entitled to the description of “Chartered Accountants).

<sup>50</sup> The Institute of Chartered Accountants in England and Wales, the Institute of Chartered Accountants of Scotland, the Institute of Chartered Accountants in Ireland, the Association of Authorised Public Accountants and the Association of Chartered Certified Accountants are “recognised supervisory bodies” for the purpose of regulating auditors.

<sup>51</sup> All the SASs are available on the APB’s website at .

<sup>52</sup> Statutory obligation to report would include obligations under the anti money laundering legislation. The money laundering reporting duties for auditors in the United Kingdom used to extend only to the suspected proceeds of drug trafficking or terrorist funds. Under the Proceeds of Crime Act 2002, reporting has been extended to include criminal property constituting the benefit from criminal

appropriate authority should make a report without undue delay.<sup>53</sup> Where there is no statutory duty on the auditor to report a suspected or actual non-compliance with the law, auditors should, in accordance with SAS 120.13, consider whether the matter may be one that ought to be reported to the appropriate authority in the public interest. Criteria to determine public interest include the gravity of the matter, management ethos, the degree of suspicion of non-compliance, etc.;<sup>54</sup> representatives of the auditing profession indicated that, in their view, bribe payments to foreign public officials would constitute a matter of public interest. Where the auditors conclude that this is a matter which ought to be reported, they should first bring it to the attention of the board of directors, including any audit committee,<sup>55</sup> where the entity does not itself report the matter to the appropriate authority, then the auditors should report it themselves.<sup>56</sup> Finally, in cases where the suspected or actual instance of non-compliance has caused them to no longer have confidence in the integrity of the directors, auditors should report directly to the proper authorities.<sup>57</sup> It is unclear whether the use of the term “should” implies an obligation, an incitation or an authorisation of the auditor to report. Further to the on-site visit, the UK authorities indicated that the APB was preparing a Money Laundering Practice Note to clarify auditors’ obligations specifically with respect to the reporting of possible foreign bribery acts.

74. Auditors who fail to comply with the SASs are liable to be investigated by the relevant recognised supervisory body, and are liable to regulatory action which may include the withdrawal of registration and ineligibility to perform company audits.

75. Additionally, the UK Government and the independent regulator (i.e. the APB) are in the process of implementing three series of measures to further strengthen the statutory and professional requirements guaranteeing the independence of auditors, by increasing the requirements on the auditing firms, providing guidance for the companies submitted to auditing requirements, and reforming the oversight regime. Such measures include providing stricter requirements on audit firms about the supply of non-audit services to audit clients, requiring auditor independence standards to be set independently of the accountancy profession, more frequent rotation of audit partners, a compulsory two-year “cooling off” period before the re-employment of an auditing firm by the same client, and simplification of the structure in place under the Financial Reporting Council for overseeing auditors<sup>58</sup>. Implementation of these measures began in 2004 and will continue through to the end of 2005.

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conduct, where criminal conduct constitutes an offence in the United Kingdom. The APB indicated its intent to provide, in due course, guidance to auditors on the new legislation in a revised practice note on money laundering. (See part A.2.d(ii) on money laundering reporting.)

<sup>53</sup> SAS 120.12.

<sup>54</sup> Paragraph 65 of SAS 120 provides a non exhaustive list of criteria which may be taken into account to determine whether there is a “public interest” to report.

<sup>55</sup> SAS 120.13.

<sup>56</sup> SAS 120.14.

<sup>57</sup> SAS 120.15.

<sup>58</sup> The monitoring of compliance with professional standards of independence, objectivity, integrity and competence by auditors of public interest entities will be carried out independently of the profession by the Audit Inspection Unit of the Financial Reporting Council. In addition, the new Accountancy Investigation and Discipline Board will provide independent disciplinary processes for auditors of public interest entities (principally the largest 350 companies on the London Stock Market). The “recognised supervisory bodies” will continue to take decisions relating to the registration of their auditor members.



**Commentary:**

*The lead examiners recommend that the UK authorities proceed diligently with the adoption of the envisaged reforms clarifying and unifying the UK accounting legislation to align it with the International Accounting Standards, in conformity with the provisions under Article 8 of the Convention and article V.A. of the Revised Recommendation. They further recommend that the United Kingdom keep the Working Group informed of developments in this respect.*

*The lead examiners recommend that the Working Group follow-up the application of accounting standards to prohibited acts under Article 8 of the Convention, and monitor the level of sanctions pronounced for omissions, falsifications and fraud to ensure they are in line with the principles of article V.A. of the Revised Recommendation. They invite the UK authorities to provide statistics to assist in this evaluation.*

*The lead examiners further encourage the UK authorities to proceed with the envisaged adoption of guidance for auditors in order to clarify their reporting obligation concerning possible acts of bribery, in keeping with the provisions of article V.B.(iii) and (iv) of the Revised Recommendation, and to keep the Working Group informed in this regard.*

**d) Money laundering**

**(i) The money laundering offence**

76. The Proceeds of Crime Act (POCA) 2002 updates, expands and reforms the criminal law in the United Kingdom with regard to money laundering, thereby covering the laundering of proceeds of any criminal activity, including foreign corruption.

77. Sections 327 to 329 of POCA introduce three principal money laundering offences: concealing (section 327), arrangements (section 328), and acquisition, use and possession (section 329) of criminal property. These offences apply to one's own as well as another's proceeds from crimes, and natural as well as legal persons are liable. In court proceedings, it will not be necessary to link the proceeds or property to a specific predicate offence, nor to prove who committed the predicate offence which generated the proceeds. In order to secure a conviction it is necessary to prove that the laundered property was criminal property (defined as constituting a person's benefit from criminal conduct or representing such a benefit), and that the alleged offender knew or suspected that this property constituted or represented such a benefit. Criminal conduct is in turn defined as conduct which constitutes an offence in any part of the United Kingdom, or would constitute an offence in any part of the United Kingdom if it occurred there. Thus, there will be no need to establish the bribery of a foreign public official as a predicate offence. Section 334(1) of POCA provides for sanctions under sections 327 to 329 of up to 6 months on summary conviction, and up to 14 years on indictment, and/or fines.

78. At the time of the on-site visit, statistics on the implementation of the money laundering legislation under POCA 2002 were not yet available. Home Office statistics concerning money laundering offences in England and Wales in 2002, under the former money laundering legislation,<sup>59</sup> indicate that proceedings were brought against 256 defendants, with 86 found guilty. Of those 86 found guilty, nearly 70 per cent received immediate custody, 7 per cent a suspended sentence, and

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<sup>59</sup> Criminal Justice Act 1993 and Drug Trafficking Act 1994.

approximately 20 per cent community sentences. Information was not available concerning the predicate offences involved in these cases, nor whether the defendants were natural or legal persons.

79. Additionally, a negligence test is introduced with regard to reporting requirements under POCA: as introduced by sections 330(2)(b) and 331(2)(b), an offence for failure to disclose would be committed “where a person [in the regulated sector] has reasonable grounds for knowing or suspecting that another person is engaged in money laundering, even if they did not actually know or suspect.”<sup>60</sup> Furthermore, in situations where the suspicious activity report is made prior to the suspicious activity taking place, consent to proceed must be sought from a nominated officer or NCIS.<sup>61</sup> According to CPS guidance on this issue, the rationale for introducing a new standard based on “reasonable grounds for knowing or suspecting” (i.e. a “should have known” or negligence test), is that a higher standard of diligence is expected in anti-money laundering prevention in the regulated sector, where comprehensive preventive systems (in line with international standards) are required to be in place. Such systems are also required under the Second Money Laundering Directive issued by the EU, and implemented by the Money Laundering Regulations 2003. These include requirements to have in place internal systems for reporting and control, and education and training programmes. The standard of proof for establishing such negligent failure to report will be the usual criminal standard of beyond reasonable doubt, and the offence carries criminal penalties of up to 6 months imprisonment on summary conviction and/or a fine, and up to 5 years on indictment and/or a fine.<sup>62</sup> Home Office statistics indicate that, under the former money laundering legislation,<sup>63</sup> one defendant was found guilty in 2002. Proceedings were taken under the same provision against one defendant in 1995, 1999 and 2000, although convictions were not secured.

80. Finally POCA 2002 introduces further offences in sections 333 and 342 on tipping-off and prejudicing an investigation. Tipping off refers to making a disclosure that a report about possible money laundering has been made to law enforcement or a money laundering reporting officer, where that action may prejudice a possible investigation which might arise from that report. The offence of prejudicing an investigation is applicable where anyone makes a disclosure which is likely to prejudice an investigation if the person making that disclosure is aware that an appropriate officer is acting or about to act in relation to an investigation.

(ii) *Money laundering reporting*

81. In addition to the three principal money laundering offences, POCA 2002 introduces related offences of failing to report where a person has knowledge, suspicion or reasonable grounds for knowledge or suspicion that money laundering is taking place. There are three separate offences of failure to disclose which apply respectively to persons working in the regulated sector,<sup>64</sup> nominated officers in the regulated sector,<sup>65</sup> and other nominated officers.<sup>66</sup> Such failures to disclose carry criminal penalties of up to 6 months imprisonment on summary conviction and/or a fine, and up to 5

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<sup>60</sup> Explanatory Notes to POCA 2002, paragraph 478.

<sup>61</sup> Sections 335 and 336, POCA 2002.

<sup>62</sup> Section 334, POCA 2002.

<sup>63</sup> Section 52 of the Drug Trafficking Act 1994 regarding failure to disclose knowledge or suspicion of money laundering.

<sup>64</sup> Section 330, POCA 2002.

<sup>65</sup> Section 331, *ibid.*

<sup>66</sup> Section 332, *ibid.*

years on indictment and/or a fine,<sup>67</sup> as well as disciplinary sanctions by the supervisory bodies overseeing the professions subject to reporting obligations. No specific guidelines or typologies have been issued to date either by the National Criminal Intelligence Service or the other supervisory bodies to cover specifically foreign bribery situations.

82. Professionals in “the regulated sector” are under a detailed obligation to disclose knowledge or suspicion of money laundering activity and report to the National Criminal Intelligence Service (NCIS). Schedule 9 to POCA 2002 (as amended by POCA 2002 (Business in the Regulated Sector and Supervisory Authorities) Order 2003) has effect for determining which businesses are included in the regulated sector. Additionally, as of 1 March 2004 and following the full implementation of the Money Laundering Regulation 2003 bringing into force the European Union Second Directive on Money Laundering, legal professions are also required to report suspicious transactions when acting for clients in financial and real estate transactions.<sup>68</sup> As per this obligation, professionals in the regulated sector who, in the course of their business, know, suspect, or have reasonable grounds for knowing or suspecting that another person is engaged in money laundering, are required to make a disclosure to nominated officers (for professionals in the regulated sector) or to NCIS (for nominated officers in the regulated sector) as soon as is practicable.

83. NCIS is the United Kingdom’s Financial Intelligence Unit. As such it receives, analyses and disseminates suspicious activity reports (SARs) on suspected proceeds of crime. In 2003, NCIS received around 100 000 disclosures, an increase of nearly 60 per cent on 2002, itself nearly double the 2001 figures. Approximately 110 persons are employed by the Financial Intelligence Division of NCIS, notably to deal with suspicious activity reports. Relevant reports are forwarded to the police (for ordinary cases) or the Serious Fraud Office (for cases above a certain threshold, as well as all reports of overseas corruption, irrespective of value). While statistical data is not held on the overall number of prosecutions and convictions arising from disclosures, NCIS indicated that approximately 20 to 30 per cent resulted in or contributed to investigations by the law enforcement authorities in 2002-2003. However, formal feedback mechanisms appear to be rarely in place, either on the part of the law enforcement authorities vis-à-vis NCIS, or on the part of NCIS vis-à-vis the nominated officers in the regulated sector.<sup>69</sup> Such feedback could usefully contribute to assessing the adequacy of the analysis and typologies relied on to make the SARs. Following the on-site visit, the UK authorities indicated that analysis of this type is being discussed by the Money Laundering Taskforce, established as a recommendation of the KPMG Report published in July 2003, and is under consideration by the Home Office.

84. Firms in the regulated sector are required to set up systems and controls for the prevention of money laundering. Under the Financial Services Authority’s (FSA) Money Laundering Rules in force since December 2001, the FSA’s role is to ensure that regulated companies have such systems in place. While the FSA does not itself investigate instances of money laundering, it can require access to companies’ documents in order to assess whether allegations of actual money laundering indicate a breakdown in the firm’s systems and controls. Breaches of these regulatory rules are punishable by a

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<sup>67</sup> Section 334, *ibid.*

<sup>68</sup> Schedule 9 POCA 2002, as amended by the Money Laundering Regulation 2003 S.I. No. 3074 of 2003, provides that the “regulated sector” includes bureaux de change, cheque cashing, money transfer stations, casinos, estate agents, insolvency practitioners, tax advisers, company and trust formations, accountants, lawyers (in connection with financial or property transactions) and dealers in goods to a value of EUR 15 000 or more.

<sup>69</sup> According to information provided, only Inland Revenue has such a formal feedback process in place.

range of sanctions such as fines, public censure, banning of individuals from working in the regulated sector or withdrawal of FSA authorisation.

85. Representatives of large UK banks interviewed at the on-site visit indicated that mechanisms are put in place in three main directions: effective “know your customer” regime, procedures for suspicious activity reports, and programs for adequate training and awareness. These do not include bribery as a specific topic. These representatives indicated that a large number (approximately 15 000 for large banking groups) of suspicious activity reports were transmitted to NCIS each year. Notably, a number of banks involved in handling funds misappropriated by General Abacha of Nigeria made suspicious activity reports concerning those funds.

86. Representatives of smaller enterprises, such as accountancy and law firms, indicated that their constituents felt the requirements to disclose under POCA constituted a heavy burden, and had some difficulties in the interpretation and implications of the money laundering reporting rules. Because of the demanding disclosure requirements under POCA and the personal liability of professionals subject to these requirements, they fear there may be a tendency to make SARs at the slightest doubt, thus burdening the workload of regulated sector professionals as well as that of supervisory bodies and NCIS. In answer to this concern, NCIS has provided guidance on the types of circumstances appropriate for abbreviated information to be provided in the form of a Limited Intelligence Value report, which does not preclude NCIS from asking for a Standard Disclosure report which includes more detailed information. Representatives of the regulated sector indicated that, in their view, money laundering offences where the predicate offence appears to be bribery of a foreign public official would be the subject of a Standard Disclosure report, although they had no practical experience of reports being made in this specific context.

***Commentary:***

***The lead examiners welcome the extension of the reporting obligations to all professions in the regulated sector, including accountants and the legal profession. Given the recent implementation of the new provisions under POCA 2002, the lead examiners recommend that this issue continue to be monitored, particularly with respect to the application of the offences of failing to report, the levels of sanctions in practice, and the efforts made to raise awareness and devise typologies and/or guidelines including foreign bribery situations.***

***Given the already large number of suspicious activity reports received by the NCIS, which is likely to further increase with the extension of money laundering reporting obligations notably to legal professionals, the lead examiners urge the UK authorities to pay due attention to the issue of human and financial resources available to adequately deal with these reports and forward them in due time to the law enforcement authorities. Additionally, they encourage the law enforcement authorities to provide feedback on the result of the SARs transmitted to them by NCIS, in order to allow for assessment of the effectiveness of the analysis and typologies used, and welcome the first initiatives in this respect taken by the Money Laundering Taskforce and the Home Office. Similar feedback should also be provided by NCIS to reporting entities.***

## C. INVESTIGATION, PROSECUTION AND SANCTIONS

### 1. Investigation

#### a) *Overview of investigative bodies*

87. An extraordinary number of institutions have a potential role in the investigation of foreign bribery cases in England and Wales. The Responses to the Phase 2 questionnaires included a March 2004 Memorandum of Understanding (the "March MOU") between most of these institutions which provides some rules for attributing investigative responsibility for foreign bribery cases.<sup>70</sup> The MOU is not based on any statute and simply reflects the agreement of the relevant agencies. The UK authorities contend that one the strengths of the MOU format is its flexibility because, unlike legislation, it can be easily changed; they note that the agencies involved consider it to be binding. During the on-site visit, the UK authorities indicated that the relevant agencies had agreed to a revised version of the MOU on 16 July 2004 (the "July MOU"), and provided a copy to the examiners.<sup>71</sup>

#### (i) *The National Criminal Intelligence Service (NCIS)*

88. The NCIS is a multi-agency organisation providing tactical and strategic intelligence on serious and organised crime to all law enforcement agencies. As noted, its Financial Intelligence Division is the UK's FIU for money laundering. Although the NCIS has no investigative role with regard to foreign bribery, the March MOU gave it a key gatekeeper and supervisory role with regard to such cases. As discussed below, the NCIS's role in this regard has not been consistent or successful and the July MOU transfers this responsibility to the Serious Fraud Office.

#### (ii) *Local police forces*

89. On paper, the 43 local police forces in England and Wales had and have a major role to play in the UK scheme of enforcement of the foreign bribery offence. [See March MOU § 9 (other than SFO cases, the local police force is charged with the investigation); July MOU § 9.] The organisational structure of the police in England and Wales, based on separate local police forces, is heavily focused on local concerns; police priorities are generally set by local police chiefs named and supervised by local boards. It does not appear that satisfactory attempts have been made to overcome this local focus for purposes of foreign bribery cases in order to make local police forces an appropriate choice to investigate such cases. To the contrary, as described below in the section on resources for investigations, (see part 2. C.) resources dedicated to fraud and economic crime in local police forces have shrunk substantially in recent years. No additional resources have been provided by the Home Office to local police forces to deal with foreign bribery. Despite the wording of the MOU, no cases have been forwarded to local police forces other than the MPS in London. Nor have such forces generated any cases.<sup>72</sup> Subsequent to the on-site visit, the UK authorities informed the

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<sup>70</sup> See Overseas Corruption, Revised Memorandum of Understanding on Implementing Part 12 of the 2001 Act adopted 10 March 2004 § 9 (included in UK Responses to Supp. Questions).

<sup>71</sup> During the on-site visit, the examining team was provided with a 24 June 2004 draft of the revised MOU that reflects incorporates the terms of the final document. A copy of the March MOU was included with the Supp. Responses at p. 50 et seq.

<sup>72</sup> Similarly, the National Crime Squad (NCS) is party to the March and July MOUs, which state that the NCS is available, particularly for local police forces, "for any case where there is clearly a need for their pro-active policing techniques." It has not yet had any actual involvement in any foreign bribery cases. See Parliamentary written questions, 26 May 2004: Column 1655W (response of Caroline Flint).

examiners that positive changes had been made to the treatment of foreign bribery in terms of its relative priority for the local police in the most recent National Policing Plan.<sup>73</sup>

90. Amongst the local police forces, the Metropolitan Police Service (MPS) stands apart. The MPS is the largest police force in the UK and has its headquarters at New Scotland Yard. It has a team of 25 officers within its Economic and Specialist Crimes Department (known as the Public Sector Team) that investigates foreign bribery and public sector fraud offences. The MPS, however, is still essentially a local police force and is limited to investigating fraud and corruption within the Metropolitan police area. Like other local police forces, the MPS reports to a local board. In the absence of designated resources for foreign bribery investigations, the examiners are sceptical about whether the MPS has the resources to undertake a national role and international role in the area of foreign bribery.<sup>74</sup>

91. The City of London - the square mile in London that is home to much of the UK's financial services industry - has its own police force, which is separate from the MPS. The City of London Police are parties to the MOU, but are not otherwise mentioned in the Responses. It plays an important role in assisting the Serious Fraud Office with its domestic fraud investigations (but it has apparently few resources to help with foreign bribery cases as discussed below in the section on resources).

(iii) *The Serious Fraud Office*

92. The Serious Fraud Office (SFO) is an independent Government department headed by a Director under the oversight of the Attorney General. As discussed further below, it has taken a greatly increased role in foreign bribery cases since April-July 2004 as both an investigator and as a "vetter" (initial reviewer) of foreign bribery cases. The SFO has statutory jurisdiction to investigate and prosecute cases which appears to its Director to "*involve serious and complex fraud*". [See Criminal Justice Act 1987 ("CJA") § 1(3).] Its investigations are conducted by multi-disciplinary teams comprising lawyers, financial investigators, police officers and others. The SFO has the power both to direct the investigation and prosecute (although it relies heavily on support from the police).

93. Section 2 of the CJA grants the SFO special investigative powers unavailable to the police, including the power to compel witnesses to produce documents and answer questions. The SFO's

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<sup>73</sup> During the Phase 2 review process, the examiners expressed concerns about the treatment of foreign bribery in the National Policing Plan 2004-2007. The NPP is a short high-level overall strategic document that establishes police priorities and, as noted above, constitutes an important source for awareness raising among the police. The UK authorities have indicated that the new National Policing Plan 2005-2008, which was released by the Home Secretary in November 2004, changes the language addressed to the foreign bribery offence and addresses a number of the examiners' concerns. The new role of the Serious Fraud Office (SFO) in foreign bribery cases is highlighted and police forces are specifically asked to support the SFO in its investigations. (On the new role of the SFO in foreign bribery cases, see below the sections on the SFO and on Case attribution since April-July 2004, §§ 102-106) In addition, whereas previously, the language referred only to police forces following up on any cases referred to them, the new NPP makes clear that police forces are encouraged to take on investigations not falling within the SFO's remit. The new NPP also no longer includes an explicit reference to an expectation that there will be few foreign bribery investigations. The examiners welcome these changes to the NPP.

<sup>74</sup> The MPS website indicates that the 25-officer Public Sector Unit deals with fraud in the public sector as well as with corruption, including allegations against civilian members of the MPS. The Public Sector Unit is part of the Fraud Squad, which also has three other smaller units. The Fraud Squad only takes on cases for frauds in excess of £750,000 except in exceptional circumstances. The Fraud Squad also assists the SFO.

section 2 powers also give it better access to financial records than the police. The SFO can obtain confidential banking records providing the Director or his designate so requires. [See CJA § 2(9).] Many section 2 notices are issued to banks, financial institutions, accountants and other professionals who may be in possession of information or documents relevant to a fraud, but who generally owe a duty of confidence to their clients. A section 2 notice overcomes this duty. The mere existence of section 2 can also be used to induce cooperation and obtain a voluntary witness statement.<sup>75</sup> A recent Home Office white paper on the fight against organised crime notes that similar powers can be “*particularly powerful in securing useful testimony from peripheral players in major investigations*” and “*in identifying and holding defendants to given lines of defence*”. [See One Step Ahead: A 21st Century Approach to Defeat Organised Crime (March 2004) (“Organised Crime White Paper”) at 42.]<sup>76</sup> But Section 2 powers do not apply until a case has been taken on for investigation under section 1.

