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

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Part II: Enforcing bribery

This article follows on from "[Part I: Detecting bribery](#)", which also contains a summary of the background to the OECD's Phase 4 Report. For completeness, a short background section is repeated here.

Background to the Phase 4 Report

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 second of these issues.

The foreign bribery offence

Although the WGB found that some aspects of the UK's foreign bribery offences need further thought, the Report acknowledges that the UK Bribery Act 2010 does at a minimum meet the standards required by the Convention.

However, the WGB is more critical of the UK's progress in criminalizing foreign bribery in the Crown Dependencies ("**CDs**") and Overseas Territories ("**OTs**"). As far as authority over these jurisdictions is concerned, the UK's position on this has been largely unchanged since long before the introduction of the Convention in 1999: while the UK government is responsible for the CDs and OTs, it will generally leave them to make up their own mind about which treaties to ratify. Several OTs and CDs have taken the decision to ratify the Convention—most recently, the British Virgin Islands and Gibraltar—and the WGB acknowledges the UK's "*more proactive approach*" on this subject in recent years. However, the Report is critical of the fact that "*significant offshore financial centres*" such as Bermuda and the Turks and Caicos islands have yet to ratify the Convention.

Similarly, the OECD's Phase 3 Report recommended that the UK extend jurisdiction of the Bribery

Act to legal persons incorporated in the CDs and OTs. Although the UK will in many cases have jurisdiction over natural persons in the CDs and OTs by virtue of their “*close connection*” to the UK, the Report notes that this authority has not yet been extended to legal persons, a matter which the WGB considers should be rectified “*as a matter of priority*”.

Investigative and prosecutorial framework

The Report has much to say on the subject of interagency co-operation and case assignment in the UK, and its effect on the efficiency of prosecutions.

In its Phase 3 Report, the WGB expressed concern at the assignment of cases between the Financial Conduct Authority (“**FCA**”) and the Serious Fraud Office (“**SFO**”), and in particular the SFO’s reluctance to pursue parallel criminal proceedings where the FCA had already brought a civil action. The WGB concluded in 2012 that “[t]he SFO and FSA should conduct coordinated enforcement actions where appropriate [as] [t]he FSA’s fines...may not fully reflect the gravity of the criminality in a case...”¹. By contrast, the Phase 4 Report identified a “*limited level of mobilization in the FSA in relation to foreign-bribery related offences*”. This apparent apathy from the FCA does not appear to be what the WGB had in mind by “*coordinated enforcement actions*”, and the Phase 4 Report re-affirms the importance of such an approach, particularly given the importance of the financial services industry in the UK.

The Report refers briefly to the updated 2014 Memorandum of Understanding (“**MOU**”) between various agencies, including the City of London Police (“**COLP**”), the FCA, the National Crime Agency (“**NCA**”) and the SFO. During an on-site visit, the WGB were informed that a further updated MOU is under preparation, which would also include HMRC and the UK Financial Intelligence Unit (“**UKFIU**”) as parties, a welcome development from the WGB’s perspective.

Despite its emphasis on the benefits of inter-agency co-operation in detecting and enforcing bribery, the WGB have historically taken issue with the confusing “*multiplicity of law enforcement agencies in the UK*”. The Phase 4 Report is unequivocal about the solution to this problem: the SFO is the “*essential actor*” in the UK’s prosecutorial framework. As the Report recognizes, in practical terms this is currently the case—at the time of the Phase 4 Report, the SFO had responsibility for 8 out of the 12 foreign bribery and related cases finalized since the Phase 3 Report. The WGB are also complimentary about the SFO’s ‘Roskill Model’, whereby investigators and prosecutors both work together from the start of a case. However, the Report still expresses concern that the SFO’s good progress might be stymied by uncertainty over the adequacy of its resources, and continuing confusion over the division of labour between agencies. The recent Conservative Party manifesto pledge to merge the SFO into the NCA in the event of a general election win in June this year will therefore be troubling news to the WGB².

Views on this issue from inside the SFO at the time of the Report were fairly muted. Representatives from the SFO explained that a blockbuster funding model allowed them the flexibility to adjust resources depending on the flow of work, rather than having “*all that money permanently sitting around with no cases*”. However, representatives outside the organization were more skeptical, stating that “*the current budget is clearly not enough to carry out the SFO’s work*”, and that the

blockbuster funding model in fact represented an “*unnecessary bureaucratic hurdle*”. Notably, the Report points out that the SFO’s budget for the 2015–2016 period (£33.8 million) is more or less the same as for the 2011–2012 period (£33.9 million), despite the significant increase in workload.

