

An overview of the OECD's Phase 4 Report on the UK's implementation of the Anti-Bribery Convention: Part I

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Part I: Detecting bribery

"The UK has made significant improvements to its ability to detect foreign bribery, but could still do more by reforming out-of-date legislation and better utilizing existing resources."

On 23 March 2017, the Organisation for Economic Co-operation and Development ("OECD") published the results of its Phase 4 review of the UK's implementation of the OECD Anti-Bribery Convention (the "**Convention**"). The Report is drafted by representatives of the OECD's Working Group on Bribery in International Business Transactions ("**WGB**"), and focusses on three key areas: detection of bribery; enforcement of the Convention and anti-bribery laws; and corporate liability. This article considers the WGB's comments and conclusions on the first of these issues.

Background to the Phase 4 Report

The OECD's monitoring and enforcement of the Convention is a staged process, in which parties undergo a compulsory peer review system. The results of the review at each stage are then published, and a number of recommendations for improvement are made. The UK's last review—Phase 3—was conducted in March 2012, with a follow-up report on implementation of the Phase 3 recommendations published in 2014. The Phase 4 Report then assessed the UK's progress on key recommendations from its Phase 3 evaluation, and identified areas where further improvements could be made.

The scope of the WGB's review for Phase 4 was impressively comprehensive. During on-site visits to London in October 2016, WGB representatives met with members of the UK government, law enforcement authorities, the judiciary, the private sector (including business organisations, companies, banks, lawyers and auditors), representatives of UK Crown Dependencies ("CDs") and Overseas Territories ("OTs"), civil society (including NGOs), academia and the media.

Self-reporting: moving in the right direction

The WGB takes a generally positive view of the effectiveness of self-reporting in the UK as a means of detecting bribery. As the Report points out, a large number of ongoing and concluded bribery

cases in the UK have been triggered by corporate self-reports. In addition, incentives to self-report have increased since the WGB's Phase 3 report in 2012 with the introduction of deferred prosecution agreements ("**DPAs**") in the UK, since in order to achieve a DPA companies are generally required to have self-reported misconduct to law enforcement. However, the Report is somewhat critical of aspects of the UK's DPA regime. In particular, the Report points out that offering "generous" reductions in sentence to companies that do *not* self-report could potentially undermine the incentive for corporates to self-report in future. The Report also notes that in order to incentivise self-reporting, the threat of pro-active detection by the body responsible for enforcing corporate bribery—the Serious Fraud Office ("**SFO**")—must be a credible one.

Whistleblowing regime: time for a re-think

The Report recognises that whistleblowing by individuals provides an important channel for bribery detection in the UK. It also recognises that in order to encourage the practice, whistleblowers must be offered a sufficient degree of legal protection. The legislative framework for whistleblower protection is currently contained in the Public Interest Disclosure Act 1998 (PIDA). Following discussions with UK NGOs, the Report suggests the protection currently afforded to whistleblowers by the PIDA may not go far enough, citing critics' concerns that "*while PIDA may have been model legislation when it was passed in 1998, it would benefit from a major overhaul to take into account lessons learned from nearly 20 years of implementation*". While the UK government has indicated it will consider reforms to legislation in this area, the Report concludes that there has been "*limited progress on this front*".

As well as ensuring robust legal protection for whistleblowers, the Report suggests that more could be done to raise public awareness of the value of whistleblower reports, and the protection available to those individuals. According to a 2015 survey of UK workers, 67% of respondents were unaware or believed that there was no whistleblowing protection available under UK law. Although this represents an improvement from the same survey conducted in 2012 as part of the Phase 3 review, in which this figure was 77%, the WGB recommends that more could be done to "[bolster] confidence of potential whistleblowers in the value of their report".

Anti-money laundering procedures: an untapped resource

Perhaps the most significant criticism made by the WGB related to the UK's capacity to detect bribery through its anti-money laundering ("**AML**") infrastructure.

Currently, businesses in the UK regulated by the Money Laundering Regulations must file a suspicious activity report ("**SAR**") where there are reasonable grounds to know or suspect money laundering. According to the Report, the National Crime Agency's UK Financial Intelligence Unit ("**UKFIU**") received more than 380,000 SARs in 2014/2015, most of which were available to UK law enforcement agencies. However there does not appear to be any record of an SFO foreign bribery investigation being generated by information provided by the UKFIU. Given the often incomplete nature of information in SARs, and the UKFIU's limited powers of further investigation, this is perhaps not surprising, but nonetheless represents a "*source of great concern*" for the WGB.

The WGB recognises that these issues are, at least in part, being addressed by the UK

government. In its April 2016 Action Plan for Anti-Money Laundering and Counter-Terrorist Finance, the government made a commitment to "*upgrade the capabilities of the UK Financial Intelligence Unit*"¹. Proposed changes to the UKFIU's powers were then included in the Criminal Finances Bill in October 2016 which, if enacted, would allow the UKFIU to request additional information from reporting entities. For the WGB, this would be a welcome development. However, the Report emphasises that despite "*increasing concerns about the effectiveness of the SARs regime*" both from law enforcement and the private sector, the "[r]eform [of] the suspicious activity reports regime"², promised in the UK government's April 2016 Action Plan has not yet materialised. The WGB therefore calls for further reforms of the UKFIU and the reporting regime generally, in order to improve detection of foreign bribery.

Increasing the use of other potential sources to detect bribery

Although most ongoing and concluded bribery investigations appear to originate from either whistleblower reports or corporate self-reports, the WGB highlights that other government agencies have a role to play in bribery detection, in particular the Foreign and Commonwealth Office ("**FCO**"), the UK's credit export agency UK Export Finance ("**UKEF**"), and tax authorities. While relevant information has been passed to enforcement authorities by both the FCO and UKEF, the Report expresses concern about the lack of detection capability within HMRC. This criticism is not a new one; as part of its Phase 3 review in 2012, the WGB recommended a review be conducted into HMRC's failure to detect and report foreign bribery. The Phase 4 Report reaffirms the need for such a review, and for effective cross-agency intelligence sharing between HMRC and enforcement bodies - in particular the SFO.

The Report is also critical of the lack of bribery cases originating from UK CDs and OTs, indicating inadequate detection capability and information sharing between these jurisdictions and the UK. In particular, Bermuda, the Cayman Islands and the British Virgin Islands have a significant role in the global financial services industry, and as such they "*represent a great potential for detection*". The WGB concludes that this potential has not been utilized by the UK government, although no specific recommendations are made on this point.

Concluding thoughts

The WGB's view of the UK's bribery detection capabilities, particularly when contrasted to the Phase 3 Report in 2012, is broadly positive. However, there is a general theme at play in the Report: the information needed to detect bribery is, to a large extent, already out there, but the UK is not using its resources appropriately. The recommendations therefore focus on improving not just the quality of information detected and gathered by agencies and law enforcement, but also the procedures for subsequent cross-agency information sharing.

¹ *Action Plan for Anti-Money Laundering and Counter-Terrorist Finance*, April 2016, p. 11.

² *Ibid.*