(iv) *Other investigative bodies*

94. The Ministry of Defence Police (MDP) is a civil police force that is part of the Ministry of Defence (MOD). The MDP was not specifically identified as an investigative agency for foreign bribery in the UK’s Responses to the Phase 2 questionnaire and its statutory jurisdiction was not explained, but the recent July MOU states that it has jurisdiction over the investigation of all foreign bribery cases involving defence contracts. This raises a number of concerns for the examiners which are discussed below in the section on Case attribution since April-July 2004, §§ 109 and following.

95. The MOU indicates that the Companies Investigation Branch of the DTI (CIB) can be requested to investigate UK companies “*where there is good reason to suspect wrongdoing by a company incorporated in GB but where the evidence is not sufficiently strong to warrant a criminal investigation.*” (March MOU § 12.)<sup>77</sup> DTI representatives indicated that CIB has not had any role in foreign bribery investigations to date.<sup>78</sup> They underlined that the CIB’s powers under the Companies Act were limited to activity in the UK; they apparently considered that under the March MOU, which

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<sup>75</sup> See M. Levi, “Economic Crime”, in M. McConville & G. Wilson, eds., *The Handbook of the Criminal Justice Process* (2002) at 432.

<sup>76</sup> The police have fewer powers to obtain information than the SFO. The police generally do not have the power to require witnesses to provide information. Other than the SFO or other specialized bodies, there is no body with the powers of an examining magistrate in many civil law countries, a U.S. grand jury or an Australian Examiner to obtain answers to questions. To obtain bank records, which constitute “special procedure material”, the police must seek an order from a Crown Court judge; the order is ordinarily made after a hearing between the parties (including the party requesting the material and the possessor of the material) and takes the form of an order to the possessor of the documents to produce them (rather than an order allowing a constable to enter and search premises). [Compare PACE Sch. 1 §§ 1-4 (production order) with § 8 (order allowing entry to premises); see also PACE § 14.] No information has been provided with regard to the length of time it takes to obtain bank records through this process, including the time taken to obtain the court order and the time for actual production of the records. The examiners are concerned about the potential for delays and the accompanying risk of loss of key information.

<sup>77</sup> Certain regulatory bodies, such as the Financial Services Authority and Companies Act inspectors, have similar powers.

<sup>78</sup> CIB typically receives about 4000 complaints a year; some 800 are formally considered for investigation and about 250 are accepted for investigation. The vast majority are carried out under section 447 and are confidential. See <http://www.dti.gov.uk/cld/intro.htm>.

was expressly limited to cases where all acts took place outside the UK, there was little role for the CIB.<sup>79</sup> The Responses do not mention the CIB as an active participant in bribery cases.

(v) *Scotland*

96. The situation regarding the investigation of foreign bribery by Scottish authorities differs from that in England and Wales, and appears much less subject to fragmented and overlapping jurisdiction. Unlike the CPS, the Scottish Crown Office and Procurator Fiscal Service, headed by the Lord Advocate, are responsible for the investigation of crime and the police are obliged both by statute and common law to conduct investigations subject to the direction of the relevant Procurator Fiscal.<sup>80</sup> The police may commence an investigation in a straightforward case without reference to the Procurator Fiscal, but are subject to his direction thereafter and the question of sufficiency of evidence is not a matter for the police. The Responses state that all offences of bribery or corruption must be reported immediately by the Procurator Fiscal receiving the initial report to the International and Financial Crime Unit in the Crown Office, which then becomes responsible for supervision of the case.<sup>81</sup> In terms of investigative powers, this Unit has the same powers as the SFO in England, Wales and Northern Ireland.

**b) *Case attribution among investigative bodies***

97. The examiners consider that the fragmentation of responsibility for foreign bribery cases together with the lack of clear rules for attributing responsibility for results have been major impediments in the fight against foreign bribery in the UK. Apparently as a result of the poor results achieved with regard to investigation to date, significant changes occurred in April-July 2004 with regard to the rules and practice of attributing cases to investigative authorities. This report reviews the situation both before and after the April-July 2004 changes.

(i) *Case attribution prior to April-July 2004.*

98. The practice with regard to the attribution of cases prior to April 2004 did not appear to be satisfactory. The NCIS maintained a register of allegations and investigations, and the examiners welcome the UK's efforts to track allegations of foreign bribery and their progress in the chart.

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<sup>79</sup> Based on interviews with DTI representatives, it appears that there is little scope for active CIB involvement under current law even though the July MOU expands its scope to include foreign bribery cases where some acts occur in the UK. DTI representatives from outside the CIB appeared to have little awareness of the role of the CIB under the MOU, and representatives from the CIB indicated that where it appears from their investigation that a crime such as bribery has occurred, they transfer the matter to the criminal authorities, their own jurisdiction being essentially limited to fact-finding investigations. They similarly considered that the CIB would have a limited ability to take over cases from criminal investigatory agencies in cases where the latter determined that there was insufficient evidence to commence an investigation. They noted that because CIB's stronger investigative powers are limited to civil investigations, such powers must not be abused by being used to obtain evidence in an existing criminal investigations. The CIB can only investigate companies and individuals linked with companies, such as directors.

<sup>80</sup> The Procurators Fiscal and Procurator Fiscal Deputies are the Lord Advocate's local agents in each of 49 districts. The Lord Advocate is appointed by and a member of the Scottish Executive, and is answerable to the Scottish Parliament. His/her deputy is the Solicitor General, also appointed by the Scottish Executive.

<sup>81</sup> The Responses indicate that NCIS will refer any case with a Scottish element direct to Crown Office, or to the relevant Scottish Police force, who are obliged to report the case to the Procurator Fiscal.



However, while too much should not be read into difficulties in the maintenance of the register, the lead examiners have concerns about the way in which the UK authorities attributed cases prior to April 2004. Information that could have been of use to investigating authorities was apparently at times not passed on until after a significant delay from its reception. No resources were provided to NCIS to cover its foreign bribery responsibilities, including maintenance of the chart, and the register was maintained by a single employee. The lead examiners were made aware of one instance where information related to a foreign bribery allegation was received by the DTI in March 2004 and was not attributed for investigation until four months had passed. The UK authorities draw attention to specific references to overseas corruption in the National Policing Plans from 2002 to 2004 although the lead examiners note that this had no perceptible effect on the investigation of foreign bribery allegations by local police forces.

99. Other underlying problems in the method for attributing cases for investigation and follow-up were made known to the lead examiners during the on-site visit. Other than the SFO's broad and discretionary jurisdiction over "*serious and complex fraud*" under CJA § 1, there is little statutory or other legal basis for determining which agency should investigate a particular foreign bribery case or for determining which agency was responsible for the results either in particular cases or in general. Where criteria may exist, such as local police jurisdiction, they appear unsuited to the problem at hand.

100. In practice, the NCIS transferred all cases for investigation to the MPS. A February 2004 letter from the Home Office to an MP indicated that "*so far, all [foreign bribery] allegations that are to be investigated have gone [from NCIS] to the MPS and it looks like that will be the general trend*".<sup>82</sup> As noted, the March MOU indicated that the NCIS was expected to usually call a case conference "*to establish who is best placed to lead*", but no criteria for such determination were provided. Only two investigations had been commenced as of March 2004, little if any investigative activity had occurred and it appeared that no one was engaged in any meaningful follow-up.

101. The examiners consider, however, that a number of recent events and government initiatives are encouraging. Parliamentary questions and investigative press reporting have focused on the chart. The FCO changed the emphasis of its advice to overseas officers a more enforcement-oriented perspective. The number of cases on the chart has increased rapidly in recent months.<sup>83</sup> Perhaps most importantly, the role of the SFO has been significantly increased, albeit in an informal manner. Many of these changes occurred in the weeks and days before the on-site visit and it is too early to draw definitive conclusions.

(ii) *Case attribution since April-July 2004.*

#### New roles for the SFO

102. As noted above, the SFO's responsibility for foreign bribery has increased since April-July 2004 in two ways: its role as an investigator has been expanded and it has acquired a new role as a "vetter" of such cases. In April 2004 an informal decision was taken to increase significantly the SFO's role as an investigator. The chart of cases indicated that a number of cases were transferred to

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<sup>82</sup> Letter from Caroline Flint, Parliamentary Under Secretary of State to Simon Thomas, MP, dated 26 February 2004.

<sup>83</sup> See Jean Eaglesham, "Claims of UK bribery abroad higher than published data", Financial Times (23 March 2004) (noting that NCIS "has had 17 allegations referred to it, more than four times the number cited in a written parliamentary answer last October" and that the Ministry of Defence had six allegations registered with it).

the SFO at that time. At the July on-site visit, the SFO representative recognized that whereas the SFO had a marginal role with regard to enforcement of the foreign bribery offence prior to April 2004, it began taking significantly greater investigative responsibility in this area in April 2004. He anticipated that the SFO would retain responsibility for foreign bribery and that the new projected Serious Organised Crime Agency (SOCA) would not have major responsibilities in this area.<sup>84</sup> The SFO has confirmed that it has opened two investigations since April 2004.<sup>85</sup>

103. No legal text or document reflects or provides any firm basis for this important recent decision to increase the SFO's role in investigating foreign bribery cases. The statutory basis of the SFO's competence has not changed; under CJA 1987 section 1, it continues to have discretionary jurisdiction over cases reasonably perceived to involve serious and complex fraud, as it has had for many years. The SFO's new active investigative role is also not reflected in the new July MOU (unlike its new vetting role). Its stated role is unchanged from the March MOU (indeed it appears to be reduced by the July MOU's new reference to the MDP's investigatory jurisdiction over cases involving defence contracts).<sup>86</sup> As noted, the UK authorities have stated since the on-site visit that the MOU is regarded as binding on those agencies involved. The language of the MOU, however, appears to have relatively little effect on key matters such as the scope of the SFO's investigatory role in practice.

104. The principal basis of the new SFO investigative role thus appears to be based simply on a general political decision that it should get more involved. Subsequent to the on-site visit, the UK authorities clarified that the April 2004 decision to expand the SFO's investigative role was "*an internal SFO decision based upon the extra resources provided*" to the SFO in the Spending Review of 2002 (which applies until the end of the 2005-06 financial year). The resources attributed to the SFO in 2002 are not, however, earmarked for foreign bribery purposes. [See, e.g., Parliamentary Questions, 2 February 2004, Column 613W (statement by the Solicitor-General that "*The SFO have received no additional resources since February 2002 specifically for the purpose of investigating and prosecuting [under the 2001 Act]*").] While the lead examiners welcome the SFO's undoubted active current interest in foreign bribery cases, they have concerns about the durability of the new arrangements and SFO role as new priorities emerge.

105. The second major expansion of the SFO's role with regard to foreign bribery is its new vetting and case attribution role. This change is reflected in the July MOU. As noted above, this task involves receiving referrals of all allegations, reviewing the allegations at the outset, deciding on the appropriate investigative agency and transmitting the case to that agency. The expanded investigative role of the SFO should mean that this vetting process will result in the SFO deciding to take on the investigation itself in significantly more cases, but it can also decide to transfer the case to a different

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<sup>84</sup> The Organised Crime White Paper contained a proposal to create a new Serious Organised Crime Agency ("SOCA") as part of a broad new approach to fighting organised crime. SOCA will bring together the NCIS, NCS, the investigative and intelligence work of Her Majesty's Customs and Excise (HMCE) on serious drug trafficking and the recovery of related criminal assets, and the Home Office's responsibilities for organised immigration crime. The exact nature of SOCA remains unclear. The paper does refer briefly to the anti-corruption provisions in the 2001 Act at the end of a general section on "international efforts", but does not suggest that SOCA will address foreign bribery. It is not clear exactly what investigative powers and role it would have. A number of participants in the panels indicated that the problem of foreign corruption in international business is distinct from organised crime and that it would not be advisable to give SOCA the role of investigating and prosecuting foreign bribery offences.

<sup>85</sup> The number of investigations varies significantly depending on the criteria used.

<sup>86</sup> On the issue of MDP jurisdiction see the section on Case attribution since April-July 2004, §§ 109-115.

investigative authority. While it gives the SFO a vetting role, the July MOU does little to specify the rules for attributing cases or to address the problem of resources. The SFO also lacks powers to ensure follow-up by other agencies (although some pressure can be brought to bear). The SFO has an existing vetting process for its fraud cases. The SFO vetting officer pointed out that the only person who was bound to be affected by the new vetting role for foreign bribery cases was himself, as they may not accept many cases, and that the SFO would not be committing specific resources to such cases.

106. While the lead examiners had understood that the SFO would make decisions about attributing cases under the new July MOU, the UK authorities have now indicated that the NCIS still makes the decisions about case attribution, but its decisions are at present informed by the SFO's new vetting process. The lead examiners consider that this area remains unclear in practice.

107. As noted above, the SFO has broad jurisdiction to exercise its discretion to investigate and prosecute cases that reasonably appear to “*involve serious and complex fraud*”. [See CJA 1987 § 1(3).] Many panel participants, including the SFO, considered that corruption cases would generally fall under this broad rubric. It does appear, however, that UK law distinguishes, sometimes sharply, between fraud and corruption. For example, the Law Commission report on corruption noted “*general agreement*” among respondents that corruption “*is not an offence of fraud*” and the Commission agreed with this position. [See Law Commission Corruption Report (no. 248) at 86 n.134.] In its recent 2002 report on reform of the law of fraud, the Law Commission has continued to take the position that corruption is not fraud. [See Law Commission Fraud Report (no. 276) at 69 n.26 (noting that Law Commission has argued that “*corruption is not in essence, and should not be treated as, an offence of fraud*”).] The government’s recent proposals to reform the law of fraud express general agreement with the Law Commission’s report on fraud and indicate that, subject to comments received, the report will form the basis of new legislation on fraud. [See Home Office, Fraud Law Reform: Consultation on proposals for legislation § 11 (May 2004)]. Undoubtedly, in most if not all significant cases of foreign bribery, some fraud will be “involve[d]”.

#### Criteria for SFO Investigations

108. As noted, the SFO's statutory jurisdiction gives it the discretion to choose its cases. The SFO director has described its general criteria for choosing cases involving serious and complex fraud as including whether the case involves at least GBP 1 million (1.45 million EUR); involves the Governments of other countries; requires specialist knowledge of, for example, Stock Exchange practices or Regulated Markets; has a significant international dimension or requires a combination of legal, accountancy and investigative skills; requires Section 2 investigative powers; involves fraud that could damage confidence in UK financial institutions; and would benefit from the SFO’s integrated investigative and prosecutorial functions.<sup>87</sup> At the meetings, an SFO representative stressed that the SFO's monetary threshold is flexible and that it is not the most important criterion. The SFO considers and has taken on cases under the threshold. Since the on-site visit, the SFO has indicated that they would treat overseas corruption referrals as they would treat any other domestic referral.<sup>88</sup>

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<sup>87</sup> Speech by Robert Wardle, Director, SFO, 13 May 2003.

<sup>88</sup> Some media reports and panel participants stated that they believe that due to its increased responsibilities, the SFO now frequently applies a GBP 2 million (2.9 million EUR) threshold as rule of thumb, but the SFO expressly denied this claim in materials submitted after the on-site visit.

Special rules for the investigation of cases involving "defence contracts".

109. As indicated above, the text of the July MOU makes a significant change by referring to the Ministry of Defence Police (MDP) having investigative jurisdiction over all foreign bribery cases involving "defence contracts". [See July MOU § 9 (defining the MDP as the relevant investigative agency for "any case involving MoD employees or defence contracts").] In contrast, the March MOU provided that all cases would be investigated by either the local police or the SFO. The examiners are concerned by these new provisions, which the July MOU does not explain.

110. As noted, the Responses did not refer to the MDP as an institution concerned with the fight against foreign bribery and no information was provided about its statutory jurisdiction. The examining team learned about the new MOU and MDP role during the July 2004 on-site visit and thus had a limited opportunity to evaluate the nature and role of the MDP at that time. Subsequent to the on-site visit, the UK authorities clarified that the MDP has jurisdiction over any corruption involving contracts to which MOD is a party and referred to its statutory jurisdiction over MOD defence contracts under section 2(3) of the Ministry of Defence Police Act 1987. Section 2(3) provides that "*members of the Ministry of Defence Police shall have the powers and privileges of constables ... in relation to matters connected with anything done under a contract entered into by the Secretary of State for Defence for the purposes of his Department or the Defence Council*". According to the MDP website, its primary role continues to be to provide law and order policing services to the Ministry of Defence. Generally, jurisdictional requirements mean that the powers available to the MDP are restricted to Ministry of Defence land and property within the United Kingdom, although there are exceptions.<sup>89</sup> According to the UK authorities, the role of the MDP in the investigation of corruption cases involving MOD procurement in the UK is well known and they have significant expertise.

111. According to post-visit information received from the UK authorities, the MDP's jurisdiction over foreign bribery is significantly narrower than as stated in the July MOU. Although the July MOU refers broadly to "defence contracts", the UK authorities clarified that "[r]egarding defence contracts between UK based companies and overseas governments, the MDP would have no investigative role unless the UK MOD was a party to the contract". In this regard, the UK authorities explained that the July MOU wording "*is designed to refer to defence contracts involving the UK MOD – wherever they may be effected.*" Moreover, according to the UK authorities, the new wording in the July MOU does not change the previous position because the MDP have always investigated cases of corruption involving MOD defence contracts and continue to do so. In addition, the UK authorities note that the July MOU provides that the SFO will vet at the outset all foreign bribery cases including cases involving defence contracts; the UK authorities further consider that the MDP's investigative jurisdiction is not exclusive and that such cases will likely result in joint SFO/MDP investigations where investigations are warranted.

112. In light of the explanations from the UK authorities about the role of the MDP being limited to defence contracts to which the MOD is party, the examiners consider that the wording of the MOU indicating that the MDP has broad jurisdiction over all foreign bribery cases involving defence contracts is misleading and should be amended to clarify that the MOD must be a party to the contract. The UK authorities indicated following the on-site visit that the MOU would be promptly amended in this manner.

113. In addition, however, the lead examiners also note that in cases involving purchases by foreign governments, MOD's role as a contracting party is fundamentally different than for its own

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<sup>89</sup> See Co-ordinated Policing Protocol between the Ministry of Defence police and Home Office Police Forces, Home Office Circular 24/2002 (May 3, 2002) § 10.

procurement; it is arguably acting as a form of seller rather than a buyer. Accordingly, concerns about bribery may be different than in domestic procurement cases and the appropriateness of MDP jurisdiction is less evident. Although the international defence industry is widely perceived as being at high risk for foreign bribery, the MDP did not play any role prior to 2004 in investigating such cases under its existing jurisdiction. The lead examiners note that the existence of a government to government contract in the defence area is frequently not publicly disclosed.

114. While the relationship between the MDP and the MOD may appear peculiar to some Working Group members, the lead examiners accept the UK's assurances that the status of MDP police officers as constables provides independence from the MOD. Nevertheless, the examiners consider that the Working Group should follow up with regard to the effectiveness of the investigations carried out by the MDP in relation to foreign bribery cases involving defence contracts to which the MOD is a party.

#### Coverage of pre-2002 cases.

115. The March MOU applied only to foreign bribery cases that took place entirely abroad, i.e., that did not involve any acts in the UK. [See March MOU § 5 ("*This MOU covers cases which will be dealt with by virtue of section 109 of the 2001 Act – that is cases where all the action takes place overseas.*")] It did not apply to foreign bribery cases over which the UK has territorial jurisdiction. As a result, it did not apply to cases that occurred prior to the entry into force (in February 2002) of nationality jurisdiction pursuant to the 2001 Act even though the UK has affirmed that the common law applies to foreign bribery.

116. The lead examiners welcome the extension of the July MOU to cover all cases of foreign bribery.<sup>90</sup> After the on-site visit, the UK authorities clarified that the March MOU did not apply to territorial jurisdiction cases because it focused only on the attribution of responsibility for the new types of cases introduced by the 2001 Act; the territorially competent local police would in theory deal with territorially-based cases as it had done previously. However, it does not appear that any pre-2002 cases were in fact being transferred to the relevant local police force for investigation; they were simply noted in a chart of cases (discussed below) as pre-dating the legislation. With the extension of the July MOU to cover all foreign bribery cases, the investigation of foreign bribery has been significantly rationalized.

#### ***Commentary:***

***The examiners consider that the very large number of investigative bodies has resulted in excessive fragmentation of efforts, lack of specialised expertise, lack of transparency both for the public and for investigative authorities, and problems in achieving coherent action.***

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<sup>90</sup> Certain government officials and prosecutors stated to the examiners the government's position, as set forth in Phase 1, i.e., that pre-2002 cases are covered providing a UK jurisdictional nexus exists in the form of acts in the UK. But a number of prosecutors, representatives of investigative authorities and others noted that defence counsel would inevitably raise the passage of the new legislation as alleged evidence that the offence did not exist previously; while prosecutors could argue that the legislation was merely a clarification of existing law, the additional uncertainty feeds into the reluctance to expend resources on investigating and prosecuting cases. Press articles, including from journalists who have aggressively investigated corruption cases, have suggested that some company executives and journalists apparently believe that no offence existed prior to 2002. See, eg, D. Leigh & R. Evans, "Arms firm's £60m slush fund", *Guardian* (4 May 2004); B. Ferguson, "Corruption probe at arms giant", *Edinburgh Evening News* (4 May 2004).