Undue influence on foreign bribery investigations and prosecutions

On the subject of undue influence, the WGB considers that the UK still has not implemented recommendations from the Phase 3 Report relating to Article 5 of the Convention, which requires investigators and prosecutors to ensure they are not 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*”³. Historically, the WGB had expressed concern that Article 5 did not have binding force as a matter of UK law. This issue has to some extent been remedied by the 2014 MOU, which states that the Convention “*establish[es] legally binding standards*”, but as the Report points out, this only appears to apply to signatories of the MOU, leaving other relevant entities (such as the Attorney General) apparently free from Article 5’s requirements. On a practical level, the Report concludes that even those entities apparently bound by Article 5 such as the SFO may not be aware of their duty to comply with this aspect of the Convention.

The Report raises issues for a second time around the SFO’s funding structure, highlighting concerns that “*the reliance of the SFO on blockbuster funding represents a risk of political interference, and could...result in an unfortunate perception of influence of the executive over law enforcement*”. Presently, this seems to be more of a theoretical concern for the WGB, since the SFO’s record apparently testifies to its current independence and capacity to investigate and prosecute on an impartial basis. What may be more concerning for the WGB is the ability of government ministers to be consulted on individual criminal cases (Shawcross exercise), a process which the Report concludes should be both transparently conducted, and infrequently used.

Conducting a foreign bribery investigation and prosecution

The Report is fairly neutral on the scope and adequacy of the SFO’s powers of investigation. The UK’s decision to launch a public central register of company beneficial ownership information (the “PSC”, or “persons with significant control” register) in October 2016 is viewed positively, as well as the SFO’s “*pragmatic*” approach to international co-ordination in multi-jurisdictional cases.

In terms of the SFO’s track record since Phase 3, the impression the WGB were left with following discussions with representatives from various sectors is “*broad unanimity on the SFO’s good performance*”. Areas for suggested improvement are regular reviews of the SFO’s case acceptance policy, a general effort to ensure all credible allegations are appropriately reviewed and followed up, and attentiveness to the need to ensure effective prosecution of natural persons.

Concluding and sanctioning foreign bribery

At the time of the publication of the Phase 4 Report, foreign bribery cases in the UK had concluded through a number of methods: civil settlement, contested convictions at trial, convictions at trial resulting from a guilty plea, deferred prosecution agreements (“*DPAs*”), and acquittals at trial.

The WGB commend the efforts of UK law enforcement in resolving many of these cases successfully, while also acknowledging concerns expressed by civil society about the lack of effective prosecution of individuals for foreign bribery. For the WGB, however, more emphasis seems to be placed on the idea that enforcement action has *“not systematically been taken”* against corporations, rather than individuals, *“despite the fact they may have benefitted from the bribery”*. Although the introduction of DPAs into the prosecution arsenal since the time of the Phase 3 Report in 2012 is *“an interesting and effective feature”* for prosecutions against legal persons, the report explicitly recommends that the UK *“ensure that [corporations] are subject to confiscation, civil forfeiture or other financial sanctions, as appropriate, in foreign bribery cases”*.

International co-operation

One of the primary challenges faced by UK law enforcement in prosecuting complex bribery cases is, according to the Report, obtaining evidence from overseas jurisdictions, either by way of general intelligence sharing or through the formal mutual legal assistance (“**MLA**”) channels. The WGB are sympathetic to an extent, and recognize the efforts that the UK has made since the Phase 3 Report in 2012 to develop and streamline the MLA framework, for example with the introduction of the UK Central Authority (“**UKCA**”) database used to monitor and record the progress of each MLA case electronically. The WGB also notes the SFO’s efforts to digitalise cases, including the use of a proprietary database to monitor connections between international and domestic cases using MLA information from the UKCA. Notwithstanding these technical advances, it is still difficult for the WGB to assess how promptly and effectively the UK is itself able to provide MLA in foreign bribery cases, due to the lack of available information on the subject. Obtaining MLA from CDs and OTs is an even greater challenge, again due to *“the lack of comprehensive and appropriate data”*.

Concluding thoughts

On the whole, the WGB sees the UK’s bribery enforcement infrastructure as much improved since the Phase 3 Report in 2012. Investigations are conducted more efficiently, including multijurisdictional and multi-agency investigations, and as a result UK law enforcement has enjoyed an increased incidence of successful case outcomes. In large part, these successes are attributed to the development and growth of the SFO. Many recommendations made by the WGB are therefore directed at cementing the SFO’s authority, stability and prominence as an enforcement agency, particularly from the point of view of funding. Given that the SFO’s very existence is now under threat, the WGB’s message strikes an even more urgent tone: in order to continue the positive momentum of recent years, the SFO needs not only an adequate budget, but also a funding model that is protected from the vagaries of government.

¹ Phase 3 Report on Implementing the OECD Anti-Bribery Convention in the United Kingdom, March 2012, p. 30.

² Conservative Party General Election Manifesto 2017.

³ Article 5, OECD Convention on Combating Bribery of Foreign Public Officials in International

Business Transactions.