*The examiners welcome the expanded role of the SFO in the investigation of foreign bribery cases since April-July 2004. They consider that this partial centralisation of responsibility in an agency with significant investigative powers and financial expertise should constitute a major step forward in improving enforcement in the UK. They invite the government to take further steps to ensure that the role of the SFO in foreign bribery investigations is confirmed and clarified and that appropriate financing is provided.*

*The lead examiners recognise that the SFO's current broad jurisdiction should allow it investigate most if not all major cases of foreign bribery. Given the importance of promptly achieving effective results in foreign bribery cases, the examiners also invite the UK authorities to encourage the SFO's expressed willingness to investigate foreign bribery cases even where the SFO's informal threshold with regard to the amount at stake is not met. They also encourage the authorities to adopt criteria and methods to monitor and evaluate the performance of the SFO and other relevant agencies with regard to foreign bribery allegations on an on-going basis, including in particular with regard to decisions not to open or to discontinue an investigation. They consider that the Working Group should follow-up with regard to these issues.*

*In light of the difficulties experienced by the NCIS, the lead examiners also welcome the attribution to the SFO of a vetting and case assignment role under the July MOU. However, they note that the SFO has few if any powers to exercise its vetting and case attribution role, or to compel cooperation from agencies to which it would assign cases.*

*The lead examiners are also concerned about new and vague rules in the July MOU apparently attributing broad investigative jurisdiction to the MDP in cases involving defence contracts. They take note of the clarification that MDP jurisdiction applies only in cases in which the MOD is a contracting party and recommend that UK authorities amend the MOU to make this limitation clear. The lead examiners consider that the Working Group should follow up with regard to the effectiveness of the investigations carried out by the MDP in relation to foreign bribery cases involving defence contracts to which the MOD is a party.*

(iii) *Case attribution and referrals to foreign jurisdictions*

117. As extended by the 2001 Act, the UK foreign bribery offences apply both to the active and passive bribery of foreign public officials. However, although the text of the law applies to the passive bribery of foreign public officials, the UK authorities have clarified, subsequent to the on-site visit, that, as a matter of principle, the UK does not take jurisdiction over the acts of foreign public officials outside the UK who are foreign nationals.

118. The UK authorities have discretion about whether to investigate foreign bribery cases over which the UK has jurisdiction. The MOU states that "*the existence of a new UK jurisdiction over corruption offences does not mean that it will always be appropriate for the UK to exercise it in any given case.*" The MOU also suggests that in exercising their discretion whether to prosecute bribery cases, law enforcement agencies should consider, *inter alia*, whether the UK can prosecute the foreign recipient of a bribe. Paragraph 7 of the MOU thus states that "*[t]he decision as to which jurisdiction is the best placed to pursue each case will depend on where the main evidence and witnesses are likely to be located. Also, a bribery case is likely to involve at least 2 parties, one of whom at least may not be prosecutable in the UK. It would be undesirable for these parties to escape prosecution by the*

*proper authority*".<sup>91</sup> Given that the UK does not prosecute foreign public officials abroad who are the recipients of bribes, the text of the MOU could be read to suggest that cases of bribery of foreign public officials should be transferred to a jurisdiction that can prosecute both the active and passive bribery offence, presumably to the home jurisdiction of the foreign public official. The examiners accept the UK authorities' assurances that this is not the correct interpretation, but invite the authorities to clarify the MOU with regard to the exercise of discretion not to investigate. The examiners note in this regard that the scope of the July MOU was expanded to cover foreign bribery cases over which the UK has territorial jurisdiction.<sup>92</sup>

119. The MOU also suggests that the discretion not to prosecute should be exercised where another jurisdiction is better placed to prosecute. Moreover, the July MOU now applies to both nationality and territoriality based cases, and it thus suggests the exercise of discretion not to prosecute for territorially-based cases as well as nationality-based cases. The examiners note that referral of cases to the jurisdiction where the bribe was paid was possible prior to the Convention and they consider that that the Parties adopted the Convention because they recognized the inadequacies of that system. The UK suggests that this wrongly explains the purpose of the Convention because it does not require the parties to adopt nationality jurisdiction, as the UK has done. As a general matter, the examiners consider that the suggestion that there is a single best jurisdiction in each case may give insufficient emphasis for the frequent need for combined and aggressive investigation in several countries (whether in the context of independent investigations or in the context of mutual legal assistance requests).<sup>93</sup>

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<sup>91</sup> See also Letter from Baroness Scotland of Asthal (Minister of State, Home Office) to Hugh Bayley MP dated 23 July 2004. ("*Overseas investigations can be particularly complex. The UK remains of the view that for practical reasons, criminal proceedings can usually best take place in the country where the crime took place, because that is where the evidence and witnesses are likely to be. Extra-territorial jurisdiction is most likely to be used only in cases where a foreign country is unable or unwilling to proceed itself or if there are over-riding practical considerations which favour a prosecution overseas.*")

<sup>92</sup> On the expansion of the July MOU to include cases subject to territorial jurisdiction, see section above on Coverage of pre-2002 cases, §§ 115-116.

<sup>93</sup> Subsequent to the on-site visit, the UK authorities indicated that they consider that Article 4.3 of the Convention supports the idea that there is a single best jurisdiction for prosecution in each case. Article 4.3 provides that "*when more than one Party has jurisdiction over an alleged offence described in this Convention, the Parties involved shall ... consult with a view to determining the most appropriate jurisdiction for prosecution.*" The lead examiners consider that the purpose of Article 4.3 is to mandate, under certain conditions, consultations with other Working Group members in order to achieve the most effective prosecution; in some cases, such as those involving allegations relating to consortia with numerous parties from different countries, several prosecutions in different Working Group countries may be appropriate. Moreover, regardless of the number of prosecutions, vigorous investigations may be appropriate in several jurisdictions. Although Article 4.3 does not address non-Parties to the Convention, consultations with appropriate authorities in non-Working Group members about how best to prosecute may frequently also be appropriate, but care should be taken to ensure that such consultations do not unduly limit investigative activity. The lead examiners consider that cases involving serious allegations should not be transferred to non-Working Group countries (or to Working Group countries), and investigative activity discontinued in the transferring jurisdiction, unless there are reasonable assurances that a serious investigation will occur in the transferee jurisdiction.

***Commentary:***

***The lead examiners invite the UK authorities to clarify in the MOU that UK investigations and prosecutions of foreign bribery do not depend on the UK's ability to prosecute any foreign public official who may be involved.***

***c) Resources for investigations***

120. As noted above, the examiners are concerned about the limited investigation of foreign bribery to date in the UK. Lack of resources for investigation and prosecution of foreign bribery cases was widely cited as a major barrier to the development of triable cases in the UK.

121. The examiners are concerned that the lack of resources is based on an explicitly-stated expectation that “few” foreign bribery cases will be investigated. (See 2004-2007 National Policing Plan (NPP); see also MOU.)<sup>94</sup> The basis for this estimate is not set forth in the NPP or the MOU; one panel participant suggested that it might be based on a pro rata comparison with enforcement in the U.S. Given the heavy involvement of UK companies both large and small in a number of international industries widely recognized as being particularly subject to corruption, including defence, construction, energy and telecommunications, the examiners considered that there appeared to be little basis for such a small a priori estimate.

122. The UK authorities supplied additional information after the on-site visit about their estimate about the number of cases. At the time the 2001 Act was adopted, the Home Office estimated the likely number of investigations and prosecutions; the estimate were based on US figures because it was the only country at the time with actual court cases in this area. Based on US experience of 25-35 investigations and 2-3 prosecutions and a US/UK ratio of 3.5 to 1 (based on foreign trade rather than population), the Home Office roughly estimated that the UK would have 10-20 investigations and 1-2 prosecutions per year. The examiners note that the actual number of investigations and prosecutions to date is far below the numbers forecast in 2001 and they welcome the recent measures to improve the system of investigating foreign bribery cases in the UK. The examiners encourage the UK authorities to better publicise to investigative authorities their estimates of the number of cases rather than merely expressing an expectation that there will be few such cases. They also encourage the authorities to express concerns to the investigative authorities about results significantly below those estimates. As noted above in the section entitled Overview of investigative bodies, § 89, the examiners also welcome the new language in the 2005-08 NPP which no longer refers to an expectation of a small number of investigations.

123. Diffuse responsibility for the investigation of foreign bribery has resulted in limited specialised expertise in any particular agency and the examiners are concerned about the relative lack of specialisation. As noted, lack of resources is also of concern. Recent public attention to the absence of cases and serious government efforts have led to the number of investigations increasing in recent months. However, it is not clear that sufficient resources exist to carry out the existing investigations.

124. The new SFO roles since April-July 2004 raise several additional issues with regard to resources. While the examiners would welcome the possible evolution of the SFO into the de facto

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<sup>94</sup> The examiners are concerned that the estimate as expressed in the NPP and MOU may have reflected in part, as a practical matter, an implicit expectation that pre-2002 cases would not be investigated. For example, the NPP does not refer to, and the March MOU did not address, the common law offence based on territorial jurisdiction. As noted, the examiners welcome the extension of the July MOU to cover pre-2002 cases.



central investigative and prosecutorial agency for the fight against foreign bribery in the UK, it is far from clear that it has or can call on the resources to conduct or even supervise 10-20 investigations and 1-2 prosecutions a year. First, the SFO has no standing force of police officers and needs to be able to call on substantial outside police resources. Corruption cases typically fall within the broad rubric of fraud squads in police forces, which have seen substantial reductions in recent years. These reductions directly affect the SFO. [See Speech by Robert Wardle, Director, SFO, 13 May 2003 ("*we are faced with a decline in police resources to deal with fraud*")]

125. The UK authorities have indicated since the on-site visit that police forces generally do not receive resources earmarked for specific offences or types of cases. However, there are exceptions. For example, in December 2003, the City of London Police received new and dedicated resources to allow it "*to assume the position of lead police force for SFO cases in London and the South East*".<sup>95</sup> However, these new resources are limited to domestic cases of fraud in London and the Home Counties; they cannot be used for foreign bribery investigations.<sup>96</sup> The examiners consider that the absence of dedicated police assets available to assist the SFO in foreign bribery cases raises serious concerns that the investigation of such cases may be hampered or even precluded by lack of police support. Alternatively, it could mean that the SFO is required to call on police forces that may appear to be less than ideal for a variety of reasons.

126. The SFO has little if any power to take action if an investigative agency takes no action or declines to investigate due to insufficient resources or other priorities. Similarly, the government does not appear to have appropriately considered the level of funding required to investigate and prepare a major foreign bribery case for trial; in cases that involve expensive, complex, sensitive and possibly unpopular investigations of companies, the expectation that police forces will in effect volunteer for the task appears unrealistic.

127. In addition to the critical problem of its limited ability to call on the necessary outside police forces, the SFO itself has limited resources. Many consider that the SFO has been seriously underfunded for years; its current permanent staff of 244 is one-tenth that of the Financial Services Authority (which regulates the financial sector).<sup>97</sup> Only substantial recent increases in the SFO's budget have allowed it to reach its present relatively small staff. Its budget was GBP 23 million (EUR 31.1 million) in 2003/04, GBP 30 million (EUR 43.2 million) in 2004/05, and GBP 35 million (EUR 50.4 million) in 2005/06.<sup>98</sup> Most of the increase, however, was to provide for a new SFO role in prosecuting cartel cases under the Enterprise Act.

128. The SFO has not received any specific funding for foreign bribery cases either in the past or as a result of its significant new responsibilities since April-July 2004. An SFO official indicated that the 2004 spending review has determined that SFO funding is expected to remain flat over the next biannual budget cycle, i.e. from 2005-06 to 2007-2008. The SFO Director has expressed concern about the SFO being spread too thin. [See Accountancy Age, "Profile: Robert Wardle, Head of the Serious Fraud Office", (11 March 2004).]

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<sup>95</sup> See SFO 2003-2004 Annual Report.

<sup>96</sup> See SFO News Release (15 December 2003) ("It will provide an increased pool of police expertise, ring-fenced for fraud investigations, on which the SFO will be able to draw for cases not only in London, but also throughout the Home Counties.")

<sup>97</sup> See A. Brummer, "Britain's top fraud fighter gives his verdict on tackling the jury system", Daily Mail (29 July 2004).

<sup>98</sup> Speech by Robert Wardle, Director, SFO, 13 May 2003.

129. A number of commentators indicated that the SFO and its police support are frequently seriously outmatched by the lawyers and experts mobilised by the defence in major fraud cases involving large companies. In addition to investigative resources, substantial resources are needed to carry out the legal analysis necessary to bring cases under untried conditions, and these needs are obviously greater in cases based on complicated and uncertain statutes or common law provisions. Moreover, the SFO's performance is frequently evaluated, at least informally and in the press, based on its success rate in prosecutions. The SFO itself considers that its overall conviction rate of approximately 70% suggests that it is not outmatched even in large cases.

130. Particularly in the absence of dedicated resources, the tendency to frame foreign bribery cases in familiar and tested ways, i.e., using non-bribery charges, may be overwhelming; as the UK authorities noted after the on-site visit, as a general matter it is certainly not an unreasonable approach for prosecutors to frame cases in ways that have been successful in the past. The examiners are concerned, however, that given the complex and untried nature of foreign bribery law in the UK, this may frequently result in bribery charges being dropped in favour of other charges. It is far from clear that well-tested offences such as fraud in fact cover the harm addressed by the foreign bribery offence, which addresses different policy concerns. The UK's Phase 1 review did not focus on the use of alternative offences to cover the basic Article 1 offence under the Convention. In addition, under these conditions, the foreign bribery offence would not generate any of the case law that is needed to improve its clarity and visibility.

131. A senior defence lawyer with a long-standing interest in the fight against corruption noted that he has heard the same reasons for the lack of prosecutions since he began writing about the issue a number of years ago, and that he suspects that they may be convenient problems that mask a lack of political will and commitment of resources. He noted that other priorities continually displace the fight against foreign corruption and that the UK has been slow to reform its law. His corporate clients currently feel that there is a greater risk of sanctions than in the past, but he fears that there is a risk that if there are repeated government pronouncements that the issue is taken seriously without any cases, the fear factor in the boardroom will evaporate; moreover, he indicated that much of the boardroom perception of risk is focused on possible exposure to US prosecutions.

132. Since the on-site visit, the UK authorities have confirmed that the SFO is demonstrating a genuine commitment to its new role. It has accepted two cases for full investigation and is actively considering several others.

***Commentary:***

***The lead examiners consider that the combination of numerous agencies and the absence of designated assets or centralised responsibility for investigating foreign bribery cases in any agency has constituted a crucial barrier to the effective implementation of the Convention in the UK. As noted above, the lead examiners welcome the recent decisions to increase the role of SFO both as investigator and vetter and they urge the UK authorities to ensure that the agency is able to call on appropriate human and financial resources both internally and especially from outside police forces. The lead examiners are concerned that in the absence of appropriate dedicated assets or other similar arrangements, there is a significant risk that the SFO will encounter resistance when it seeks to enlist the help of investigators in major cases, and they regret that it has few powers to address this situation. The lead examiners also recommend that the UK authorities reconsider the appropriateness of an officially stated expectation that there will be few foreign bribery investigations or prosecutions.***

**d) Witnesses and special investigative powers**

133. As a general matter, the examiners found that the Responses and panel members focused relatively little on what investigation could be done in the domestic sphere with regard to foreign bribery and much more on the potential difficulties in obtaining evidence abroad. (See, e.g., Responses § 9.2.) The UK authorities have not provided any examples of or statistics regarding the actual use of investigative techniques in foreign bribery cases.

134. Reduction in sentences for defendants in exchange for cooperation (such cooperation is known as “Queen’s Evidence”) is permitted under applicable case law. However, it appears that the availability of such cooperation for investigators and prosecutors (including the SFO) could be substantially improved. The Organised Crime White Paper recognizes that “*Queen’s Evidence is currently underused in serious and organised criminal cases*”. [See also J. Sprack, Emmins on Criminal Procedure, (9th ed. 2002) at 358 (indicating that cooperation leading to conviction of numerous other defendants occurs in a “*handful*” of cases).] Subsequent to the on-site visit, the UK authorities indicated that it is “*reasonably common*” for defendants to cooperate and receive a sentence reduction as a result; a two-thirds reduction may well be given under applicable case law. The White Paper contemplates improvements to the regime for witness cooperation in certain types of cases, but does not mention foreign bribery.<sup>99</sup> In addition, a Metropolitan Police Service (MPS) representative indicated that the applicable case law requires that the cooperating witness must identify and give evidence against defendants for serious crime, which in this context means “*the sort of criminality which without discounts would attract 10 years*”.<sup>100</sup> The statutory bribery offences do not meet this threshold so this case law would not apply. He noted that cooperation could nonetheless be a factor in sentencing.

135. Police and prosecutorial representatives indicated that the Court of Appeal has repeatedly set limits on plea bargaining, although the practice continues. The SFO has argued that plea bargaining and defendant cooperation would help to overcome problems with excessively long trials. [See S. Bowers, “SFO’s new chief lobbies for radical overhaul”, Guardian (21 April 2003) (quoting SFO director as stating “*I would like a position where we could go along and say to a defendant ‘this is what we have got ... if you cooperate, hand the money back, agree to be disqualified, we can go to the judge and recommend a certain sentence ...’*”).]

136. The Regulation of Investigatory Powers Act 2000 provides for confidentiality and risk assessment mechanisms for informants and other sources. Case law on anonymity, as well as interviewing and debriefing methodology relied on by the Police relating to the protection of witnesses in serious crime cases are also applicable to all those involved in serious criminality, including whistleblowers (see also above the section on whistleblowers, part A.2.a)). Witness protection programs are currently run at the local level. Police representatives indicated that the originating police force retains the responsibility for relocating the witness in the new jurisdiction, which creates difficulties. In addition, programmes vary from agency to agency and smaller forces may have to improvise where the issue arises infrequently. The UK authorities indicated that in 2003 the government launched a wide-ranging strategy to tackle witness intimidation, which includes protection of witnesses in court and in the community. A national review of witness protection has recommended that there should be a centralised unit to provide assistance to law enforcement agencies for high-level witnesses, and that force-level witness protection units should be consolidated on a regional basis. A

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<sup>99</sup> See White Paper at 43 (referring to linking the exercise of these powers “to a series of listed offences such as drug trafficking, terrorism, people smuggling, serious tax fraud and money laundering”).

<sup>100</sup> The quoted language is from a post-visit clarification received from the UK authorities.

range of measures are being introduced to improve the security of witnesses in giving their evidence to the court. New witness protection legislation is being drafted.

137. Covert human intelligence is regulated under the Regulation of Investigatory Powers Act 2000 (RIPA) and the Police Act 1997.<sup>101</sup> Each police force has a dedicated unit and in appropriate circumstances witnesses can appear in court without being identified. The UK authorities have indicated that such intelligence can be used in foreign bribery cases. Wiretap evidence cannot be used in legal proceedings in the UK.

***Commentary:***

***The lead examiners consider that the UK authorities should make efforts to improve the investigative tools available in foreign bribery cases and to use them more actively. The examiners welcome the increased role of the SFO in this regard as well as the UK's recent efforts to improve witness protection programs.***

***e) Disclosure to non-investigative agencies.***

138. The MOU provides that (1) the Foreign and Commonwealth Office (FCO) "*wishes to be kept informed by investigating agencies at all the main stages of a case*"; and (2) NCIS should systematically obtain input from FCO before taking its decision on reporting allegation to foreign jurisdictions. (MOU §§ 15, 8.) Questioned about the purpose of the requirement to inform the FCO about each stage of an investigation, an investigator indicated that (1) the embassy would be able to advise on conditions on the ground in the relevant country; and (2) the diplomatic service generally seeks to promote UK business and he would expect it to cease promoting the interests of a company subject to an investigation. The UK authorities have noted that "*[t]here is no obligation to disclose information that runs counter to Article 5 of the Convention*". The examiners are concerned, however, because there are no stated guidelines or limits with regard to FCO's use of the information. The examiners accept the rationale for informing FCO that a particular company is under investigation, but they are not convinced that this rationale requires continuous disclosure to FCO of each stage of the case. As well, while recognizing the usefulness of FCO's input prior to disclosing the allegations to foreign authorities, they would like it to be clear that this input should not include "*considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal person involved*", all of these being considerations which are to be excluded under Article 5 of the Convention. The examiners invite the UK authorities to reconsider the MOU requirement that the FCO be kept informed about each stage of the investigation of cases involving defence contracts, and to consider whether disclosure of information about an investigation to the FCO should be limited to disclosure, if any, that the investigating agency considers is necessary to carry out the investigation.

139. The July MOU states for the first time that the Ministry of Defence (MOD) "*wish[es] to be kept informed by investigating agencies at all the main stages of ... any case involving defence contracts.*" The reasons for this requirement and the role of the MOD are not specified. The examiners invite the UK authorities to reconsider the new July MOU requirement that the MOD be kept informed about each stage of the investigation of cases involving defence contracts, and to consider whether disclosure of information about an investigation to the MOD should be limited to disclosure, if any, that the investigating agency considers is necessary to carry out the investigation.

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<sup>101</sup> The Act also covers other matters such as covert surveillance, and telephone, postal and communications intercepts. The Regulation of Investigatory Powers (Scotland) Act applies in Scotland.

140. The Attorney General as such is not a party to the MOU but he superintends a number of departments that are parties, including the SFO and the CPS. As described further below in the section on prosecution, his prior consent is required prior to the filing of a prosecution for a statutory bribery offence. In at least one case involving major UK defence companies, the Attorney General “*required to be kept informed, as the [MLA] investigation progressed, of the view taken by the Director of the SFO on whether there should be a domestic investigation.*”<sup>102</sup> Subsequent to the on-site visit, the UK authorities indicated that the Attorney General exercised this oversight as part of his supervisory function and that he “*was interested in a positive way [and] was not seeking to limit any action.*”

***Commentary:***

***The lead examiners consider that any disclosure of information from an on-going criminal investigation is potentially damaging. The lead examiners encourage the UK government to reconsider obligations in the MOU requiring disclosure of information about the investigation to non-investigatory government departments (notably the FCO and the MOD).***

***The lead examiners also urge the UK authorities to ensure that the purposes of any disclosures of information about investigations are clearly defined and limited, that they are subject to the decision of the investigators, and that any disclosed information is used with due regard to the needs of the investigation and Article 5 of the Convention.***

***f) Judicial co-operation***

***(i) Mutual legal assistance***

141. New legislation to govern the provision of mutual legal assistance (MLA) came into force on 26 April 2004. The Crime (International Co-operation) Act 2003 supersedes the Criminal Justice (International Co-operation) Act 1990 as the primary piece of legislation for MLA. The new Act updates and streamlines arrangements, with the aim of providing for increased direct transmission of requests and return of evidence, and enabling the UK to assist with request to take evidence via live television link.

142. The Act does not in general require dual criminality. Exceptions concern requests involving fiscal offences (in the absence of an agreement) or use of search and seizure powers. The availability in the UK of searches and seizures requested in rogatory letters is dependent on the classification of the offence as a “*serious arrestable offence*”. The foreign bribery offence, although an “*arrestable offence*”, is not included in the defined list of per se “*serious arrestable offences*”.<sup>103</sup> An arrestable offence which is not automatically serious is to be regarded as serious only if it did have or was intended to have or was likely to have any of the following consequences: serious harm to the State or public order; serious interference with the administration of justice; the death or serious injury to any person; or substantial financial gain or loss to any person. In order to obtain search and seizure when

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<sup>102</sup> See Letter of Rt Hon Harriet Harman, Solicitor General, to Simon Thomas, MP dated 15 June 2004 (“The SFO’s [MLA] investigation on behalf of the Attorney General of Jersey was an important case and moreover one that concerned major UK companies and therefore the Attorney General required to be kept informed, not just at routine meetings but on a continuous basis. [...] He also required to be kept informed, as the investigation progressed, of the view taken by the Director of the SFO on whether there should be a domestic investigation.”).

<sup>103</sup> The Police and Criminal Evidence Act 1984, section 116 and Schedule 5 specify the list of “serious arrestable offences”.

requesting MLA in foreign bribery cases, the requesting authority must accordingly demonstrate, on a case by case basis, that the facts of the offence are such that there are reasonable grounds to believe that a serious arrestable offence occurred. The UK authorities indicated in their answers to the questionnaire, as well as during the on-site visit, that a foreign bribery offence will almost certainly always be regarded as a serious arrestable offence. To date, however, no search warrant has been requested or obtained in rogatory letters concerning foreign bribery offences. Thus, questions remain regarding the possibility to obtain searches and seizures when requesting MLA in foreign bribery cases. The procedures in Scotland are similar, with the only significant difference that the concept of “serious arrestable offence” does not apply in Scotland. The criterion for the use of search and seizure powers is that the offence being investigated is “punishable by imprisonment”. This would apply to all offences of bribery and corruption.

143. Sections 13 to 15 of the Crime (International Co-operation) Act 2003 provide for the execution of overseas requests for assistance in obtaining evidence and replace section 4 of the 1990 Act. Under section 14, for requests to be satisfied before a court may be nominated to receive evidence, they must be made in connection with criminal investigations or proceedings, administrative investigations or proceedings, clemency proceedings or an appeal before the court against a decision made in administrative proceedings. Where the request relates to criminal or administrative investigations or proceedings, assistance may be provided if the UK territorial authority is satisfied that an offence has been committed or that there are reasonable grounds for suspecting this, and that proceedings have been instituted or an investigation is being carried out. The Act does not specify grounds for refusal nor does it indicate specific criteria for evaluating whether the offence has or is suspected of having been committed; thus, the UK judicial authorities will need to evaluate these MLA cases as if they were domestic cases tried before a UK court. This appreciation by the UK territorial authority as to whether an offence has been committed could provide an explanation regarding the perception by certain foreign prosecuting authorities that they are in fact required to prove a prima facie case (a higher threshold than the mere provision of sufficient evidence) before any assistance is provided.

144. An important modification brought about by the Crime (International Co-operation) Act 2003 is the possibility for certain agencies, such as the Customs and Excise, to receive requests pertaining to their activity. In addition, there is now a separate Central Authority for Scotland and Northern Ireland. Prior to 26 April 2004, all requests had to be streamlined through the United Kingdom Central Authority (UKCA), based in the Home Office, who would decide on the authority to be appointed for execution of the request. Given that the UKCA currently has a staff of 17 persons dealing with approximately 5 000 MLA (two thirds of which are incoming) requests, the processing of incoming MLA requests by other authorities would appear a welcome initiative and could contribute to a more efficient treatment of MLA requests. However, to date, only 5 persons are responsible for dealing with the handling of MLA requests in the Serious Fraud Office. Thus, concerns remain concerning the adequacy of resources available in the United Kingdom for providing prompt and effective legal assistance in proceedings concerning foreign bribery offences. The UK authorities indicated that the SFO constantly reviews the level of resources, and is considering the possibility of increasing human resources for dealing with MLA requests.

145. Current UKCA databases do not compile statistics on the number of MLA requests incoming and outgoing, on the number of requests granted or rejected, on the nature of offences concerned, or on the length of time required to respond to rogatory letters. Although in an EU Council report of March 2001 on MLA in the United Kingdom, the UK authorities had indicated that a full statistical package would be shortly available, representatives of UKCA stated that no further progress had been made in this respect. Following the on-site visit, the UK authorities indicated that the UKCA is

currently making arrangements for an upgrade to their database, which they hope will be in place at the earliest possible.

(ii) *Extradition*

146. To summarise the situation with regard to extradition, prior to 2004, the United Kingdom could provide extradition pursuant to the Extradition Act 1989. The 1989 Act has been replaced with the Extradition Act 2003, which entered into force on 1 January 2004. The Extradition Act 2003 has introduced new rules which limit the number of possible challenges to the extradition process and require that they all be examined together. The Act also imposes strict time limits on the courts at first instance commencing the hearing where the decision for issuing a decision on the request is taken, and on the appellate courts for commencing the hearing on appeal.

147. In addition to streamlining the extradition procedures, the Act has given effect to the United Kingdom's obligation to implement the EU Framework Decision on the European Arrest Warrant into UK domestic law. Thus, distinction is now made between requests for extradition by category 1 territories (countries operating the European Arrest Warrant, as well as those specifically designated by the Home Secretary) and category 2 territories (other countries). Part 1 of the Extradition Act 2003 deals with extradition requests emanating from category 1 territories. For these requests, the traditional requirement of dual criminality is deemed to be met for a number of offences (32) listed in an annex to the EU Framework Decision and carrying a minimum penalty of 3 years imprisonment. For offences carrying a maximum penalty of 1 to less than 3 years imprisonment, extradition is still possible, but only if the offence also constitutes an offence under UK law (requirement of dual criminality). For category 2 territories (dealt with under Part 2 of the Extradition Act 2003), there will always be a requirement for dual criminality.

148. Important differences between category 1 and category 2 territories lie in the authority in charge of authorising the extradition, and on the information required to allow the extradition. For category 1 territories, extradition is granted by a court where the person is accused of an offence the warrant is issued with a view to the person's arrest and extradition for the purpose of being prosecuted or for the purpose of sentence where the person has been convicted; liability to extradition is determined by a court, with the decision on the actual extradition made by the Secretary of State.<sup>104</sup> In addition, the requirements on the requesting country are higher in the case of category 2 territories, which must provide prima facie "evidence" justifying the extradition,<sup>105</sup> whereas judicial authorities of category 1 territories (as well as certain other countries specifically designated for this purpose by the Secretary of State) will only need to provide "particulars of the circumstances".<sup>106</sup> The UK authorities have specified that the requirement of "evidence" for category 2 territories can be met by means of a "sworn hearsay statement" from one witness (for instance, an investigator) describing the prima facie evidence in the case, rather than by sworn statements from all the witnesses involved. The Extradition Act also allows the Secretary of State to waive the evidence requirement by designating countries concerned. As of February 2005, Australia, Canada, New Zealand and the United States, all of whom had to provide prima facie evidence under the previous scheme, have been so designated, along with certain territories with which extradition relations continue to be conducted under the European Convention on Extradition 1957. Nonetheless, as for MLA requests, there is concern that the burden of proof for the requesting judicial authorities will be very high for many requesting countries.

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<sup>104</sup> Section 70(4) *ibid.*

<sup>105</sup> Section 71(3) *ibid.*

<sup>106</sup> Section 2(4)(c) and (d) *ibid.*

**Commentary:**

***The lead examiners welcome the new legislation governing MLA and extradition passed by the United Kingdom. They urge the UK authorities to pay due attention to the resources available to promptly and effectively handle MLA requests concerning foreign bribery offences.***

***In addition, given the high threshold for requesting and obtaining MLA and extradition in the United Kingdom, the lead examiners recommend that the UK authorities take all appropriate measures to ensure that legal assistance is promptly and effectively provided for offences under the Convention, and that extradition provisions are efficiently applied, in line with Articles 9 and 10 of the Convention. The lead examiners recommend that the Working Group follow this up.***

***Furthermore, the lead examiners recommend that the United Kingdom put in place statistical tools to allow for the evaluation of the number and efficiency of treatment of MLA requests, and ensure that adequate resources are made available in this respect.***

**g) *Allegations of Foreign Bribery and Cases under Investigation***

149. The Chart of cases received by the examiners in May 2004 listed 18 allegations; during the July 2004 on-site visit, the examiners were informed that there were 23 allegations by that time.<sup>107</sup> However, in a number of cases involving serious allegations reported in detail in the press, the authorities had, at least until recently, not opened an investigation. In March 2004, the DTI indicated to Parliament that only two investigations had been commenced in foreign bribery cases. Cases have been principally failing at the outset rather than at the stage of evaluating a potential prosecution at the conclusion of an investigation. The examiners were encouraged to hear during the July 2004 on-site sessions that six cases were under investigation and that the SFO is taking a much greater role in investigations. For example, the SFO reported that it has recently opened a UK investigation after receiving an MLA request. At the same time, they were concerned about earlier press reports and documents relating to the failure to open investigations in specific cases. The UK has clarified since the on-site visit that there are currently two full investigations and eleven cases under review for possible investigation.

150. Of particular interest to the lead examiners was a case that had received a great deal of attention in the UK press. It involved allegations that a prominent UK defence contractor made substantial payments to numerous foreign public officials in connection with defence contracts in the Middle East to at least one of which the MOD was a party. According to contemporaneous SFO and MOD documents, the case was initially not taken beyond a discreet internal inquiry of the allegations' implications, despite the availability of substantial documentary evidence and witnesses who allegedly had first hand knowledge of suspicious transactions. According to SFO documents, the case was not initially investigated because of insufficient evidence but this conclusion was drawn quickly and apparently before the available evidence had been properly explored. This raised concern among the

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Parliamentary Written questions, House of Lords, 4 March 2004, Column WA120 (Lord Sainsbury of Turville (Parliamentary Undersecretary of State, DTI)). Similarly, a recent Corner House submission affirms that only 3 cases are being investigated. See Susan Hawley, The Corner House, "Enforcement of overseas corruption offences in the UK: towards a model for excellence", § 1.3 (internal footnotes omitted).



examining team regarding the level of evidence necessary to open investigations. The SFO and MDP indicated at the on-site visit that three years following the initial allegation, they commenced a joint investigation after receiving additional evidence.

151. The UK's handling of this case raises a number of serious concerns including the following: (1) the extremely high level of proof that appears to be required to open an investigation into suspicious transactions including into alleged transactions with substantial events occurring in the UK; (2) the consideration by the UK authorities of the impact of an investigation on the UK economy, contrary to article 5 of the Convention; and (3) the adequacy of checks and balances regarding decisions by investigatory agencies to not investigate serious allegations of foreign bribery.

152. In July 2004 a plea agreement between a Scotland-based subsidiary of ABB (known as ABB Vetco Gray (UK) Ltd) and US authorities was accepted by a US court. Under the plea agreement, which is publicly available, Vetco UK agreed to pay a fine of USD 5.25 million. The plea agreement contains a set of agreed facts and explicitly leaves open the possibility of charges against individuals, including employees of the Scottish company. The Scottish authorities have indicated that they were alerted to the US investigation by disclosures made to NCIS by a potential acquirer of an ABB subsidiary in Scotland who had learned of the US proceeding. The matter was referred to the Grampian police and thereafter to the Procurator Fiscal. At that time, it appeared to the Scottish authorities that all matters relating to the disclosures were being investigated by the US authorities although no contacts were made between law enforcement authorities in Scotland and the US. The Scottish authorities were unaware of the details of the plea agreement until it was raised by the examining team during the on-site visit. Since the on-site visit, the Scottish authorities have indicated that they have requested information about the case from the US authorities and that, when the information is received, the Scottish authorities will determine if there should be a full criminal investigation in Scotland.

## **2. Prosecution**

### ***a) Principles of prosecution***

#### ***(i) Prosecutorial authorities***

153. As described above, as of approximately April 2004 the SFO has informally been given an expanded role in prosecuting (as well as investigating) foreign bribery cases. Where the SFO declines to take on a case under its screening criteria as applied in light of this new expanded role, however, the case would be prosecuted, if at all, by other agencies.

154. The Crown Prosecution Service (“CPS”) is the main prosecutorial authority in England and Wales. The CPS is headed by the Director of Public Prosecutions who is appointed by the Attorney General. The latter is a member of the government appointed by the Prime Minister and is answerable to Parliament for the CPS, the conduct of which s/he “*superintends*”. The CPS Headquarters is home to the Casework and Policy Directorate where a specialized anti-corruption unit has operated since 1988. The unit has full-time prosecutors, chosen because of their past experience with serious and complex cases involving for example undercover operatives, informants and covert surveillance techniques. A foreign bribery case would be dealt with by the London, Birmingham or York office of the CPS.

155. In addition to the CPS and SFO, however, numerous government departments have retained prosecutorial and investigative powers in specific areas, and this apparently extends to bribery. In describing the government agencies that have competence over the fight against foreign bribery in the

UK, the Responses state that “Other authorities that could prosecute cases of corruption within England, Wales and Northern Ireland within their sphere of competence include H.M Customs and Excise, the Inland Revenue, the Department of Trade and Industry and the Police Complaints Authority (Independent Police Complaints Commission as from April 2004).” (Responses § 2.1.) The March and July 2004 MOUs, on the other hand, provides that all foreign bribery cases are to be prosecuted by the SFO or the CPS. [See MOU § 10 (“CPS will prosecute any case linked with England and Wales not falling within SFO’s remit.”).] Subsequent to the on-site visit, the UK authorities have pointed to the advantages of maintaining the flexibility to allow foreign bribery cases to be brought by a wide variety of agencies depending on the circumstances (such where the bribery is related to drug trafficking and the case has been developed with extensive input from the Customs service). The examiners consider, however, that the flexibility in the UK system has not demonstrated its effectiveness to date. Taking into account both the specificities of the UK system and the concerns expressed by representatives of law enforcement agencies, the examiners consider that a greater degree of centralised competence – and responsibility for results – would be highly beneficial. They consider that the recent measures to give the SFO a more central role in fight against foreign bribery in the UK constitute a positive step in this regard.

156. The SFO’s jurisdiction extends to Northern Ireland. The Department of the Director Public Prosecutions in NI is analogous to the CPS. A new public prosecution service is planned with full implementation by 2006. A fundamental element in the new Northern Ireland criminal justice system will be a single independent prosecution service responsible for undertaking all criminal prosecutions. It will be named the Public Prosecution Service for Northern Ireland and will be headed by the Director of Public Prosecutions.

157. In Scotland, there is a single centralised prosecutorial service. Unlike the CPS, the Scottish Crown Office and Procurator Fiscal Service, headed by the Lord Advocate, are responsible for the investigation of crime and the police are obliged both by statute and common law to conduct investigations subject to the direction of the relevant Procurator Fiscal.<sup>108</sup> The Responses indicate that the police may commence an investigation in a straightforward case without reference to the Procurator Fiscal, but are subject to his direction thereafter and the question of sufficiency of evidence is not a matter for the police. However, it is not clear under this test whether a foreign bribery case would be immediately reported to the Procurator Fiscal. The Responses state that all offences of bribery or corruption must be reported immediately by the Procurator Fiscal receiving the initial report to the International and Financial Crime Unit in the Crown Office, which then becomes responsible for supervision of the case.<sup>109</sup> This Unit has the same powers as the SFO in England, Wales and Northern Ireland. (The SFO’s jurisdiction does not extend to Scotland.)

***Commentary:***

***The lead examiners encourage the UK to further strengthen the centralisation of prosecutorial jurisdiction in order to achieve the necessary degree of specialised competence and commitment. In light of the apparent continuing uncertainty about jurisdiction of other agencies over certain prosecutions, the lead examiners recommend***

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<sup>108</sup> The Procurators Fiscal and Procurator Fiscal Deputies are the Lord Advocate’s local agents in each of 49 districts. The Lord Advocate is appointed by and a member of the Scottish Executive, and is answerable to the Scottish Parliament. His/her deputy is the Solicitor General, also appointed by the Scottish Executive.

<sup>109</sup> The Responses indicate that NCIS will refer any case with a Scottish element direct to Crown Office, or to the relevant Scottish Police force, who are obliged to report the case to the Procurator Fiscal.

***that the UK continue clarifying jurisdiction over foreign bribery cases through the MOU or other appropriate means.***

(ii) *Prosecutor decisions about the appropriateness of prosecution*

158. The Code for Crown Prosecutors, which is a public statement of the principles which guide decision making in every case, set forth a two part test for the evaluation of the appropriateness of prosecution.<sup>110</sup> The same tests appear to be applied by both the CPS and the SFO. The first part of the test examines if there is sufficient evidence to provide a realistic prospect of a conviction. If so, it is decided whether the prosecution is required in the public interest. Because no investigation of foreign bribery has yet proceeded near to the prosecution stage, the test has not been applied to a potential prosecution.

#### Evidentiary test

159. The general evidential test as set forth in the Code is a realistic prospect of conviction, i.e. that a jury or magistrate is more likely to convict than not. Prosecutors must consider whether the evidence can be used in court (i.e., whether it will be excluded because of the way it was gathered) and whether it is reliable (for example, the reliability of a witness, confession etc.).

160. A Legal Guidance manual on the CPS website contains a variety of legal principles on criminal offences. The section on bribery and corruption contains a short reference to the foreign bribery offence. With regard to bribery offences generally, the Legal Guidance manual sets forth a series of questions for purposes of evaluating the strength of the evidence: *“The following questions can be extremely pertinent in deciding whether the test of evidential sufficiency is met. Was the offer made in the presence of more than one person who can therefore corroborate? Was the offer serious and was it made on more than one occasion? Was the offer reported as soon as practicable? Did the defendant have the money readily available to pay the bribe? Did any money pass hands? Did the person making the offer receive encouragement to make it?”*

161. Traditionally, the CPS does not have the power to direct investigations or commence prosecutions. The police investigate an allegation, sometimes acting with advice from the CPS. Subsequent to the on-site visit, the UK authorities clarified that the police *“invariably”* act with CPS advice in cases of any seriousness or complexity. Until 2003, the police themselves decided whether to initiate proceedings by charging the suspect (or laying an information). The police commenced the prosecution and transmit it to the CPS in approximately 75% of cases. The 25 percent or so of prosecutions not commenced by the police are brought by a wide variety of prosecutors, including Inland Revenue (for tax offences), Customs and Excise (for VAT and other offences); this group also includes the SFO, which as noted above has both an investigative and prosecutorial function. In addition, a minority of cases are brought as private prosecutions.

162. Under the Criminal Justice Act 2003, prosecutors will assume responsibility from the police for determining appropriate charges to bring against alleged offenders.<sup>111</sup> It is not clear how this change will affect the relationship between the police and prosecutors. Commentators have noted the problem of the direction of the prosecution and the degree of interest in investigation and prosecution

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<sup>110</sup> The Code for Crown Prosecutors is available at <http://www.cps.gov.uk/publications/docs/codeeng.pdf>.

<sup>111</sup> The Attorney General recently announced a review of the Code for Crown Prosecutors to introduce this and other changes. See *New Law Journal* (26 March 2004).

of foreign bribery by the police<sup>112</sup>. During the on-site visit, prosecutors noted that the problem of coordination could be surmounted by “*robust early advice*” from prosecutors to the police, but that such advice was not always well received by the police.<sup>113</sup> As noted above, in contrast to the CPS, the SFO both prosecutes and directs the investigation; it also decides on the appropriate charges.

### The Public Interest Test

163. The public interest test must be considered in each case where there is enough evidence to provide a realistic prospect of conviction. The Code for Crown Prosecutors states that a prosecution will take place unless there are public interest factors tending against prosecution which clearly outweigh those tending in favour. As set forth in the Code, public interest factors that can affect the decision to prosecute usually depend on the seriousness of the offence and the circumstances of the suspect, but as discussed further below in connection with the issue of Law Officer’s consent, they also include such matters as the impact of the case on international relations, which raises concerns about compliance with Article 5 of the Convention.

164. The examiners consider that the Code should be amended to clarify that, consistent with Article 5, investigation and prosecution of foreign bribery cases shall not be influenced by considerations of national economic interest or the potential effect upon relations with another state. The UK authorities have indicated that the Code is not intended to be case specific and is a general statement of principles, and suggest that guidance be included in the CPS Manual of Legal Guidance. However, in light of the importance of Article 5 on the one hand, and of the Code in UK practice on the other hand, the examiners consider that, while retaining its general nature, the Code should reflect in some manner that Article 5 limits exist. The Manual and other relevant documents (including documents used by the SFO) should then address the applicable limitations in detail.

### Prosecutorial Discretion and Facilitation Payments

165. The foreign bribery offences in the UK do not include an express exemption for facilitation payments. However, it appears that through the exercise of prosecutorial discretion, prosecution of small facilitation payments to foreign officials will rarely if ever occur. The April 2004 document circulated by FCO to its staff quoted the following policy from the relevant prosecutorial agencies with regard to whether a prosecution is likely where it involves a facilitation payment: “*We do not think it is desirable for UK law to apply differently overseas from the way it applies in the UK. We do not tolerate 'facilitation payments' to UK officials. However, it is difficult to envisage circumstances in which the making of a small 'facilitation payment', extorted in countries where this is normal practice, would of itself give rise to a prosecution in the UK. The making of such payments may well, however, be illegal under the law of the country concerned.*”<sup>114</sup>

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<sup>112</sup> In the TI 2004 Global Corruption Report (at 129), Fritz Heimann notes that in Britain, “responsibility for conducting investigations is not at the national level and prosecutors cannot proceed until local investigators – over whom they have little control – complete their work.” See also A. Sanders, “Prosecutions Systems” in McConville, op cit. at 158 (“The CPS is in a structurally weak position to carry out its ostensible aims primarily because of police case construction. The CPS reviews the quality of police cases on the basis of evidence provided solely by the police.”)

<sup>113</sup> The CPS is a relatively recent creation from the mid 1980’s and took over traditional police functions relating to prosecutions. See A. Sanders, op cit. at 156-57.

<sup>114</sup> See FCO, “Bribery Overseas, Updated Guidance” (April 2004). This policy, which the FCO noted was slightly revised, followed an earlier editorial in the Financial Times and a letter in response from the Secretary of State for Foreign and Commonwealth Affairs, in which he affirmed that the government

166. Given that the notion of a facilitation payment is not defined in UK law, concerns exist about whether prosecutors will use a definition that is consistent with the narrow one in the Convention. The UK authorities consider that “[g]iven that the UK does not recognise facilitation payments as such and that a corrupt payment is a corrupt payment, it is self-evident that the exemption will be defined narrowly in accordance with the carefully chosen words of the exemption.” However, the examiners remain concerned because, for example, contrary to Commentary 9 of the Convention, the exemption does not limit facilitation payments to cases where the official is being paid to perform his/her functions such as issuing licences or permits.

### Scotland

167. The Procurator Fiscal applies a test to prosecutions similar to that applied by the CPS and SFO. She first considers whether there is sufficient admissible and reliable evidence to obtain a conviction. If the Procurator Fiscal is satisfied that there is sufficient evidence in a case, she will consider whether, and if so what, action is required in the public interest. If criminal proceedings are to be initiated, the Procurator Fiscal decides (subject to certain exceptions) in which court the case should be tried. The most serious cases are tried on indictment in the High Court. In respect of serious cases which will be tried on indictment in either the High Court or the Sheriff Court, the Procurator Fiscal or a member of her staff will interview the principal witnesses and will not rely on the statements provided by the reporting agency (this stage is known as ‘precognition’).

#### *Commentary:*

***The examiners note that the Code for Crown Prosecutors can be read to suggest consideration of public interest factors that are not permitted to be considered in foreign bribery cases under Article 5 of the Convention. The lead examiners urge the UK authorities to amend where appropriate the Code, the CPS Manual and other documents to clarify that the investigation and prosecution of bribery of foreign public officials shall not be influenced by considerations of national economic interest, the potential effect upon relations with another state or the identity of the natural or legal persons involved. Because no investigation of foreign bribery to date has proceeded to near the prosecution stage, the lead examiners also consider that the Working Group should follow up with regard to the application of the test for prosecution under the Code.***

#### *(iii) Consent of the Law Officers to prosecution of statutory bribery offences*

168. In England, Wales and Northern Ireland, a prosecution for a statutory bribery offence cannot be instituted without the consent of the Attorney General or Solicitor General, which is only given after consideration of the public interest in light of the factors set out in the Code for Crown Prosecutors.<sup>115</sup> The Phase 1bis report indicates that the Phase 2 report should examine whether the Law Officer’s consent requirement may be an obstacle to effective implementation of the Convention

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takes bribery seriously and clarified that, as in other cases, prosecutorial authorities will take account of the availability of evidence and the public interest in evaluating prosecutions of this type.

<sup>115</sup> As discussed further below, there is no consent requirement for prosecution under the common law offence. The Responses state that in Scotland, the prosecution of a case of foreign bribery is “not dependent on the consent of any person or body outwith the normal prosecutorial authorities”.<sup>1</sup> There are no private prosecutions in Scotland.

and whether the U.K. is in a position, within the exercise of prosecutorial discretion, to fully respect Article 5 of the Convention.<sup>116</sup>

169. Consent requirements are not extraordinary in the UK. They apply to approximately 500 offences, with the result that the Law Officers have to address a large number of requests for consent. The current trend, however, is to reduce the number of such consent requirements. The Attorney General and other panel participants pointed out the long tradition of independence of the Law Officers from partisan considerations in exercising his discretion to give or withhold consent, noting that governments have fallen where this principle has been breached. The examiners do not in any way question or express any opinion on the principle of the Attorney-General's non-partisan role in the UK.

170. However, the examiners note that the issue under Article 5 of the Convention is not partisan influence, but rather the exclusion of certain considerations that, under a reasonable reading of the Code, could ordinarily be included within the Law Officer's non-partisan evaluation of the public interest. [See Code of Crown Prosecutors (referring to consideration of impact of case on international relations as part of public interest test).] During the on-site visit, a representative of the Attorney-General's office indicated that he could not confirm that Law Officer consent would conform to Article 5 because the process is based on the public interest test in the Code for Public Prosecutions. The examiners are thus concerned that the consent process involves the possible consideration of UK interests that the Convention expressly prohibits in the context of decisions about foreign bribery cases.

171. Subsequent to the on-site visit, the Attorney-General indicated that he had not been consulted about the answer in the previous paragraph and he specifically confirmed that none of the considerations prohibited by Article 5 would be taken into account as public interest factors not to prosecute. Moreover, the Attorney General noted that public interest factors in favour of prosecution of foreign bribery would include its nature as a serious offence and as an offence involving a breach of the public trust. In addition, the UK authorities note that by acceding to the Convention, the UK has confirmed that the circumstances covered by the Convention are public interest factors in favour of a prosecution. The UK authorities also emphasised that the Code is a general document and does not mandate any particular decision. The lead examiners take note of the Attorney-General's clarification and the UK's commitment to comply fully with Article 5. However, because of the importance of this issue, they consider that awareness of that commitment should be improved in all relevant agencies, including throughout the offices of the Law Officers, and that appropriate statistics should be maintained with regard to denials of consent for relevant offences.

172. In addition, a representative of the Attorney General's office and others also recognized that neither statistics about, nor the tenor of, Law Officer decisions about consent are made public in any systematic way. Statistics were also unavailable until recently. A government reply to an October 2003 Parliamentary Question indicated that statistics about consent in corruption cases could not be provided except at disproportionate cost. Subsequently, the Solicitor General indicated in a June 2004 letter to an MP that this information has been maintained from the beginning of 2004 and has been reconstructed for 2002 and 2003.<sup>117</sup> However, there is no guarantee that Parliamentary interest in

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<sup>116</sup> Article 5 of the Convention states that investigation and prosecution "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".

<sup>117</sup> The Law Officers received 22 corruption applications in 2002. Three, which involved co-defendants, were subsequently withdrawn by the CPS. Consent was granted in 16 of the remaining 19 cases and consent was refused in each case based on the sufficiency of the evidence. In 2003, consent was

disclosure about consent decisions will continue and, in the absence of any systematic disclosure, the reasons for consent or lack of consent in particular cases may frequently not be disclosed.

173. The UK authorities disagree about the risk of a lack of Parliamentary interest in foreign bribery in the future, and note that the examiners have approved the high degree of Parliamentary interest in foreign bribery issues in the UK. They note that the Law Officers are accountable to Parliament for the prosecutorial decisions they make and can be called upon to justify their decisions. The examiners in no way wish to limit their positive appreciation of the importance of parliamentary oversight or the oversight role of the UK parliament as expressed elsewhere in this report, but they are aware of the enormous range of issues of public concern to an active Parliament and that the focus of Parliamentary interests typically changes over time. Neither prosecutors, victims nor competitors can effectively challenge the decision about consent in a public proceeding. The UK authorities note that victims or competitors could seek to focus parliamentary interest on the consent decision in a particular case or engage in other efforts to create publicity. However, the examiners consider that the ability to bring private prosecutions cannot adequately be replaced by complaints to a member of parliament.<sup>118</sup> In the absence of any systematic disclosure of consent decisions, the denial of consent -- and the case -- are not likely to come to the attention of the public.<sup>119</sup> The UK authorities disagree that denial of consent will frequently not become public. They consider that the mature nature of democracy in the UK, the right to freedom of expression under domestic law and the high degree of Parliamentary interest in the topic of foreign bribery will ensure publicity, particularly where prosecutors, victims or competitors feel aggrieved at the decision taken.

174. The examiners are also concerned that the imposition of an additional high-level consent requirement for bribery prosecutions may hinder prosecutions of such offences. The Law Commission's 1998 report on bribery specifically recommended that prosecution of bribery "*should not require the consent of either the Law officers or the Director of Public Prosecution*".<sup>120</sup> The Law Commission Report noted that consent provisions were included in the 1889 and 1906 Acts because of the risk that blackmailers would threaten private prosecutions. (LRC Report § 7.17.) It also found that no problems existed with malicious prosecutions under the long-standing common law bribery offence even though it has no consent requirement. (Id. § 7.24.) Similarly, panel participants during the on-site

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granted for all of the 32 requests received. From January to June 2004, one request was received and it was granted. Letter from Rt Hon Harriet Harman to Simon Thomas MP dated 15 June 2004.

<sup>118</sup> In addition, obtaining the involvement of parliament would publicise the case and undermine its confidentiality, thereby possibly compromising any future investigation.

<sup>119</sup> There appears to be some uncertainty about how the consent procedure operates in practice. The Responses indicate that both the prosecutor and the Law Officer apply both parts of the two-part test for prosecution in the Code in the same manner. During the on-site visit, however, two prosecutors indicated that their practice is not to evaluate the public interest factors in cases requiring consent, but rather to transmit an analysis of the public interest factors to the Law Officer's office, without any recommended decision. Moreover, even where consent is granted, the consent requirement could also potentially complicate and delay the preparation of foreign bribery cases for trial with a resulting risk of loss of evidence or of the accused leaving the UK. Defendants can seek judicial review of the Law Officers' decision about consent, thus creating a second parallel proceeding. For example, in one domestic bribery case, the trial date was vacated to allow a different court to consider an application for judicial review of the decision of the Attorney General to consent to prosecution. [See *R v. Attorney General, ex parte Rockall*, [1999] All ER 312 (Q.B. 1999).] Depending on the circumstances, the second judicial review proceeding concerning the consent could require a substantive hearing and possible further review before being finally decided, with resulting delay for the main trial and additional expense.

<sup>120</sup> The Report is available at <http://www.lawcom.gov.uk/files/lc248.pdf>.

visit did not identify any such problems in the period since the 1998 report. The UK authorities consider that there is no evidence that a high level consent requirement for bribery prosecutions may hinder prosecutions for such offences. The UK authorities recognise that no consent requirement applies to the common law offence. However, after the on-site visit, they noted that the law does not prevent a prosecutorial decision being taken by a Law Officer in such cases. They also affirmed that in practice prosecutors refer such cases to the Law Officers in order to maintain consistency of approach. However, private prosecutions under the common law do not need to be referred to the Law Officers.

175. The Law Commission also pointed to the fact that there are in any event numerous other tools available to stop malicious private prosecutions either at the outset or subsequently, including, *inter alia*, (1) refusal of a magistrate to issue a summons; (2) termination of proceedings by the Attorney-General entering a *nolle prosequi*; (3) application by the Attorney-General to the High Court for a criminal proceedings order against a vexatious litigant; and (4) termination of a prosecution by the Director of Public Prosecutions after taking it over. (Law Commission Report §§ 7.25-26.) Despite the opinion and recommendation of the Law Commission, the government has indicated that its current intention is to retain an additional high-level consent requirement in the draft corruption bill. In its December 2003 response to the Joint Committee on the draft Corruption Bill, the government indicated that it intended to follow up the recommendation of the Committee and include a provision in the Bill which requires the consent of the Director of Public Prosecutions and one nominated deputy in corruption cases. This would replace the current requirement of Attorney-General or Solicitor-General consent and would still impose a high level consent requirement in addition to the decision by the prosecutor on the case, contrary to the recommendation of the Law Commission in its report on bribery. Because the current draft bill would also eliminate the common law offence, adoption of a consent requirement could exacerbate the problem.

176. During the on-site visit and subsequently, government representatives defended the consent requirement by reference to a more general Law Commission report on consent requirements. This report suggested that consent requirements would be appropriate “*for offences which create a high risk that the right of private prosecution will be abused and the institution of proceedings will cause the defendant irreparable harm*” and for “*offences related to the international obligations of the State.*” The Law Commission, however, did not specifically address corruption in its general report on consent requirements, nor did it address in its 1998 recommendation that such a requirement be eliminated for bribery offences. The government takes the position that corruption is an offence in which there is a high risk of abuse of the right of private prosecution and irreparable harm is likely in event of the institution of such proceedings, and that a consent requirement is accordingly justified. However, the government has not identified any actual cases of such abusive proceedings in relation to bribery. Moreover, concerns about the need for a consent requirement are principally focused on the asserted need to protect MPs and other public figures from malicious prosecutions.<sup>121</sup>

177. During the discussion of the draft report and recommendations in the Working Group, some delegations indicated that they supported the idea of a high-level consent to prosecution in some form. The idea that a transfer of the responsibility for high level consent from the Law Officers to the Director of Public Prosecutions might lessen concerns about high-level consent in the UK was also mentioned during the discussion.

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<sup>121</sup> Subsequent to the on-site visit, the UK noted that the Joint Committee on Parliamentary Privilege recommended that the consent requirement apply to prosecution “*whether of a member or a non-member*”. However, the UK authorities have not clarified the scope of the committee’s interest in prosecution of non-members for bribery or the reasons for the recommended application of consent requirements to such prosecutions.



**Commentary:**

***In light of the longstanding absence of any consent requirement for the common law bribery offence, the lead examiners recommend that the UK consider the appropriateness of Law Officers' consent for cases of bribery of foreign public officials. They further invite the UK to gather relevant statistical information to allow for future evaluation by the Working Group.***

(iv) *The selection of charges and evidentiary issues*

178. A number of prosecutors indicated that what may appear to be foreign corruption could frequently be prosecuted as fraud or conspiracy to defraud because of (1) the breadth of those offences; (2) their well-established nature in the case law and resultant familiarity; and (3) the strong tendency to simplify cases and limit the number of charges in bringing cases. Conspiracy to defraud in particular is widely used and the resultant familiarity of the offence makes it a likely candidate. An SFO representative indicated that many foreign bribery cases could be prosecuted as fraud cases for these reasons. (As noted above in the section on Case attribution since April-July 2004, § 107, there is some uncertainty about the relationship between corruption and fraud in the UK.) It is unclear whether such fraud charges would be based on the harm caused to the foreign state. Any possible uncertainty about the relationship between fraud and corruption could further encourage the SFO or other prosecutors to frame corruption cases as fraud or conspiracy to defraud cases. The UK authorities note that the choice of charge will always be a matter for the prosecutor and that maintaining the flexibility to select the charge most likely to reflect the criminality is vital in the fight against crime.

179. Some statements by investigators and prosecutors during the on-site visit appeared to indicate that, in a foreign bribery case, prosecutors would be forced to choose between bringing pre- or post-2002 charges in a single case, but would not be able to bring both. This raised concerns for the examiners because many cases may involve acts both before and after 2002. The UK authorities subsequently clarified, however, that this was a misunderstanding and that both types of charges can be brought in the same case. The examiners encourage the UK authorities to join such charges together in all appropriate cases.

180. CJA 2003 will liberalise to some degree the technical restrictions that limit the use of out-of-court statements apparently including those obtained abroad. Among other things, the Act provides for the following: (1) a clear definition of hearsay, so that unintentional remarks are not excluded as hearsay evidence; (2) If the witness is unable to attend court for a good reason (for example through illness or death) or where records have been properly compiled by business, the evidence should go in automatically; (3) statements from frightened witnesses should be admissible, with leave of the court, provided the interests of justice do not dictate otherwise; and (4) judges will also have discretion to admit any other out of court statement where it would not be contrary to the interests of justice for it to be used.<sup>122</sup> Although much will depend on judicial interpretation and exercise of discretion, these measures offer the basis for more effective use of foreign evidence. These provisions on hearsay evidence are preliminarily expected to be implemented in April 2005. The Act also extends the ability of witnesses to give evidence from a distance using “live links”.

<sup>122</sup>

See [http://www.cjsonline.org/news/2003/november/Criminal\\_Justice\\_Act\\_Nov\\_2003\\_A-Z.html](http://www.cjsonline.org/news/2003/november/Criminal_Justice_Act_Nov_2003_A-Z.html).

***Commentary:***

***The lead examiners note that the UK government has recently liberalised certain evidentiary restrictions on the admissibility of evidence from other countries.***

***The lead examiners invite the UK to consider whether the tendency to simplify cases and to use alternative charges could affect the implementation of the Convention in the UK.***

***b) The Offence of Bribery of Foreign Public Officials***

***(i) The Elements of the Offence***

181. It is widely recognised that the current substantive law governing bribery in the UK is characterised by complexity and uncertainty.<sup>123</sup> Among the issues relating to the elements of the offence, identified during the Phase 1 and 1 bis Review, the Working Group recommended that the new anti-corruption statute cover the notions of offering, promising or giving, and include a definition of the nature of the benefit conferred that reflects “any undue pecuniary or other advantage”. The Working Group also suggested that the new statute made clear that the offence of foreign bribery may be committed for the benefit of a third party, as provided in Article 1(1) of the Convention.

The agent/principal relationship

182. The 1906 Act uses the concepts of principal and agent and conceives of corruption as the suborning of the agent to the detriment of the principal. Under general principles of the law of agent and principal, the informed consent of the principal to the agent’s actions is generally a defence to the liability of the agent. Article 1 of the Convention does not contemplate an exception to the offence of foreign bribery where the person bribed acts with the consent of his/her principal. The UK authorities have indicated that a defence based on the consent of the principal to the agent receiving the bribe “has no basis in current UK law” and would not apply in foreign bribery cases. However, in the absence of case law to support the UK government’s position, the lead examiners are concerned that the agency/principal basis of the foreign bribery offence could lead to interpretations of the offence that are not in compliance with the Convention. Agents of foreign governments may often accept bribes with the knowledge or acquiescence of their supervisors or managers; the courts could possibly consider such individuals to be “principals” in some cases. While the lead examiners do not reject the UK authorities’ position, they believe that this issue should be followed up by the Working Group.

Foreign Public Official

183. The examining team notes that Section 108 of the 2001 Act does not provide an autonomous definition of a “foreign public official”. The Act simply added a “foreign” element to the existing definitions of “agent”, “principal”, “public office”, “public body” and “public authorities”. However, it should be noted that when the draft of Section 108 of the 2001 Act was debated in the House of Lords on 4 December 2001, the Attorney General gave assurance that the new statutory legislation, taken together with the common law would “cover all the categories of public officials that the OECD

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<sup>123</sup> See, e.g., Law Commission Report No. 248, *Legislating the Criminal Code: Corruption* (1998) § 2.1 (characterising current law as “uncertain and inconsistent”); *Raising Standards and Upholding Integrity: The Prevention of Corruption* (June 2000) § 2.1 (“Bribery White Paper”) (“the Government accepts that there are difficulties of interpreting the language and concepts used in the statutes and largely accepts the recommendations made by the Law Commission”).

Convention require to be covered”,<sup>124</sup>. At the on-site visit the lead examiners focused on the definition of foreign legislature and parliamentary privilege.

### Members of Parliament

184. The exclusion of MPs from the statutory offences of corruption rests on the legal argument that the Houses of Parliament are not public bodies under the Public Bodies Corrupt Practices Act 1889 and an MP is not an agent under the Prevention of Corruption Act 1906. On the other hand, the assumption by the UK authorities that the common law offence of corruption covers MPs is supported by case-law.<sup>125</sup>

### Parliamentary Privilege.

185. The House of Commons has the power to punish bribery of a Member of Parliament, or the acceptance of a bribe by a Member, as a contempt of Parliament. However, the relationship between the jurisdiction of the House in such matters, and the courts in relation to the common law offences of bribery, is not clear and, in 1995, the Committee on Standards in Public Life recommended clarification of this issue.<sup>126</sup>

186. Members of Parliament enjoy no general immunity from the law by virtue of their office. However, by virtue of Article 9 of the Bill of Rights, proceedings in Parliament may not be impeached or questioned in any court or place outside Parliament. One practical effect of this is that what is said or done in parliamentary proceedings may not be made the subject of criminal or civil proceedings. The Joint Committee on Parliamentary Privilege (in its report of 30 March 1999) and the British Government’s proposals for the reform of the criminal law of corruption in England and Wales (June 2000) recommended that the Draft Corruption Bill should regulate the matter and refer specifically to “Members of both Houses”.<sup>127</sup>

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<sup>124</sup> See Hansard, 4 December 2001, col. 818-819.

<sup>125</sup> The only recent domestic case concerning an MP was that of *Greenway and others* (Central Criminal Court June 1992). At trial the defence argued that although bribery was an offence recognised by common law, an MP did not hold a public office and was therefore not covered by the offence. The trial judge, Mr. Justice Buckley, reviewed a number of cases, many dating back to the 18<sup>th</sup> century. In particular, the trial judge referred to Pitt and Mead (1767), which concerned the bribery of a voter at a Parliamentary election; the Canadian case of Bunting (1885), which dealt with similar issues; and the Australian appeal case of Boston (1923), which concerned the attempted bribery of an MP in New South Wales. In the view of the trial judge, all of these cases showed that a wide meaning should be given to the concept of “office” for the purpose of the bribery offence. In this context, the judge concluded “I am satisfied that undoubted common law offence of bribery is not artificially limited by reference to any particular shade of meaning of the word ‘office’. It should be noted that the case *Greenway and others* did not progress to a full trial and was never considered by the Court of Appeal. According to the British authorities, however, the fact that the decision comes from a High Court judge gives it a great weight.

<sup>126</sup> First report of the Committee of Standards in Public Life, Cm 2850-1 (1995) p. 43.

<sup>127</sup> Clause 12 of the Draft Corruption Bill makes evidence admissible in proceedings for a corruption offence notwithstanding Article 9 of the Bill of Rights 1689, which prevents proceedings in Parliament from being impeached or questioned in a court. However, both the Joint Committee on the Draft Corruption Bill and the UK Government recommended that Clause 12 be narrowed to apply only to “the words or actions of an MP or peer in the case he is a defendant [...]”.

### Intermediary and Third Party Beneficiaries

187. Neither the offence in the 1906 Act nor the common law offence expressly applies where an offer, etc. is made through an intermediary. The UK authorities clarified 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...”. They also indicate that for active bribery there is no need to expressly state that a bribe passing through an intermediary is caught by the criminal law, since it is understood that the use of an agent (innocent or otherwise) by an offender will not allow the offender to escape criminal liability<sup>128</sup>. According to the UK authorities, the wide ambit of section 1 of the 1906 Act is demonstrated by the passive provisions which explicitly state “for himself or for any other person”. However, cases demonstrating that the relevant offences cover bribes that directly benefit third parties have not been submitted.

188. As for third parties beneficiaries, the common law offence does not expressly apply where a third party receives the benefit. However, the UK authorities clarify 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 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<sup>129</sup>. Similarly, according to the UK authorities, the 1906 Act, when read in accordance with general principles, criminalises a payment directly to a third party.

#### (ii) *The Draft Corruption Bill*

189. The Phase 2 review conducted by the lead examiners did not include the same level of scrutiny of the Draft Corruption Bill given to the current foreign bribery legislation<sup>130</sup>. However, certain characteristics of the draft legislation were discussed with a number of panellists during the on-site visit.

190. The Draft Corruption Bill retains the agent/principal concept despite the recommendation of the Joint Committee to abandon it.<sup>131</sup> The Joint Committee states that discarding the agent/principal concept would extend the offence to bribes that are sanctioned by the agent’s principal, and that it would make the definition of corruption less complex. However, the Government rejects the proposal of the Joint Commission for the following three main reasons: 1. It is the opinion of the Government that corruption constitutes subversion of loyalty to a principal, 2. There is no evidence that cases that would not be caught by the agent/principal relationship, which are morally reprehensible, would not be covered by other offences, and 3. By going beyond the agent/principal construct, the offence would cover a variety of innocent situations. The UK Government also contends that: 1. the Commentaries to the OECD Convention “specifically allow” parties to cover foreign bribery offences by the agent/principal concept. In this regard, however, the UK points to the passage in the Commentary

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<sup>128</sup> See Archbold (2004 ed.) section 18, and Archbold para 21-43 (by analogy, cases re: innocent agents under the Theft Act 1968).

<sup>129</sup> See Archbold (2004 ed.), at 31-129.

<sup>130</sup> In 2002 the UK authorities offered to present to the Working Group a Draft Corruption Bill once it was published. The Working Group, however, declined the offer.

<sup>131</sup> See paragraphs 12-15 of *The Government Reply to the Report from the Joint Committee on the Draft Corruption Bill (presented to Parliament by the Secretary of State for the Home Department by Command of Her Majesty, December 2003)*

which states that “a statute prohibiting the bribery of agents generally which does not specifically address bribery of a foreign public official, and a statute specifically limited to this case, could both comply with this Article”. This text does not specifically address the agent/principal concept. 2. The vast majority of those who responded to the Law Commission's consultations in 1997 and the Government's consultations in 2000 supported the proposal that the new law should be based on the agent/principal construct<sup>132</sup> and 3. The same public/private 'agent' concept applies in other common law countries (i.e. Ireland). It should be noted that while it retains the agent/principal construct, the Draft Corruption Bill expressly excludes the defence of “principal's consent” in case of bribery of public officials and limits it to private sector corruption cases. The lead examiners express no opinion about the merits of the Government's arguments with regard to domestic bribery, including bribery in the private sector.

191. In addition, the bill would require that the active briber must "believe that if [the foreign public official] did the act or made the omission it would be primarily in return for the conferring of the advantage ..." [See Draft Corruption Bill § 5(1)(b).] The requirement that the briber must believe that the public official would act "primarily" because of the bribe raises difficulties. It requires the prosecution to prove the briber's belief about the official's state of mind, a highly artificial exercise. In addition, many businesspeople might be able to convince the court – or at least raise a reasonable doubt – that they believe that their own product or service is superior on the merits and that, in a context where they perceived bribery to be widespread, they did not think that their own bribe was the primary determinant of the official's action. They may contend that they believed that the bribe was necessary merely to re-establish a level-playing field and allow competition on the merits<sup>133</sup>..

192. The Draft Corruption Bill does not expressly mention any of the categories of foreign public officials listed in the OECD Convention<sup>134</sup>. It seems, however, that the Bill's intention and effect are to include them within the new corruption offences.<sup>135</sup> Although the stated intent of the UK government is to provide a broad coverage of public officials, the lead examiners are of the opinion that an approach consistent with Article 1 of the Convention (*i.e.* specifying the categories of officials

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<sup>132</sup> Paragraph 13 of the Government Reply to the Report from the Joint Committee on the Draft Corruption Bill states that: “*Attractive though the simplicity of their proposal might be, we do not think that it would be wise to abandon the agent/principal construct and the basic premise that corruption is subversion of loyalty to a principal. The vast majority of those who submitted evidence to the Committee, to the Home Office in response to the White Paper or to the Law Commission in response to its consultation document did not propose such a radical rethink. As Lord Falconer put it (Q460) “it is difficult to think of occasions when the essence of corruption is not cheating on the person who you should be looking after”.*”

<sup>133</sup> The UK authorities note that the OECD Convention itself does not define ‘undue’, and are of opinion that the term “undue” can mean, amongst other things, ‘excessive’. They also point out that the Draft Corruption Bill attempts to flesh out what it is about payments that means they are ‘corruptly’ made and in the absence of any meaning given by the Convention of the term ‘undue’ it cannot be said that its attempt would not be compliant.

<sup>134</sup> Under the Convention, a “foreign public official” is defined as follows:  
...any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organisation.

<sup>135</sup> See The Draft Corruption Bill, March 2003, CM 5777, Explanatory Notes p. 17; with reference to the coverage of MPs, see also The Joint Committee on the Draft Corruption Bill, Report and Evidence, Session 2002-03, p. 38.

covered) would be more appropriate<sup>136</sup>. In addition, the bill does not expressly mention whether an offence is committed regardless if the offering, etc. is done through an intermediary and regardless if the advantage is for a third party. The UK authorities indicated that 1. the bribery of a foreign official is “within the scope of the Bill” and that it is not necessary to specify the types of official covered; 2. the Draft Corruption Bill does not mention third parties specifically but Clauses 5 (1) (b) and (2) (b) state that, if the intention of the advantage is to influence an agent, it does not matter “whoever obtains it”,<sup>137</sup>.

193. During the on-site visit, NGOs, company representatives, business organisations and lawyers expressed serious concerns about the lack of clarity of the Bill. A number suggested that a new Draft Bill should address some of the concerns of the JPC in this regard.<sup>138</sup> It was also suggested that the new Bill should make UK companies liable for the actions of foreign subsidiaries under their control<sup>139</sup>.

194. During the discussions, the UK authorities did not indicate when sufficient space in the legislative timetable would be found for the enactment of the Draft Corruption Bill.

***Commentary:***

***The lead examiners share the widely-held view that the current substantive law on foreign bribery in the UK is characterised by complexity and uncertainty. In order to ensure the effectiveness of the offence of bribery of a foreign public official, the lead examiners recommend that the UK enacts at the earliest possible date comprehensive legislation whose scope clearly includes the bribery of a foreign public official.***

***The lead examiners also recommend that the Working Group follow up on these issues.***

***c) Liability of legal persons***

195. None of the bribery offences in the UK expressly mention liability for legal persons. However, general provision for the liability of legal persons is made by the Interpretation Act 1978.

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<sup>136</sup> Clause 19 of the Draft Corruption Bill also contains repeals of the common law of bribery and the relevant provisions in the Prevention of the Corruptions Acts 1889 to 1916, which will be superseded by the offences in the Bill.

<sup>137</sup> In addition, para 17 of the explanatory notes of the DCB states as follows: “[...] it results from subsections (1)(b) and (2)(b) [of clause 5] that the person obtaining the advantage need not necessarily be the agent whose conduct it is sought to influence or reward. This approach ensures that behaviour where an agent has an interest in a third party (such as the agent’s spouse) receiving a benefit will be covered. It is not necessary for the advantage to be of direct benefit to the person upon whom it is conferred”.

<sup>138</sup> Some NGOs supported the JPC’s recommendation of a new definition of corruption which would replace the words “confer, offer or agree to confer” an advantage “corruptly” with the notion of “improper advantage”. However, they noted that in order to comply with international obligations, it would be simpler to preserve the current distinction between public and private sector bribery.

<sup>139</sup> At the on-site visit one NGO proposed that The Draft Corruption Bill should extend to include subsidiary companies of those incorporated in the UK if under actual control; in the case of other subsidiaries, associated companies and joint ventures, there should be an offence by the UK incorporated company if it fails to take adequate measures to satisfy itself that the foreign registered company or joint venture is implementing suitable anti-corruption policies in the conduct of its business.

Subject to the appearance of a contrary intention, the word “*person*” in a statute or subordinate legislation is construed as including “*a body of persons corporate or unincorporate*”. Unincorporated bodies such as trusts can thus commit offences in the UK although it is difficult to prosecute them: the absence of a theory of attribution means that the prosecutor must prove the individual guilt of each of the persons involved in the unincorporated enterprise. (See Responses § 5.1 & Supp. Responses § 4.). The UK authorities have not supplied examples or statistics with regard to prosecutions or convictions of unincorporated bodies generally or trusts in particular. Similarly, partnerships can theoretically commit offences in the UK but the prosecution faces the same hurdle of proving the individual guilt of every partner.<sup>140</sup>

196. Section 109 of the 2001 Act, which establishes nationality jurisdiction over the foreign bribery offence, does not apply to unincorporated bodies. Accordingly, the offence only applies to such bodies where there are sufficient territorial contacts with the UK.

(i) *Attribution of acts of bribery to the legal person.*

197. The bribery offences require a finding of intention or *mens rea* in order to obtain a conviction.<sup>141</sup> Where an offence involves *mens rea*, 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. Two related theories appear to apply to the establishment of the liability of legal persons in cases of *mens rea* offences, both of which apply very narrowly: the longstanding identification theory and the newer test set forth in the Privy Council case of *Meridian Global Funds Management Asia Ltd. v. Securities Commission*, [1995] 2 AC 500.<sup>142</sup> The identification theory considers that certain corporate organs or officers are the embodiment of the company when acting in its business interests. Their acts and states of mind are deemed to be those of the company and they can thus be deemed to be the “*directing mind*” of the company. The CPS manual for prosecutors indicates that the leading case of *Tesco Supermarkets Ltd v Natrass* [1972] AC 153 restricts such corporate liability to the acts of “*The Board of Directors, the Managing Director and perhaps other superior officers of a company who carry out functions of management and speak and act as the company.*” The manual further notes that “*In seeking to identify the ‘directing mind’ of a company, you will need to consider the constitution of the company concerned (with the aid of memorandum/articles of association/actions of directors or the company in general meeting) and consider any reference in statutes to offences committed by officers of a company.*”<sup>143</sup>

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<sup>140</sup> According to the UK authorities criminal liability generally does not apply to unincorporated bodies in Scotland unless a statute specifies such liability so the result is the same for partnerships: only the individual partners are liable. (See Responses § 5.1.) During the on-site visit, a Scottish prosecutor confirmed that the law is similar in Scotland to the rest of the UK.

<sup>141</sup> For the statutory offences, establishing *mens rea* requires a finding that the accused acted “*corruptly*”.

<sup>142</sup> A third theory, based on vicarious liability, is not applicable in bribery cases. For a thorough review of the law applicable to the criminal liability of corporations in England and Wales, see C. Wells, *Corporations and Criminal Responsibility* (2d ed. 2001).

<sup>143</sup> A second exception referred to in the CPS manual notes that the Board of Directors may delegate some of their responsibilities of management, giving to the delegate full discretion to act independently of any further instruction from them. The identification principle applies to the delegate acting within the scope of the delegation, see (*Esseden Engineering Company v Maile* [1982] RTR 260).

198. A second related theory for attributing acts to legal persons in cases involving *mens rea* is set out in *Meridian*.<sup>144</sup> *Meridian* held that the test for attribution should depend on the purpose of the provisions creating the relevant offence rather than on a “*metaphysic[al]*” search for a directing mind. [See *Meridian* (“*the rule of attribution is a matter of interpretation or construction of the relevant substantive rule*”).] It also suggested that a somewhat broader test than the *Tesco* test could be appropriate. However, *Meridian* involved a statutory regulatory offence relating to securities law disclosure, not a conventional crime.<sup>145</sup> The CPS manual indicates that the *Meridian* principle is limited to “*exceptional*” cases, but does not provide authority or argument for this limitation.

199. A significant problem with the application of the *Meridian* test to bribery offences is the difficulty of identifying the purpose of the offence. The Responses refer to *Meridian*, but do not identify the purpose of the various bribery offences or how the purpose would allow identification of the relevant group of individuals in a legal person. To the contrary, in answering a question about the purpose of the 1906 Act, the Responses indicate that “*the original reasoning for the passing of [the 1906 Act] is of little consequence to modern prosecuting authorities and prosecutors are not deemed to be bound by the policy considerations that were prevalent at the time of the passing of the Act.*” Supp. Responses § 3. It appears to be unclear what the purpose of the bribery offences is in this regard, where it can be found by prosecutors, courts and others, and how it would apply to define the class of individuals whose *mens rea* would be attributed to the company. A prosecutor with extensive knowledge of corruption issues indicated that *Meridian* could be applied by “*looking evidentially at the practical day-to-day exercise of authority over the problem*” at issue. However, he believed that “*it would be dangerous for prosecutors to rely on Meridian for saying that the difficulties we have always had with corporate liability are overcome. [The situation] needs legislative change to get corporate liability of any real size or complexity.*”

(ii) *Rejection of aggregated intent.*

200. Another important problem is that UK law does not permit the creation of a corporate *mens rea* by aggregating the states of mind of different people in the company. [See C. Wells, *supra* at 109 (“*It does seem clear, however, that the aggregation argument is unlikely to take root in the common law and that statutory intervention would be necessary for it to become a part of the English law of corporate liability.*”).] The criminal responsibility of a legal person thus depends on proving a culpable act and intent by a single representative of the company (although an actual conviction of the individual is not required). (See *Crown v P & O European Ferries Ltd [1990] 93 Cr App R.*) One commentator has noted that “*Meridian did not resolve the problem of the lack of an aggregation doctrine: one individual has to be the company for the relevant purpose since two or more individuals cannot jointly constitute it.*”<sup>146</sup> The necessity of identifying a single individual with the appropriate *mens rea* does not address modern complex decision-making structures in large corporations where it is often difficult to identify one individual decision-maker within a management chain.

(iii) *Lack of prosecutions and convictions of legal persons for domestic or foreign bribery.*

201. Despite the longstanding existence of bribery offences in the UK, neither the traditional identification theory nor the *Meridian* test has given rise to any known convictions of legal persons for

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<sup>144</sup> Privy Council cases do not bind the UK courts although they are highly persuasive authority.

<sup>145</sup> Cf. M. Jefferson, “Corporate Criminal Liability in the 1990’s”, *Journal of Criminal Law* 64(106) (Feb. 2000) (“*it remains to be seen whether Meridian, which concerned a statutory regulatory offence, can be applied to a common law conventional crime such as manslaughter*”).

<sup>146</sup> See M. Jefferson, *supra*.



domestic or foreign bribery under the common law, the 1889 Act or the 1906 Act. There is also scant evidence of any prosecution of legal persons. No cases were referred to prior to or during the on-site visit. After the on-site visit, the UK authorities identified one case involving an unsuccessful prosecution of a company for domestic bribery. [See *R. v. Andrews-Weatherfoil Ltd.*, [1972] 1 WLR 118, 1 All ER 65 (C.A.) (overturning conviction of company for bribery because judge wrongly instructed jury on the applicable legal test).] Convictions or prosecutions of corporations for analogous offences also appear to very rare or non-existent, and none have been cited; during the on-site visit, prosecutors were unable to point to any convictions in any area “*close to bribery*”. While the identification theory could conceivably apply to small companies where top management are the actors, it appears unlikely ever to apply to a large company with decentralised operations, or operations away from the corporate head office.<sup>147</sup> As noted, there was very limited confidence that *Meridian* would be of much help in this regard.<sup>148</sup>

202. During the on-site visit, prosecutors indicated that prosecutions against companies are rarely undertaken even in cases presenting very strong facts that would apparently meet the very stringent UK tests for attribution. A CPS prosecutor indicated that even if a director is directly involved, it can be difficult to prove that he was not on a frolic and was acting on behalf of the company. He referred to a domestic corruption case involving acts by a managing director in which prosecutors decided to forego prosecution of the company because of the perceived necessity of proving that the other members of the board were also aware of those actions.<sup>149</sup> Similarly, the SFO representative indicated that it is not common for companies to be prosecuted (other than under specific statutory regimes such as applies to cartels); finding the necessary evidence to prosecute a company was unlikely.

(iv) *Foreign subsidiaries.*

203. If the offender is a wholly-owned foreign subsidiary of a UK company, the UK parent company would not generally be liable. In order to prosecute the parent company, it would be necessary to show direction or authorisation by a directing mind. The “*directing mind*” requirement would raise the same practically insurmountable evidentiary hurdles discussed above. There could be a prosecution against the responsible individuals if they are UK nationals.

(v) *Independent and complementary administrative and civil sanctions for legal persons.*

204. The Convention contemplates the possible imposition of both independent and complementary administrative and civil sanctions for legal persons. (See Convention arts. 3(2), 3(4); Commentary § 24.) Current UK law does not impose any such complementary sanctions on legal persons.

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<sup>147</sup> See A. Hainsworth, *The Case for Establishing Independent Schemes of Corporate and Individual Fault in the Criminal Law*, J. Crim. L. 65(420) (October 2001) (“*In the case of more diffuse business and corporate structures, where the directing mind and will of the company are not involved in decisions taken at ‘ground level’ within the company, a requirement of mens rea within an offence can leave it with very little bite.*”); CPS Manual, *Offences Committed by Companies* (“*The smaller the corporation, the more likely it will be that guilty knowledge can be attributed to the controlling officer and therefore to the company itself.*”)

<sup>148</sup> See also C. Wells, *supra*, at 103-105.

<sup>149</sup> The prosecutor may have been referring to *R. v. Attorney General, ex parte Rockall*, [1999] 4 All ER 213 (Q.B. Div. 1999), in which the accused was the managing director of a group of companies. The case concerned alleged corrupt payments made by him and others to two UK civil servants. There is no indication that any proceedings were brought against any of the relevant companies.

(vi) *Current bribery law reform proposals and legal persons.*

205. The draft foreign bribery legislation does not contain any specific provisions on corporate liability or sanctions. Like current law, it would simply apply to a “*person*” committing the offence. Moreover, it would continue to require a finding that a person acted “*corruptly*” thereby arguably imposing a stringent *mens rea* requirement that could attract the narrowest form of the identification theory in cases involving legal persons.<sup>150</sup>

(vii) *New proposed company law legislation.*

206. DTI representatives indicated that a “*major slot*” of parliamentary time is likely to be reserved for a wide-ranging reform of company law in the UK and that substantial preparatory work is underway in this area. But they recognized that there had been no suggestion so far that the issue of corporate liability for bribery offences should be addressed in this work and that there are no current plans to do so. Nonetheless, DTI representatives, prosecutors and others felt that a more general reform of the rules of attribution for purposes of criminal liability of companies would be more workable than a *Meridian*-inspired case-by-case approach.

***Commentary:***

***With regard to the regime of criminal liability applicable to legal persons and Article 2 of the Convention, the lead examiners consider that the UK should broaden the level of persons engaging the criminal liability of legal persons for foreign bribery offences. In addition, the examiners recommend that the UK consider adopting a regime of additional administrative or civil sanctions for legal persons that engage in foreign bribery.***

***The UK should also consider other ways to comply with the Article 3 requirement of effective, proportionate and dissuasive sanctions on legal persons for bribery of foreign public officials. As one part of this approach, the examiners note the potential role of the new civil forfeiture action under POCA and invite the UK authorities to explore actively how that new action could be effectively in cases of bribery of foreign public officials.***

***d) Jurisdiction***

(i) *Territorial jurisdiction*

207. As indicated in the Phase 1, UK law establishes jurisdiction over any part of an offence taking place within the territory of the United Kingdom. Prosecuting authorities confirmed that there is no requirement for a substantial part of the offence to have taken place in the United Kingdom to establish jurisdiction, and instances where the benefits of the bribe payment returned to the United Kingdom, or where a telephone conversation relative to the offence took place within the territory would be covered by anti-bribery legislation. In support of this, the UK authorities indicated that, in

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The lengthy Law Commission reports on reform of the bribery offences give scant if any attention to the issue of corporate liability for bribery. (One Law Commission report (n. 237) on the issue of “corporate killing” examined the concept of “management failure” as a potential basis for corporate liability, but in a context unrelated to bribery.) Similarly, the issue of liability for legal persons has apparently received little attention in the voluminous materials generated in connection with the analysis and public consultations with regard to the draft corruption legislation. See, e.g., Corruption - Draft Legislation (Cm5777) (Home Office March 2003); Joint Committee Report on the Draft Corruption Bill (HL Paper 157; HC705) (2003).

the Van der Horst case, which was discussed during the Phase 1bis, a conviction had been handed down for corrupt activity mainly carried out overseas.

(ii) *Nationality jurisdiction*

208. As noted in the Phase 1bis examination by the Working Group, section 109 of the Anti-terrorism, Crime and Security Act 2001 introduced broader extra-territorial jurisdiction over the foreign bribery offence than existed under the previous statute and common law. Under these new provisions, corruption offences committed by UK nationals and by bodies incorporated under the law of the United Kingdom may be covered, even if no part of the offence took place in the United Kingdom. Certain judges interviewed during the on-site visit did not, however, appear to be aware that the 2001 Act entitled UK authorities to proceed against UK nationals in cases of foreign bribery on the basis of nationality jurisdiction.

209. The Memorandum of Understanding on implementing Part 12 of the Anti-terrorism, Crime and Security Act 2001, which has been agreed between all agencies concerned with implementing these provisions, specifies that it may not be appropriate in all cases to rely on this nationality jurisdiction principle, and that the decision regarding the most suitable jurisdiction to pursue each case could take into account factors such as “*where the main evidence and witnesses are likely to be located*”. In their answers to the questionnaire, the UK authorities also indicated that difficulties in securing MLA, the will of the other jurisdiction to initiate proceedings, the part played by the UK national, and the respective chances of the matter resulting in a conviction were also factors that could, inter alia, be taken into account when deciding to exercise jurisdiction on the basis of section 109. Thus, it would appear that the Memorandum allows for a great deal of discretion in deciding whether to initiate proceedings based on nationality jurisdiction.

210. While the definition of UK nationals (as defined under section 109(4)) includes British citizens and persons with British nationality, as well as citizens from the Crown Dependencies (CD) and Overseas Territories (OT), the Act only applies to legal persons incorporated under UK law, but not to bodies incorporated in the CDs or OTs, which are considered as foreign companies. (See below for discussion of the specific situation in CDs and OTs.) Since the UK authorities indicated that UK companies cannot be prosecuted if the offence was committed by a wholly-owned foreign subsidiary, the same would be true of a foreign bribery offence committed entirely abroad by the subsidiary of a UK company incorporated in a CD or OT.

211. In addition, unincorporated companies such as partnerships, trusts or unincorporated foundations and associations are not covered and could not be prosecuted under the Anti-terrorism, Crime and Security Act 2001. However, individuals employed by such bodies and committing a foreign bribery offence abroad could be prosecuted under the principle of nationality jurisdiction as UK nationals.

***Commentary:***

***The lead examiners encourage the UK authorities to further raise awareness of the recently introduced nationality jurisdiction provisions among all parties involved in the enforcement of the foreign bribery offence, notably judges. Furthermore, they recommend that the United Kingdom take all available action, within the rules governing their relationship, to bring the situation in the CDs and OTs in line with the principles of the Convention and Revised Recommendation, notably as concerns coverage of legal persons incorporated in the CDs and OTs.***

*Given the absence of cases to date regarding the establishment of jurisdiction over offences that have taken place wholly or substantially abroad, and the broad discretion allowed for deciding to exercise such jurisdiction on the part of the UK prosecuting authorities, the lead examiners recommend that this issue be further monitored by the Working Group.*

*e) Crown Dependencies and Overseas Territories*

*(i) In general*

212. Given the array of dependencies and overseas territories over which the UK exercises varying levels of control, the examining team decided to focus on the applicability of the OECD Convention and the Revised Recommendation to the UK Crown Dependencies (CDs) and Overseas Territories (OTs). The role played by the UK authorities in dialoguing with the CDs and OTs was another topic of discussion with representatives of both the FCO and the CDs who participated in the on-site visit. The lead examiners also note that the CDs and some of the OTs are international financial centres that have in recent years made substantial improvements to MLA, anti-money laundering and anti-terrorism financing measures and have given commitments to increasing transparency and exchange of information for tax purposes.

*(ii) Crown Dependencies*

213. The three UK Crown Dependencies are the Isle of Man, Jersey and the Bailiwick of Guernsey, which includes the islands of Sark and Alderney<sup>151</sup>. They have constitutional links with the UK based on their allegiance to the English Crown, not to the State itself, although the State is responsible for their defence and external relations. The CDs do not send representatives to the UK Parliament. Their legislation is enacted by their own elected parliaments. The UK authorities indicated that UK Acts of Parliament and the ratification of international treaties and conventions are only extended to the islands following consultation. The CDs give and receive judicial co-operation to and from other countries and territories directly but the Judicial Co-operation Unit, part of the Home Office, facilitates such co-operation with the CDs for both requesting authorities in the UK and abroad.

The Isle of Man

214. In the Phase 2 questionnaire the UK authorities indicated that the OECD Convention was extended to the Isle of Man (IoM) in 2001. Section 73 of the Anti-terrorism and Crime Act (IoM) 2003 (which mirrors Parts 12 of the 2001 Act) extends the scope of the law on corruption by importing a “foreign” element into the offences of bribery under the existing legislation (the Corruption Act

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<sup>151</sup> The three Crown Dependencies are not Member States of the European Community (EC) nor are they part of the UK Member State. The relationship of the Islands to the EC is governed by virtue of the EC Treaty (Article 299(6)(c)), and by Protocol 3 to the UK’s Act of Accession to the Community, which provides that Community rules on customs matters and quantitative restrictions apply to the CDs under the same conditions as they apply to the UK. Community provisions on the free movement of persons and services do not apply to the Islands. Furthermore, the CDs are not subject to Community measures on taxation, nor are they for any purposes within the EU’s fiscal territory. Measures on police and criminal judicial co-operation adopted under Title 6 of the Treaty on European Union do not apply to the Islands. However, the United Kingdom has undertaken to consult the Islands about such measures in order that the Islands can consider whether they wish to adopt legislation or administrative practices to improve police and criminal judicial co-operation with Member States.

1986 and section 323 of the Criminal Code 1872). The Act also established nationality jurisdiction over those offences.

215. The Isle of Man has enacted legislation that creates money laundering offences, under the Criminal Justice Act 1990 and the Drug Trafficking Act 1996. Under the Anti-Money Laundering Code 1998, a person carrying on “relevant business” is required to put procedures in place to identify an “appropriate person” to whom a suspicious report can be made. The Island’s regulators, the Financial Supervision Commission and the Insurance and Pensions Authority have issued guidelines for the identification of suspicious transactions.

216. As for tax deductibility of bribes, there is no express provision in the Isle of Man's tax legislation which denies the deductibility of “bribe payments to foreign public officials”. The UK authorities confirm that IoM does not have any equivalent to section 577A of the Income Corporation Taxes Act 1988 of the UK Parliament.

### Jersey

217. The OECD Convention has not yet been extended to Jersey<sup>152</sup>. During the on-site visit, a representative of the Attorney General’s Office in Jersey indicated that a draft Corruption (Jersey) Law has been prepared and was being circulated for consultation. The Bill, which reflects the UK anti-bribery legislation, should come into force by early 2005. Jersey customary law applies in the Island and, in matters of criminal law, it can follow the common law of England; on occasions, the customary law has been developed by the courts so as to follow English statutory provisions. English statutes in which, with the agreement of the Island Authorities, the appropriate enabling provision has been included, may be extended to the Island with the consent of the Island Authorities, though in matters of criminal law the Island usually enacts its own legislation.

218. Money-laundering offences were created by the Proceeds of Crime (Jersey) Law 1999 which also created a framework for suspicious transaction reports<sup>153</sup>.

219. Jersey has not enacted legislation which prohibits a tax deduction in respect of bribe payments to foreign public officials<sup>154</sup>.

### The Bailiwick of Guernsey

220. In the Bailiwick of Guernsey the Prevention of Corruption (Bailiwick of Guernsey) Law, 2003 came into force on 19 January 2004. At the on-site visit, the representative of the Attorney General’s Office in Guernsey indicated that the new legislation was in compliance with the OECD Convention and that the Island was ready to be party to the OECD Convention. The Home Office is

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<sup>152</sup> The islands authorities have indicated their wish to have the Convention extended when the domestic legislation is in place.

<sup>153</sup> The International Monetary Fund recently reviewed the Island’s anti money laundering legislation. The report (published on 25 November 2003) is available at [www.jerseyfsc.org](http://www.jerseyfsc.org).

<sup>154</sup> Jersey has indicated, however, that a claim for such a deduction has never been made to its knowledge and if made would be disallowed.

now verifying overall compliance of the island legislation with the OECD Convention in order in order for the UK authorities to extend the ratification to Guernsey<sup>155</sup>.

221. The Bailiwick of Guernsey has also established money laundering offences under the Criminal Justice (proceeds of Crime) (Bailiwick of Guernsey) Law, 1999. Reports of suspicious transactions are made to the Financial Intelligence Service ('FIS') in Guernsey which is staffed by police and customs officers with civilian support. As part of Guernsey's international obligations, the FIS also analyses and distributes suspicious transaction reports to bodies performing similar functions in other jurisdictions.

222. Guernsey has not enacted legislation which denies a tax deduction in respect of bribe payments to foreign public officials<sup>156</sup>. In the Phase 2 questionnaire the UK authorities indicated that "if a bribe was incurred wholly and exclusively for the purposes of trade it would be allowable - regardless of the nationality of the bribed person".

(ii) *Overseas Territories*<sup>157</sup>

223. There are 14 Overseas Territories (OTs),<sup>158</sup> varying considerably in size and commercial importance.<sup>159</sup> During the on-site visit, representatives of the FCO explained that they were "encouraging" the OTs to make changes that would extend the application of the Convention to them. The lead examiners remain concerned about the low priority given to the implementation of the OECD Convention by the OTs. In particular, information provided by the UK authorities in the Phase 2 questionnaire showed that the anti-corruption legislation in Bermuda does not criminalise bribery of a foreign public official. Similarly, the legislation in the British Virgin Islands (BVI) does not comply with the requirements of the OECD Convention. In Turks and Caicos, there is no local law which implements the Convention. In the Cayman Islands, the local authorities have drafted a piece of legislation which mirrors the UK's Corruption Bill. The draft is now on hold until the review of the UK's Corruption Bill is completed. In Gibraltar, the authorities recently drafted legislation to implement the Convention which is now being reviewed by the UK authorities for compliance. Of the

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<sup>155</sup> The Prevention of Corruption (Bailiwick of Guernsey) Law 2003 is based on the principal/agent relationship (article 1) and requires a finding of "corrupt" behaviour (article 2a). The law, which provides an autonomous definition of a "foreign public official" in article 2(c), also establishes jurisdiction based on nationality (article 4) and criminal liability of legal persons (article 6).

<sup>156</sup> Following the on-site visit, the Guernsey Tax Authorities have indicated that they will seek an amendment to the relevant legislation to prohibit relief for corrupt payments.

<sup>157</sup> The Overseas Territories are constitutionally not part of the United Kingdom. They have separate constitutions, and most Overseas Territories have elected governments with varying degrees of responsibilities for domestic matters. The Governor, who is appointed by, and represents, HM the Queen, retains responsibility for external affairs, internal security, defence, and in most cases the public service. See [www.fco.gov.uk](http://www.fco.gov.uk).

<sup>158</sup> Anguilla, Bermuda, the British Antarctic Territory, the British Indian Ocean Territory, the British Virgin Islands, the Cayman Islands, the British Sovereign Base Areas on Cyprus, the Falkland Islands, Gibraltar, Montserrat, Pitcairn, St Helena and her dependencies (Ascension Island and Tristan da Cunha), South Georgia and the South Sandwich Islands and the Turks and Caicos Islands.

<sup>159</sup> For example, the British Virgin Islands, with a population of approximately 20,000, have more than 350,000 offshore companies – about a quarter the number registered in the UK, which has a population 3,000 times as large. Similarly, there are 45,000 registered companies in the Cayman Islands (with a population of approximately 44,000). The Island has also 600 banks and trust companies, including 47 of the world's largest 50 banks.

other OTs, the UK anti-bribery legislation (Corruption Act 1906 and the 2001 Act) applies only to the Falkland Islands by virtue of the Application of Enactments Ordinance 1954 (section 2 and Schedule, para. 3) and the Crimes Ordinance 1989. Thus, in the view of the lead examiners, further efforts by the UK authorities in encouraging the OTs to align their legislation with the requirements of the OECD Convention appear to be necessary.

224. . Money laundering has been criminalized in Bermuda, the Cayman Islands, the British Virgin Islands, Anguilla and Montserrat.<sup>160</sup> Although none of the OTs has denied the tax deductibility of bribe payments under their law, it should be noted that there is no income or corporation tax in Bermuda, Cayman Islands, Anguilla and no corporation tax in the British Virgin Islands. Thus, it is the view of the UK authorities that the issue of tax deductibility is not relevant for these territories. The UK authorities have not provided the examining team with detailed information about MLA and extradition procedures involving the OTs.

#### The Application of the OECD Convention to OTs

225. The UK authorities confirmed that the OECD Convention and UK implementing legislation were not automatically applicable to the OTs.<sup>161</sup> Thus the examination team addressed the issue of whether the UK has the authority to impose the OECD Convention upon the OTs<sup>162</sup>. The UK Government is responsible for the Overseas Territories internationally, and thus it alone has the authority to ratify Conventions on their behalf. Nevertheless, the general practice has been for the OTs to determine to which treaties they wish to adhere. The UK encourages the OTs to be bound by certain treaties, but it would be very rare for it to impose a treaty on an OT in the absence of the agreement of the OT. The UK authorities indicate that they continue to consult with the OTs to determine the appropriate steps to be taken to bring them in compliance with the principles of the OECD Convention and Revised Recommendation.

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<sup>160</sup> The money laundering provisions of the Criminal Justice Act 1988 and the Proceeds of Crime Act 2002, apply to the Falkland Islands by virtue of section 6, Schedule 1 Part 1 of the Crimes Ordinance 1989 and section 78 of the Interpretation and General Clauses Ordinance 1977.

<sup>161</sup> In the academic literature, however, one of the consequences of the UK's international responsibility seems to be that "the acceptance by the United Kingdom of an international convention will create international obligations and liabilities on the part of the United Kingdom in respect of the Overseas Territories unless the territorial application of the convention is expressly or impliedly limited to the United Kingdom or a portion of those dependencies." See Halsbury's Law of England Volume 6 (Fourth Edition 2003 Reissue) para. 804. The UK authorities indicated that the ratification of the OECD Convention would extend only to the metropolitan United Kingdom. The Convention was extended to the Isle of Man in 2001.

<sup>162</sup> The United Kingdom retains responsibility for and sovereignty over the affairs of the OTs. Local legislation is subject to the approval of Her Majesty's Government and may be "disallowed" by the Crown at any time. In addition, the laws of the OTs owe their existence to an act of Parliament which is the source of all local governmental authority. Section 5(1) of the West Indies Act 1962 provides that the Crown has the full power to make laws for "the peace, order and good government" of the OTs. This power has been exercised (by Orders in Council) on two recent occasions: the Caribbean Territories (Criminal Law) Order 2000 repealed the sodomy laws in Anguilla, Bermuda, British Virgin Islands (BVI), Cayman Islands, Montserrat and the Turks and Caicos Islands and the Caribbean Territories (Abolition of Death Penalty for Murder), Order 1991, S.I. 1991 No. 988 (enacted pursuant articles 5 and 7(3) of the West Indies Act 1962). Although the West Indies Act concerns territories in the West Indies only, there are equivalent statutes for other OTs.

The Application of the UK Anti-bribery Legislation (the 2001 Act) to Legal Persons Registered in the CDs and OTs

226. Discussions were also focused on the issue of the direct applicability of the new UK anti-bribery legislation to the CDs and OTs. As noted above, the 2001 Act introduces extra-territorial jurisdiction over crimes of corruption committed by UK nationals or incorporated bodies. Section 109 (4) of the 2001 Act defines “national” as any individual who is a British citizen, a British overseas territories citizen, a British National (Overseas) or a British Overseas citizen. The UK authorities explained that the UK nationals who are residents in the Overseas Territories or Crown Dependencies, “in addition to being subject to local law”, could also be subject to judicial processes in the UK for corruption offences “no matter where the alleged offences may have been committed”. However, following the on-site visit, the UK authorities indicated that Section 109(4) of the 2001 Act defines a national of the United Kingdom as “an individual”. As companies are not “individuals” they are excluded from the application of Section 109<sup>163</sup>. In addition, the UK authorities indicated that by Section 5 and Schedule 1 to the Interpretation Act 1978, “United Kingdom” means Great Britain and Northern Ireland. As the CDs and OTs are not “any part of the United Kingdom”, it follows that a body incorporated under the law of one of those territories is not “a body incorporated under the law of any part of the United Kingdom”. Consequently, Section 109 of the 2001 Act does not apply to legal persons incorporated in the CDs or OTs.

227. During the discussions, the lead examiners noted a certain degree of uncertainty among the UK authorities about the above-mentioned legal issue. Following the on-site visit, the FCO submitted a written answer clarifying that Part 12 would apply “only to companies incorporated in Great Britain or Northern Ireland” and that companies incorporated in the OTs “would not be covered by part 12 of the 2001 Act”.<sup>164</sup> Similarly, the representative of the AG’s Office in Guernsey submitted a note in which he stated that “UK law on corruption would have effect in relation of the majority of the population of the CDs, who have British nationality. It does not however apply to legal persons [...]”.<sup>165</sup> Notwithstanding the said statements, the examiners note a potential inconsistency in the

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<sup>163</sup>. Section 109 of the 2001 Act (*Bribery and corruption committed outside the UK*) states:

*(1) This section applies if-*

*(a) a national of the United Kingdom or a body incorporated under the law of any part of the United Kingdom does anything in a country or territory outside the United Kingdom, and*

*(b) the act would, if done in the United Kingdom, constitute a corruption offence (as defined below).[...]*

*(4) A national of the United Kingdom is an individual who is-*

*(a) a British citizen, a British Dependent Territories citizen, a British National (Overseas) or a British Overseas citizen,*

*(b) a person who under the British Nationality Act 1981 (c. 61) is a British subject, or*

*(c) a British protected person within the meaning of that Act.*

<sup>164</sup> See written submission of the Economic Policy Directorate FCO (10 September 2004). In the same document, the FCO concluded that “[companies] incorporated in the OTs are bound only by the provisions in Part 12 of the ATCS Act to the extent that those provisions form part of the law of the territory in which they are incorporated, either because enacted there or (as in the Falklands) as a result of an Ordinance providing for the application of UK law so far as appropriate in local circumstances. As far as we are aware no territory has enacted provisions equivalent to Part 12 of the ATCS Act”.

<sup>165</sup> See written submission of the AG’s Office in Guernsey (27 July 2004).



argument that legal persons “incorporated under the laws of any parts of Her Majesty’s dominions” can be considered as UK nationals by virtue of the constitutional relationship between the UK and the OTs appears to be supported by various sources such as UK Diplomatic Notes,<sup>166</sup> *amicus curiae* briefs,<sup>167</sup> and UK laws.<sup>168</sup>

**Commentary:**

*The lead examiners acknowledge the extension of the OECD Convention to the Isle of Man (IoM). The lead examiners recommend that the UK authorities verify compliance of Guernsey’s new legislation with the OECD Convention in order to extend ratification to the island. The lead examiners also recommend that the OECD Convention be extended to Jersey and invite the Jersey authorities to enact a comprehensive anti-corruption statute at the earliest possible date. The lead examiners commend the CDs for enacting a comprehensive legislative scheme to combat money laundering. However, the lead examiners recommend that the UK authorities encourage the CDs to overcome concerns such as the absence of an express denial of the tax deductibility of bribe payments in the CDs and to clarify that bribes to foreign public officials are not tax-deductible.*

*Taking into account the specific role that OTs play in the international financial markets and the relative risk factors that are associated with them, the lead examiners encourage the UK authorities, within the rules governing their relationship, to take appropriate measures to enable the OTs to align with the principles of the Convention and Revised Recommendation. In particular, the lead examiners encourage the UK authorities to assist the OTs in adopting the necessary legislation, whether locally or in the UK; to engage in a thorough evaluation and monitoring of the legal and practical application of relevant legislation and policy; and to report to the WG on these processes on an ongoing basis, as required under the Phase 1 bis recommendations.*

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<sup>166</sup> Diplomatic note no. 90/2001 (5 October 2001); Diplomatic note no. 13/2000 (2 February 2000); Diplomatic Service Procedure Manual, Annex 1, (March 1996) defining “UK National” to include “British Dependent Territories Citizens” and “companies incorporated under the law of the United Kingdom or of any territory for which the United Kingdom is internationally responsible”. The United Kingdom’s Rules Applying to International Claims expressly defines the term “United Kingdom national” to include “companies incorporated under the law of the United Kingdom or any territory for which the United Kingdom is internationally responsible”.

<sup>167</sup> Chase Manhattan Bank v. Traffic Stream (BVI) Limited (2002). In this case the UK Government filed an *amicus curiae* brief in support of the argument that a company registered in one of the OTs (BVI) was a UK national for the purpose of the Alienage Diversity Statute, 28 U.S.C. 1332 (a) (2). On the same issue, the UK Government filed two *amicus curiae* briefs in *Art 57 Properties, Inc. v. 57 BB Property, L.L.C.*, No. 99-10385 (5<sup>th</sup> Circ. 2000) and in *III Finance Ltd. V. Aegis Consumer Finance, Inc.* No. 00-7016 (2<sup>nd</sup> Circ. 2000).

<sup>168</sup> Acts of Parliament may provide that Her Majesty in Council extends the application of the Act to the Overseas Territories, e.g. see Anti-Terrorism, Crime and Security Act 2001, c. 24, ss. 44(3), 51(2), 57; Landmines Act 1998, c. 33, ss. 3(4), 29(4); Chemical Weapons Act 1996, c. 6, ss. 3(3), 39(3).

### 3. Sanctions for the foreign bribery offence and related offences

#### a) *Criminal sanctions for bribery and related offences*

228. The penalties for foreign and domestic bribery are the same. Under the 1889 Act and the 1906 Act they are as follows: On summary conviction, a maximum of six months imprisonment or a fine to the statutory maximum, currently £5,000 (7 250 EUR); on indictment, seven years imprisonment, an unlimited fine or both. The same penalties apply in Scotland. The common law bribery offences (like most common law offences) have no prescribed or maximum penalties, although generally sanctions for comparable statutory offences can guide the courts. Penalties for attempt and conspiracy are the same as for the related offence. There is no mandatory minimum sentence for any bribery offence.

229. Sentencing principles are governed by the common law, the PCCSA and the recent CJA 2003. Under the PCCSA, prisoners with custodial sentences of less than four years must serve half their sentence and are then released either unconditionally or with licence (parole) conditions. Prisoners must serve between half and two-thirds of sentences over four years, depending on a parole board recommendation. (See J. Sprack, *Emmins on Criminal Procedure*, (9th ed. 2002) at 385.) Under changes to be introduced under CJA 2003, prisoners with sentences of 12 months or more will serve half in custody and half on licence (i.e., under conditions) in the community.<sup>169</sup>

#### b) *Complementary and administrative sanctions*

230. Article 3(4) of the Convention requires parties to “*consider the imposition of additional civil or administrative sanctions upon a person subject to sanctions for the bribery of a foreign public official*”. Paragraph 24 of the Commentary indicates that “*among the civil or administrative sanctions, other than non-criminal fines, which might be imposed ...for an act of bribery of a foreign public official are: exclusion from entitlement to public benefits or aid; temporary or permanent disqualification from participation in public procurement of the practice other commercial activities; placing under judicial supervision; and a judicial winding up order*”. Generally, the UK courts cannot impose any administrative or civil sanctions on persons convicted of bribery. (See Responses § 6.1.<sup>170</sup>) The UK authorities indicated after the on-site visit that the Company Directors Disqualification Act 1986 allows the application of a civil/administrative sanction in the form of disqualification of directors for general misconduct in connection with companies. However, no information has been supplied about the nature and scope of this sanction, its application in practice or available statistics.

#### c) *Seizure and confiscation of assets*

231. There have been no cases of seizure or confiscation of assets in foreign bribery cases. Nor have the UK authorities provided any examples of the actual use of such powers in domestic bribery cases. There have, however, been important statutory developments that appear to improve substantially the regime applicable to the recovery of assets from criminals and third parties in the UK. The Proceeds of Crime Act 2002 (POCA) entered into force on 24 March 2003. It establishes a hierarchical regime of “*asset recovery*” (extending through criminal confiscation, civil forfeiture and taxation).<sup>171</sup> POCA created a new state organisation, the Assets Recovery Agency (ARA). The director

<sup>169</sup> See [http://www.cjsonline.org/news/2003/november/Criminal\\_Justice\\_Act\\_Nov\\_2003\\_A-Z.html](http://www.cjsonline.org/news/2003/november/Criminal_Justice_Act_Nov_2003_A-Z.html).

<sup>170</sup> See, however, below the new powers of civil forfeiture under POCA 2002.

<sup>171</sup> See generally Ian Smith and Danny Friedman, “Crime doesn’t pay – the new asset recovery laws”, *New Law Journal* (12 December 2003).

of the ARA has the power to apply for criminal confiscation orders, apply for restraint orders, bring appeals and enforce confiscation orders.<sup>172</sup> A number of additional state agencies are also responsible for enforcing POCA, and, for example, prosecuting agencies continue to have (joint) responsibility for confiscation.

232. Where a convicted defendant has benefited from criminal conduct, the Crown Court decides upon the “*recoverable amount*” and makes a confiscation order requiring him to pay that amount. [See POCA s. 6(5)(a)-(b).] Generally, the recoverable amount is an amount equal to the defendant’s benefit from the conduct concerned. [POCA s. 7(1).] If the court decides that the defendant has a “*criminal lifestyle*”, additional and broader confiscation is provided for under section 10. However, establishing the existence of a criminal lifestyle in cases of bribery seems unlikely.<sup>173</sup> Under PCCSA section 143, the court may also order the forfeiture of property used to commit the offence or facilitate the commission of the offence, or that was intended to be used for such purpose. Criminal forfeiture orders are regarded as essentially punitive, and the forfeiture order must be treated as part of the global penalty for the offence. Under a new power of ‘cash seizure’, a customs officer or constable may seize cash if he has reasonable grounds for suspecting that the cash is recoverable property or intended for use in unlawful conduct and if the sum seized is in excess of £5,000. POCA part V, ch. 3; SI 2004/420.

233. POCA also allows for the making of a restraint order by the Crown Court which has the effect of restraining property anywhere in the world that may be liable to confiscation following the trial. The prosecutor, the ARA Director or a financial investigator accredited by the Director may apply for the order. (POCA § 42.) In a significant change from prior law, POCA makes restraint orders available once an investigation has started (rather than only when charges are anticipated) if there is reasonable cause to believe that the alleged offender has benefited from his criminal conduct. [POCA § 40; POCA Explanatory Notes § 87.]

234. Part V of POCA creates a new right of action for civil forfeiture that could be of significant importance in recovering assets in foreign bribery cases. The ARA Director (or the Scottish Ministers in Scotland) can bring civil proceedings to recover property that has been obtained through “*unlawful conduct*”, or property that “*represents*” such property. The ARA Director can bring civil forfeiture proceedings even if the defendant is acquitted in the criminal proceedings or successfully defends against criminal confiscation.<sup>174</sup>

235. POCA provides for various orders that can be applied for on an *ex parte* basis, in order to fulfil the purpose of criminal confiscation and civil recovery investigations (s 341). These include document production orders (ss 345, 349 and 350); search and seizure warrants (s 352); disclosure orders (s 357); customer information orders (s 363); and bank account monitoring orders (s 363).

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<sup>172</sup> POCA Part II ( England and Wales) and Part IV ( Northern Ireland). In Scotland, there is a Civil Recovery Unit which has similar powers to the ARA (except that it has no powers of taxation). Responses § 2.1 at 11.

<sup>173</sup> Such a finding requires either a conviction for an offence in Schedule 2 – and bribery is not included in the list -- or several convictions of defined types. POCA s. 75, Sch. 2. Because the money laundering offences of concealing criminal property (POCA s. 327) and assisting another to retain criminal property (s. 328) are Schedule 2 offences, defendants convicted of those offences have a “criminal lifestyle” and the powerful assumptions of section 10 are applicable to expand the scope of confiscation. POCA ss. 75(2)(a), 10.

<sup>174</sup> See Explanatory Notes § 290; Ian Smith and Danny Friedman, “Crime doesn’t pay – the new asset recovery laws”, *New Law Journal* (12 December 2003).

These powers allow in particular the ARA Director to obtain a court order to obtain information about bank and financial accounts. In addition, there are a number of criminal offences relating to the prejudice of investigations generally (s 342) and the refusal to comply with the various investigation orders (s 359 and s 366).

236. Panel participants expressed varying views on the likely practical importance of these new powers for the fight against foreign bribery in the UK. One senior lawyer indicated that he felt that they would likely be of little use because although the new investigative powers could help identify culprits, problems of lack of political will and resources to actually pursue cases would likely prevent real action. An SFO representative thought that the provisions might be of use in cases where it was not feasible to prosecute a company.

***Commentary:***

***The lead examiners welcome the adoption by the UK authorities of the new and consolidated provisions in POCA applicable to the seizure and confiscation of assets, including assets relating to foreign bribery. However, it is too soon to evaluate the effect of POCA in this regard and the lead examiners accordingly recommend that the Working Group follow up with regard to application of the new POCA provisions. The lead examiners urge the UK authorities to encourage prosecutors to actively pursue the necessary procedures for confiscation in all appropriate foreign bribery cases.***

***d) Indirect sanctions***

***(i) Official Development Assistance***

**The Department for International Development**

237. The Department for International Development (DFID) is the UK government department responsible for promoting development and the reduction of poverty. The bulk of DFID assistance is concentrated on the poorest countries in Asia and sub-Saharan Africa. The British government has planned to raise DFID's departmental expenditure limit to GBP 3.6 billion in the 2003/04 financial year, its highest level ever<sup>175</sup>.

238. DFID has incorporated in its procurement contracts anti-foreign bribery provisions<sup>176</sup> and clauses<sup>177</sup> which disqualify from participating in DFID's activities where contractors have committed an offence under the Prevention of Corruption Acts 1889 to 1916 or the 2001 Act. According to DFID

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<sup>175</sup> The United Kingdom's total net ODA rose to USD 4.5 billion in 2000, the fourth largest programme among DAC Member countries. The United Kingdom's ratio of ODA to gross national income (GNI) was 0.32% in 2000, above the DAC (weighted) average of 0.22% but below the DAC average country effort (unweighted average) of 0.39%. The United Kingdom has pledged to increase its ODA/GNI ratio to 0.33% by 2003/04.

<sup>176</sup>. Clause 10 on "Corruption, Commission and Discounts" of DFID procurement contracts states that: "[the] Consultant warrants and represents to DFID that neither the Consultant nor any of the Consultant's Personnel: (a) has given, offered or agreed to give or accepted, any gift or consideration of any kind as an inducement or reward for doing or forbearing to do or for having done or forborne to do any act in relation to the obtaining or execution of any contract or for showing or forbearing to show favour or disfavour to any person or entity in relation to any contract; [...]"

<sup>177</sup>. See clause 23 on "Suspension or Termination with Default of the Consultant" of the DFID procurement contracts.

representatives interviewed at the on-site visit, however, no disqualification has been imposed for foreign bribery so far.

(ii) *Export Credit*

The Export Credits and Guarantees Department (ECGD)

239. The Export Credits and Guarantees Department (ECGD) is the official UK Export Credit Agency (ECA). It is a separate Department of the British Government, reporting to the Secretary of State for Trade and Industry. As of 1991, ECGD provides exporters of British capital goods and services with finance and insurance packages to help them win valuable overseas orders. If a country defaults on payments which ECGD has guaranteed, ECGD will seek to recover those amounts, often through the Paris Club (an informal monthly meeting of official creditors)<sup>178</sup>. ECGD policies normally cover UK exports to developing countries<sup>179</sup>.

240. ECGD informs all applicants requesting official export credit support about the legal consequences of the bribery in international business transactions<sup>180</sup>. ECGD website also informs customers of the consequences of bribery<sup>181</sup>.

241. According to ECGD's responses to the *2002 Survey on Measures taken to Combat Bribery in Officially Supported Export Credits (as of 14 May 2004)*, some measures are available before and after support is provided.

242. In examining an application for support, if ECGD suspects bribery is involved in the transaction, it will inform investigative authorities and will make enquires with a view to determining whether it might withhold support for the transaction in question. If, in relation to the transaction, ECGD is aware of a legal judgment of bribery against the applicant, or has sufficient evidence of bribery, it will normally withhold support for the transaction.<sup>182</sup>

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<sup>178</sup> Some 95 % of the debt owed to the UK government by Southern countries appears to be export credit debt. See The Corner House "Underwriting Bribery, Export credit Agencies and Corruption", December 2003, p.13.

<sup>179</sup> ECGD issues around GBP 3.5 billion of guarantees a year to cover a variety of exports. 55% of its portfolio covers support for overseas civil projects, 24% is for defence-related equipment and 21% is for civil aircraft. They are also insuring over £800 million of overseas investments. The Cover the ECGD customarily provides to companies includes the commissions companies pay to agents.

<sup>180</sup> Information obtained from the *Responses to the 2002 survey on measures taken to combat bribery in officially supported export credits as of 14 May 2004*, Working Party on Export Credits, OECD, Paris [TD/ECG(2004)9].

<sup>181</sup> The ECGD requires applicants for support to warrant that neither they nor anyone acting on their behalf have engaged or will engage in any corrupt activity in connection with the supply contract. See [http://www.ecgd.gov.uk/index/pi\\_home/policy\\_on\\_bribery\\_and\\_corruption.htm](http://www.ecgd.gov.uk/index/pi_home/policy_on_bribery_and_corruption.htm).

<sup>182</sup> In this respect the *Action Statement (of the OECD Working Party on Export Credits and Credit Guarantees) on Bribery and Officially Supported Export Credits* states as follows: "If there is sufficient evidence that such bribery was involved in the award of the export contract, the official export credit or export credit insurance provider shall refuse to approve credit, cover or other support".

243. After the approval of support<sup>183</sup>, if ECGD suspects bribery is involved in the transaction it will inform the investigative authority; if ECGD is aware of a legal judgment of bribery against the applicant, or has sufficient evidence of bribery in respect of the transaction in question, various actions may be available: invalidate the cover, deny claim indemnification, interrupt loan disbursement and seek recourse. With regard to denying access to official support, blacklisting by ECGD of companies that have previously engaged in corrupt practices would be subject to legal challenge. However, one of the representatives of the ECGD interviewed at the on-site visit confirmed that this would be taken into account when considering new applications for support.

244. On May 1, 2004, the Export Credits Guarantee Department introduced new procedures aimed at ensuring that those who seek its insurance coverage follow best practice in avoiding bribery and the making of corrupt payments. These were revised following the on-site visit, and the new procedures became mandatory on 1 December 2004. Information about the new procedures was provided by the UK authorities at the time they were introduced but this was too late for the lead examiners to take them into account in its review. However, the May procedures included the following measures:

1. Obtaining additional information from applicants for insurance coverage on the use of agents or other intermediaries with a view to establishing no improper payments have been made to procure contracts.
2. Increased rights to inspect exporters' documentation relating to the exporters' actions and the making of payments to agents in the winning of contracts.
3. Requiring provision of copy codes of ethics and conduct where exporters have them, and confirmations that it has been and will be applied to obtaining and performing the contract .
4. Requiring warranties from applicants on behalf of themselves and their affiliates as to their not being involved in offences of money laundering.
5. Extending declarations so as to require undertakings from applicants that their affiliates will not engage in corrupt activity and obtaining assurances that the applicants will take the appropriate action against anyone acting on their behalf found guilty of such behaviour.
6. Reminding applicants of their legal obligations and that OECD countries including the UK are committed to combating corruption and money laundering

245. According to ECGD authorities the changes to the rules reflect "legitimate concerns" from British industries about "the practicality of some aspects of the procedures" and ensure that the ECGD procedures will be "robust and workable". However, some NGOs have expressed serious concerns about the changes to the anti-corruption procedures adopted by the ECGD<sup>184</sup>. British newspapers<sup>185</sup>

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<sup>183</sup> In this respect the *Action Statement* (of the OECD Working Party on Export Credits and Credit Guarantees) *on Bribery and Officially Supported Export Credits* states as follows: "If, after credit, cover or other support has been approved, an involvement of a beneficiary in such bribery is proved, the official export credit or export credit insurance provider shall take appropriate action, such as denial of payment or indemnification, refund of sums provided and/or referral of evidence of such bribery to the appropriate national authorities".

<sup>184</sup> Among the major points of concern: 1) the definition of "affiliate" company which has been replaced by "Controlled Company" and Associate". In practice, applicant companies are no longer required to declare whether their "affiliate" (e.g. Joint Venture and Consortium Partners) have been

have also reported that the weaker procedures have been introduced as a result of lobbying from various UK industries which complained about their “*competitive disadvantage*” in the export markets as a result of the May 2004 rules.

**Commentary:**

*In light of the absence of additional administrative penalties upon persons and entities convicted of the bribery of a foreign public official, the lead examiners recommend that the UK considers revisiting the policies of agencies such as DFID and ECGD on dealing with applicants convicted of foreign bribery, to determine whether these policies are a sufficient deterrence.*<sup>186</sup>

*The lead examiner consider that the Working Group should follow up on the recent changes of the ECGD procedures to combat bribery and corruption with regard to any weakening of the rules that could reduce the ability of the ECGD to detect and prevent foreign bribery.*

**D. RECOMMENDATIONS OF THE WORKING GROUP AND FOLLOW UP**

246. The Working Group is appreciative of the hard work of the United Kingdom in preparing and hosting the on-site visit, and of their efforts to provide information throughout the examination process.

247. In the Phase 1 bis report the Working Group took note that the United Kingdom authorities had confirmed their government’s commitment to pursuing the wider reform of corruption law, and that Part 12 of the Anti-Terrorism, Crime and Security Act 2001 would be repealed and replaced as a part of that reform. The Working Group recommended at that time that the United Kingdom proceed at the earliest opportunity to enact a comprehensive anti-corruption statute.

248. The Working Group notes that since Phase 1 bis the United Kingdom has not enacted any new foreign bribery statute. The Working Group therefore recommends that the United Kingdom

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blacklisted or have been convicted of corrupt activity; 2) ECGD has removed the obligation on the applicant to carry out any form of due diligence on its Joint Venture or other business partners 3) The extent of information required by ECGD in relation to agents and their commissions has been significantly weakened 4) the introduction of the definition of “to the best of our knowledge and belief” by applicant companies with regard to whether any of their employees or controlled subsidiaries have engaged in corrupt practices. This provision requires the actual knowledge of the corrupt activity at the time of making the statement by the applicant.

<sup>185</sup> . See Financial Times, 18 October 2004 “*Ministers back down on bribery controls*” and 29 October 2004 “*Ministers waive new corruption rules for industry*”; The Guardian 17 November 2004 “*Bribery rules too tough for Rolls, Airbus and BAE*”; Financial Times, 20 November 2004 “*Export credit agency faces legal challenge on foreign bribery rules*” in TI Daily Corruption News Full Text Service;

<sup>186</sup> This Commentary shall not be interpreted as a suggestion that the policies of DFID and ECGD do not meet the standards set out in the *Action Statement* (of the OECD Working Party on Export Credits and Credit Guarantees) *on Bribery and Officially Supported Export Credits*, or the *Recommendations of the OECD Development Co-operation Directorate (DAC Recommendations)*.

enact at the earliest possible date comprehensive legislation whose scope clearly includes the bribery of a foreign public official. The Working Group will conduct an evaluation of the new law when it comes into force, and reserves the right to conduct a further on-site evaluation of the United Kingdom on the application in practice of the new law.

249. The Working Group notes that no company or individual has been indicted or tried for the offence of bribing a foreign public official since the ratification of the Convention by the UK.

250. Based on its findings regarding the United Kingdom's implementation of the Convention and the Revised Recommendation, the Working Group (i) makes the following recommendations to the United Kingdom under part I, and (ii) will follow up the issues in part II when there is sufficient relevant practice.

## **Part I. Recommendations**

### ***Recommendations for ensuring effective measures for preventing and detecting bribery of foreign public officials***

251. With respect to awareness raising activities to promote the implementation of the Convention and the foreign bribery offence relating to bribery and corruption and amending the Prevention of the Corruption Acts 1889 to 1916, the Working Group recommends that the United Kingdom:

- a) enhance existing efforts to raise awareness of the Convention and the foreign bribery offence among law enforcement authorities including the Police, judicial authorities and UK public officials involved with UK companies operating abroad. [Revised Recommendation, Paragraph I];
- b) undertake further public awareness activities for the purpose of increasing the level of awareness of the Convention and the foreign bribery offence among trade unions and small and medium sized enterprises (SMEs) doing business internationally [Revised Recommendation, Paragraph I];
- c) take appropriate measures to publicise, including in all explanatory material distributed to UK companies, the conditions under which parent and affiliate companies can be liable in connection with foreign bribery, and encourage UK companies to report to UK authorities, as well as to other appropriate authorities, instances of foreign bribery they come across in the course of their operations [Revised Recommendation, Paragraph I].

252. With respect to the reporting of the offence of bribing a foreign public official to the competent authorities, the Working Group recommends that the United Kingdom:

- a) establish a clear obligation for civil servants to report possible instances of bribery to the relevant authorities [Revised Recommendation, Paragraph I];
- b) in applying its legislation in the field of whistleblowing, improve protection of persons who report directly to law enforcement authorities; and pursue its efforts to make such measures more widely known among companies and the general public [Revised Recommendation, Paragraph I].



253. With respect to the prevention and detection of foreign bribery, the Working Group recommends that the United Kingdom:

- a) proceed diligently with the adoption of reforms clarifying and unifying the UK accounting legislation with the International Accounting Standards, to ensure the fraudulent accounting offence is in full conformity with Article 8 of the Convention [Convention, Article 8; Revised Recommendation, Paragraph V.A.];
- b) proceed with the adoption of guidance for auditors in order to explain and clarify their reporting obligation concerning possible acts of foreign bribery [Revised Recommendation, Paragraphs I, V.B.(iii) and V.B.(iv)];
- c) ensure sufficient time and resources are available to tax authorities to review tax information and allow for the detection of possible criminal conduct, including foreign bribery offences [Revised Recommendations, Paragraph I and IV].

***Recommendations for ensuring adequate mechanisms for the effective investigation and prosecution of offences of bribery of foreign public officials and related offences***

254. With respect to investigation, the Working Group recommends that the United Kingdom:

- a) ensure that the role of the Serious Fraud Office (SFO) in foreign bribery investigations is confirmed and that appropriate human and financial resources are provided, and consider monitoring and evaluating the performance of the SFO and other relevant agencies with regard to foreign bribery allegations on an on-going basis, including in particular with regard to decisions not to open or to discontinue an investigation [Convention, Article 5; Revised Recommendation, Paragraph I];
- b) amend the Memorandum of Understanding to clarify that the Ministry of Defence Police's investigative jurisdiction is limited to cases where the Ministry of Defence is a party to the contract [Convention, Article 5; Revised Recommendation, Paragraph I];
- c) reconsider obligations in the Memorandum of Understanding specific to foreign bribery investigations requiring disclosure of information about the investigation to non-investigatory government departments (notably the Foreign and Commonwealth Office and the Ministry of Defence) [Convention, Article 5; Revised Recommendation, Paragraph I];
- d) increase resources for the prompt and effective handling of mutual legal assistance requests [Convention, Articles 9 and 10; Revised Recommendation, Paragraphs II.vii and VII].

255. With respect to prosecution, the Working Group recommends that the United Kingdom:

- a) amend where appropriate the Code for Crown Prosecutors, the Crown Prosecution Service Manual and other relevant documents to ensure that the investigation and prosecution of bribery of foreign public officials shall not be influenced by considerations of national economic interest, the potential effect upon relations with another state or the identity of the natural or legal persons involved [Convention, Article 5];

- b) in light of the longstanding absence of any consent requirement for the common law bribery offence, consider the appropriateness of Law Officers consent for cases of foreign bribery [Convention, Article 5; Revised Recommendation, Paragraph I];
- c) broaden the level of persons engaging the criminal liability of legal persons for foreign bribery offences [Convention, Article 2].

256. With respect to Crown Dependencies and Overseas Territories, the Working Group recommends that the United Kingdom, within the rules governing their relationship:

- a) verify compliance of Guernsey's new legislation with the OECD Convention, invite the Jersey authorities to enact a comprehensive anti-corruption statute at the earliest possible date in order to extend the OECD Convention to the islands [Convention, Article 1];
- b) continue to encourage the Overseas Territories to adopt the necessary legislation in line with the principles of the Convention and Revised Recommendation, and support them in their efforts [Convention, Article 1].

257. With respect to sanctions, the Working Group recommends that the United Kingdom:

- a) consider adopting a regime of additional administrative or civil sanctions for legal persons that engage in foreign bribery [Convention, Article 3];
- b) considers revisiting the policies of agencies such as Department for International Development and Export Credit and Guarantees Department on dealing with applicants convicted of foreign bribery, to determine whether these policies are a sufficient deterrence [Revised Recommendation, Paragraph I and Paragraph VI (iii)];
- c) encourage prosecutors to actively pursue the necessary procedures for confiscation in all appropriate foreign bribery cases [Convention, Article 3].

## **Part II. Follow-up by the Working Group**

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

- a) the application of sanctions with a view to determining whether they are sufficiently effective, proportionate and dissuasive to prevent and punish the offence of transnational bribery, in particular, the practice of the courts with regard to the criminal liability of legal persons for the offence of active bribery of foreign public officials [Convention, Articles 2 and 3];
- b) the effectiveness of the investigations carried out by the Ministry of Defence Police in relation to foreign bribery offences in defence contracts [Convention, Article 5 ; Revised Recommendation, Paragraph I];
- c) with respect to money laundering, the application of the new provisions under the Proceeds of Crime Act 2002, particularly with respect to the application of offences of failure to report, the levels of sanctions in practice, and the efforts made to raise awareness and elaborate guidelines/typologies covering foreign bribery offences [Convention, Article 7; Revised Recommendation, Paragraphs II.(i) and III];

- d) the application in practice of the territorial and nationality jurisdiction for foreign bribery offences, given the absence of cases to date regarding the establishment of jurisdiction over offences that have taken place wholly or substantially abroad [Convention, Article 4];
- e) the possible effect of the tendency to simplify cases and to use alternative charges on the implementation of the Convention in the UK [Convention, Article 5; Revised Recommendation, Paragraph I];
- f) the application of the evidentiary threshold for providing mutual legal assistance and extradition. In this respect the UK should compile quantitative information to assist the Working Group in its follow-up assessment [Convention, Article 9];
- g) the recent changes of the ECGD procedures to combat bribery and corruption with regard to any weakening of the rules that could reduce the ability of the ECGD to detect and prevent foreign bribery [Revised Recommendation, Paragraph I and Paragraph VI (iii)].